A Conception of Constitutional Precedent for the Civil Law

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Summary

This thesis critically assesses the migration of the common law doctrine of precedent to civil law constitutionalism using Colombia and Mexico as case studies. Over the last two decades, constitutional judges have been abandoning the civil law doctrine of *jurisprudence constante* marked by a persuasive approach to precedent and instead are taking judicial interpretations of the constitution as binding sources as their common law colleagues. Judges are also using common law concepts as the ratio decidendi of a case, and techniques as distinguishing or overruling precedents. Despite the convergence of legal traditions regarding the use of precedent, the civil law is marked by an overproduction of constitutional judgments, a more abstract and textual approach to legal reasoning and longer constitutions. Without a proper reconfiguration of the doctrine of precedent, its use in a new context runs the risk of threatening the right to equality before courts of law solving similar cases differently without a reasonable justification thereby producing incoherence among precedents.

With the aim of reconfiguring the doctrine of precedent according to civil law style of legal reasoning and endemic challenges, this thesis endorses a normative conception of constitutional precedent called Constitutional Reciprocity. This conception is an adaptation of John Rawls' coherentist method of Reflective Equilibrium for the institutional and intersubjective context of constitutional adjudication in the civil law. Inspired by this approach, according to Constitutional Reciprocity, judges ascribe norms to constitutional provisions when solving cases. Thus, judges bear the burden of argumentation in showing that a potential judgment supports and is supported by a set of constitutional provisions and judicially ascribed norms. They need to justify that a particular judgment is more coherent with the relevant pre-existing law than its alternatives. In this way, Constitutional Reciprocity adapts the method of Equilibrium originally proposed in the field of Moral Philosophy, to achieve a reasonable degree of coherence in precedents in the civil law.

Statement of Candidate

I certify that the work in this thesis, entitled *A Conception of Constitutional Precedent for the Civil Law*, has not previously been submitted for a degree nor has it bee submitted as part of requirements for a degree to any other university or institution other than Macquarie University.

I also certify that the thesis is an original piece of research and it has been written by me. Any help and assistance that I have received in my research work and the preparation of the thesis itself have been appropriately acknowledged.

In addition, I certify that all information sources and literature used are indicated in the thesis.

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Publications

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Camarena González, Rodrigo '*La incoherencia como arbitrariedad'* [Incoherence as Arbitrariness], 20 (1), *Letras Jurídicas* (Colombia), p. 121-149, 2015

Introduction: The Migration of The Common law Doctrine of Precedent To Civil Law Constitutionalism

I. The Usefulness of a Conception of Constitutional Precedent for the Civil Law

I.1. Binding Constitutional Precedent in the Civil Law

The aim of this investigation is to endorse a normative conception of constitutional precedent suitable for the civil law tradition called Constitutional Reciprocity. As further discussed below and in later chapters, Constitutional Reciprocity is a methodology inspired by John Rawls's coherentist method of Reflective Equilibrium.[1] This method serves to reach a state of mutual support between a set of moral beliefs after a process of mutual adjustment between general principles and concrete judgments. Constitutional reciprocity is the adaptation of this method to the institutional and intersubjective context of constitutional adjudication to deal with precedents in the civil law. Constitutional Reciprocity aims, on the one hand, to assist civil law judges and lawyers to systematise precedents to form coherent wholes that justify a particular decision, and on the other hand, to guide the revision of precedents to re-establish coherence in a particular area of constitutional law.

In the last two decades, either because of changes in judicial practice, or the formal amendment of constitutions or legislation,[2] or a combination of both, constitutional judges in the civil law are

[1] See below section II. 1.

[2] In Colombia see C-836-2001, Rodrigo Escobar Gil, 9 August 2001; In Mexico see *Constitución Política de los Estados Unidos Mexicanos de 5 de febrero de 1917* [Mexican Constitution of 5 February 1917], Art 94 [10] (As amended 6 June 2011); *Ley Reglamentaria de las Fracciones I y II del Artículo 105 de la Constitución Política de*

abandoning the old doctrine of *jurisprudence constante* that treated a set of judgments as persuasive sources.[3] Instead, they are treating single judgments from constitutional courts as binding law, as their common law colleagues do.[4]

At least superficially, the civil and the common law traditions are converging towards the Anglo-American doctrine of *stare decisis*.[5] Judgments from Supreme or Constitutional courts that give content to constitutional provisions are becoming part of the supreme law of the land.[6] Civil law judges are also using common law terminology that was previously unknown, such as the ratio decidendi of a case, obiter dictum, and material facts of a case and techniques as distinguishing and overruling precedents.[7]

This convergence between traditions triggered the interest of civil lawyers in the common law doctrine of precedent. For instance, Ana L. Magaloni has analysed the role of constitutional precedent in the United States.[8] Likewise, Leonor Moral has abandoned the conventional debate in the civil law over whether precedents are formal sources of law, and instead has stressed their argumentative role in the judicial practice of European countries.[9] Moral has also argued that the use of precedent should not be grafted from common law doctrine onto civil law because of the differences between the traditions regarding the structure of the judiciary, legal cultures and judicial practice.[10] At the same time, Moral has recognised a convergence among civil and common law traditions regarding the relevance of judgments as sources of interpretation.[11]

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los Estados Unidos Mexicanos [An act regulating sections I and II of article 105 of Mexican Constitution] (Mexico) DOF, 11 May 1995, Arts 43 and 73. See also Chapter I.

[3] *Jurisprudence constante* is the doctrine that considered a set of reiterated judgments from superior courts that clarified the meaning of a rule or principle of legislation as a persuasive, rather than binding source of law. On *jurisprudence constante* see e.g., Robert L. Henry, 'Jurisprudence Constante and Stare Decisis Contrasted' [11] (1929) 15(1) *American Bar Association Journal* 11.

[4] See e,g., José Ramón Cossío Díaz, *La controversia constitucional* (Editorial Porrúa, 2014) 721.

[5] Ugo Mattei and Luca G. Pes, 'Civil Law and Common Law: Toward Convergence?' in Keith E. Whittington, R. Daniel Kelen and Calderia. Gregory A. (eds), *Oxford Handbook Of Law And Politics* (Oxford University Press, 2008) 267, 269-70.

[6] John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition* (Stanford University Press, 3rd ed, 2007) 25.

[7] In Colombia, see e.g., C-131-1993, Alejandro Martínez Caballero, 1 April 1993; SU-640-1998, Eduardo Cifuentes Muñoz, 5 November 1998, SU-047-1999, Carlos Gaviria Díaz and Alejandro Martínez Caballero, 29 January 1999; In Mexico, see A.I.R. 898-2006, José Ramón Cossío Díaz, 7 June 2006; S.M.J. 19-2010, Arturo Zaldívar Lelo de Larrea, 24 August 2011. First Chamber, 5601-2014, Arturo Zaldívar Lelo de Larrea, 17 June 2015.

[8] Ana Laura Magaloni Kerpel, *El precedente constitucional en el sistema judicial norteamericano* (McGrawHill, 2001).

[9] Leonor Moral Soriano, *El Precedente Judicial* (Marcial Pons, 2002); Leonor Moral Soriano, 'The Use of Precedents as Arguments of Authority, Arguments ab exemplo, and Arguments of Reason in Civil Law Systems' (1998) 11(1) *Ratio Juris* 90.

[10] Moral Soriano, *El Precedente Judicial*, above n 9, 18-21.

[11] Ibid 15, 18.

However, most of the work on precedent either assumes a universalist approach to precedent or considers the common law to be the paradigmatic context and style of legal reasoning. That is, scholars assume similarities between legal traditions and jurisdictions across the globe while neglecting how the differences impact on foreign ideas used in a new context. The most exhaustive work on precedent in comparative law, led by Neil MacCormick, assumes similarities between the traditions, stressing the importance of judgments in the civil and the common law.[12] Similarly, while Carlos Bernal notices that the doctrine of precedent is a transplant from the common to the civil law, he does not identify how that transplant is being accepted, modified or rejected in the new civil law context.[13] Also, Pierluigi Chiassioni has noted that the approach to precedential rules is usually more explicit in the civil than in the common law.[14] Yet, there is not much research on how differences in the civil law context may or should affect the use of precedent as a judicial decision-making method. In fact, Héctor Fix-Zamudio, arguably the most renowned comparative lawyer in Mexico, has noted that the analysis of binding precedent as a transplant to the civil law is still pending.[15]

In contrast to the general trend in legal theory and comparative law, this thesis analyses the doctrine of precedent as a *migration* from the common to the civil law.[16] That is, the research offers a dynamic comparison that examines how the concept of a binding precedent and the method that informs it, taken from the common law, are working in a new context, namely, civil law constitutionalism. Instead of assuming a universal or common law approach to precedent, the investigation focuses on how the diverse pre-existing legal culture of the civil law and the structure and practices of the judiciary should affect the use of precedent, understood as a foreign method of decision-making developed by lawyers in the common law tradition. Without rejecting the possibility of mutual influence between legal traditions, this research will propose a conception of constitutional precedent tailored for civil law challenges and styles of reasoning.

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[12] Neil MacCormick and Robert S. Summers, 'Introduction' in Neil MacCormick and Robert S. Summers (eds), *Interpreting Precedents* (Darmouth Publishing, 1997) 1, 2, 7.
[13] Carlos Bernal Pulido, 'Precedents and Balancing' in Thomas Bustamante and Carlos Bernal Pulido (eds), *On the Philosophy of Precedent* (Franz Steiner Verlag, 2012) 51, 51.
[14] Pierluigi Chiassoni, 'The Philosophy of Precedent: Conceptual Analysis and Rational Reconstruction' in Thomas Bustamante and Carlos Bernal Pulido (eds), *On the Philosophy of Precedent* (Nomos, 2012) 13, 20.
[15] Héctor Fix Zamudio, 'Prologo' in Jorge Mario Magallón Ibarra, *Los sonidos y el silencio de la jurisprudencia mexicana* (UNAM, 2004) XXIV.
[16] See Sujit Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 1. See also Frederick Schauer, 'On the Migration of Constitutional Ideas' (2005) 37(4) *Connecticut Law Review* 907. On the debate regarding legal transplants, borrowings and migrations see section III below.

As Moral has noted, the use of precedent should not be a forced graft insensitive to the new context,[17] but its use cannot be isolated from the experience of common law jurisdictions. Instead, the migration can be understood as an active dialogue between the common and the civil law traditions. Civil law judges and scholars, consciously or not, re-interpret and enrich the foreign idea with local practices and concepts.

Despite the convergence regarding the relevance of precedent, there are still at least four striking differences among the traditions that suggest the need for a more context-sensitive approach to precedent in the civil law. Firstly, the structure and functioning of apex civil law courts is *fragmented*. While the Supreme Court of the United States or the High Court of Australia usually work as Full Courts, supreme or constitutional courts in the civil law can work either as a Plenum formed by all its members or as divided into smaller Chambers to solve cases on their merits.

For instance, in Mexico, the Plenum formed by eleven Justices usually solves abstract review cases, i.e., complaints regarding abstract constitutional questions raised by actors with standing recognised by statutes, without actual controversy between the parties regarding how it is applied. In contrast, the two Chambers formed by five Justices usually solve concrete review cases, which can resolve similar questions of law differently. Then, the Plenum may later solve this conflict of interpretation between Chambers.[18] Similarly, the Plenum of Colombian Court formed by nine Justices usually solves abstract review cases, leaving concrete review cases to three Chambers formed by three Magistrates. In cases of conflicting decisions between Chambers, the Plenum may resolve the disagreement by issuing a new judgment.[19] Other civil law jurisdictions in Europe, such as Germany, divide their Federal Constitutional Court into a Plenum formed by sixteen magistrates, two Senates formed by eight, and Chambers composed of three members.[20] Thus, in the civil law, the 'Court' is, in reality, a plurality of organs formed by a Plenum and a set of two or more Chambers that may decide similar cases differently, with each organ contributing to an overproduction of precedents. The more organs and individuals forming a supreme court, the more challenging it is to develop coherent sets of precedents and to guide lower courts.

[17] On the use of foreign legal ideas as grafts see Roberto Gargarella, 'Grafts and Rejections: Political Radicalism and Constitutional Transplants in the Americas' [507] (2008) 77 *Revista jurídica Universidad de Puerto Rico* 507.
[18] Mexican Constitution, above n 2, Art. 107 XIII [3].
[19] *Decreto 2591 de 1991* [Law 2591 of 1991] (Colombia) DO, 19 November 1991, Art. 35.
[20] Robert Alexy and Ralf Dreier, 'Precedent in the Federal Republic of Germany' in Neil MacCormick and Robert S. Summers (eds), *Intepreting Precedents* (Darthmouth Publishing, 1997) 17, 18.

Secondly, the functioning of last resort courts in the civil law favours an overwhelming *overproduction* of constitutional precedent in comparison to the common law. Supreme courts in the common law solve around 80 cases on their merits a year.[21] This number includes common law and statutory and constitutional law cases. In contrast, the coordinated work of Plenums and Chambers in the civil law produces several hundred, or even thousands, of constitutional precedents each year.[22] This overproduction may be caused, first, because the right to justice in the civil law has been interpreted as a right to review in second and third instances.[23] In addition, in certain constitutional cases, supreme courts have original jurisdiction and cannot refuse to hear a constitutional complaint properly filed. Even when there are mechanisms to limit access to Constitutional Courts or Supreme Courts working as constitutional courts, the courts are designed to work as political actors that control, via concrete review, how lower judges or officials interpret the constitution or laws in light of the constitution.

Thirdly, the civil law *textual* approach to interpretation is more concerned with coherence in the legal system and the interpretation of legislation than with facts about concrete cases as in the common law. Civil law scholars have been historically focused on the idea of developing law as a coherent body of abstract rules and principles,[24] rather than interpreting precedents as practical guidelines developed by courts in a case-by-case approach as in the common law. This abstract approach to interpretation may be a legacy of the political movement of codification that tried to re-arrange a set of disparate rules and practices from distinct regions to make them part of a rational whole and a unitary guide of behaviour.[25] Also, this approach emerges from the German academic movement of jurisprudence of concepts, which strived to re-interpret written law as emerging from a clear and well-organised system of concepts.[26] This abstract approach to interpretation influences, for instance, the way civil law analogy is more concerned with extending underlying reasons or principles behind statutory rules, and filling the gaps in codes,

[21] Supreme Court of the United States, *2015 Year-End Report on the Federal Judiciary* <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> 13; High Court of Australia, *Annual Report 2015-2016* <http://www.hcourt.gov.au/assets/corporate/annual-reports/HCA_Annual_Report_2015-16.pdf> 13.

[22] Corte Constitucional Colombia, *Estadisticas 1992-2016 [Statistics 1992-2016]* <http://www.corteconstitucional.gov.co/relatoria/estadisticas.php>; Suprema Corte de Justicia de la Nación (México), *Informe anual de labores 2015 [Anual Report 2015]* <https://www.scjn.gob.mx/Transparencia/documents/Informe2015/InformeVEjecutiva2015.pdf> 28.

[23] Merryman and Pérez-Perdomo, above n 6, 121-2.

[24] See e.g., Norberto Bobbio, *Teoria dell' ordinamento giuridico* (Giappichelli-editore, 1960) .

[25] See Merryman and Pérez-Perdomo, above n 6, 12-4, 21-4, 28-30.

[26] See Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir trans, Clarendon Press, 3rd ed, 1998) 140.

than with identifying factual similarities or differences between cases, as in common law analogy.[27]

Within the civil law approach to legislative and constitutional interpretation the provision-norm distinction is particularly relevant for the purpose of precedents. Civil law scholars distinguish between a provision, as uninterpreted text found in constitutions, statutes or treaties, and norms, as the outcome of interpretation.[28] That is, they accept that the meaning of legal texts is partially indeterminate and mediated by canons of interpretation and the ideological preferences of interpreters. In fact, both the Colombian and Mexican Courts have embraced this distinction, to justify their law-making role via judicial precedent.[29] Judges consider that it is their legitimate role to give a more concrete meaning to indeterminate provisions via judicial interpretation, which as a precedent becomes a source of law for later cases.

Fourthly and finally, the judicial task of interpreting and developing constitutional law is influenced by the legacy of *codification*. Judges in the civil law are interpreting longer and sometimes more conflicting constitutions than their common law counterparts. Codifications may have influenced the length and structure of civil law constitutions. Civil law constitutions, especially those of Latin America, are generous in recognising not only liberal but also social and cultural rights that may be justiciable before courts of law. At least in Mexico, is not unusual to refer to the Constitution as the 'supreme code'[30]. Like the provisions of a code, some constitutional provisions may be relatively determinate, allowing little scope for judicial creativity, but there are other more abstract clauses that appeal to the ideological preferences of judges for ascertaining their meaning. There are provisions that appeal to freedom of expression,[31] the right to non-discrimination,[32] the right to culture,[33] or to achieve material rather than just formal equality.[34] Furthermore, the existence of apparently divergent ideals based on

[27] See Norberto Bobbio, *L'analogia nella logica del diritto* (Dott. A. Giuffrè Editore, first published 1938, 2006) 75-92. Cf. Cass R. Sunstein, 'On Analogical Reasoning' [741] (1993) 106 *Harvard Law Review* 741, 779.
[28] See Tulio Ascarelli, 'Jurisprudencia constitucional y teoría de la interpretación' in Susana Pozzolo and Rafael Escudero (eds), *Disposición y norma* (Palestra, 2011) 19;Vezio Crisafulli, 'Disposición (y norma)' in Susana Pozzolo and Rafael Escudero (eds), *Disposición y norma* (2011) 67. For an introduction to the provision-norm distinction see Fábio Perin Shecaira, 'Sources of Law Are not Legal Norms' (2015) 28(1) *Ratio Juris* 15. See Chapter I.
[29] See e.g., C-1046-2001, Eduardo Montealegre Lynett, 4 October 2001; C.T. 293-2011, Arturo Zaldívar Lelo de Larrea, 3 September 2013.
[30] See e.g., First Chamber, A.I.R. 2119-99, 29 November 2000, Olga Sánchez Cordero de García Villegas.
[31] *Constitución Política de Colombia de 4 de julio de 1991* [Colombian Constitution of 4 July 1991] (Colombia); Mexican Constitution, above n 2, Art. 20 [1]; Art. 6 [1].
[32] Colombian Constitution, above n 31, Art. 13; Mexican Constitution, above n2, Art. 1.
[33] Mexican Constitution, above n 2, Art, 4 [12] as amended 30 April 2009.
[34] Colombian Constitution, above n 31, Art. 13 [2].

competitive ideologies provides a challenge for judges to reconcile them. For instance, it may be hard to develop precedents that harmonize liberal ideals that support freedom of expression or freedom of commerce with social ideals that support non-discrimination or socio-economic equality.

The interpretation of constitutions and the drafting of judgments are also influenced by the legacy of codification. The different canons of interpretation available for interpreting codes are also used to interpret the constitution. For instance, the Mexican Supreme Court has acknowledged logical, textual, historical, systematic or holistic, teleological or evolutionary canons as valid methods of interpretation.[35] The plurality of canons of interpretation inherited from codification makes it possible for judges to ascribe different meanings to similar provisions or even to the same provision. Thus, theories of statutory or constitutional interpretation need to be complemented with a theory of precedent that limits subsequent exercises of interpretation. In turn, codification influences the way judges draft judgments identifying the ratio decidendi of a case through abstract and impersonal rules similar to code provisions.[36]

Because of these four differences, the mere borrowing of the common law concept of binding precedent for use in the civil law would be incomplete and inadequate. These dissimilarities urge the reconfiguration of the doctrine of precedent so that it can fit civil law needs. On the one hand, there are endemic *challenges*, unfamiliar to the common lawyer, that a conception of constitutional precedent for the civil law should address. A fragmented constitutional court may develop incompatible decisions about similar questions of law. Interpreters need to reconstruct the decisions of the 'Court' – ones in fact taken by distinct organs. Also, the overproduction of precedents suggests that the mere comparison of two cases – a precedent and the case at hand – is insufficient to solve a case. Instead, it is useful to take a more holistic approach that analyses a whole set of precedents on a related topic. Moreover, the existence of long constitutions makes it likely that there will be distinct constitutional provisions that regulate a similar behaviour in an incompatible way. Thus, it is the task of judges to reconcile such provisions, or ascertain which one prevails via interpretation. It is not only a problem that courts decide several cases that may be in tension, but the provisions themselves may be in tension with one another. The existence of competing principles in the constitutional text aggravates the problem of incoherence in the law.

[35] A.D.R 1225-2006, Juan Silva Meza, 30 January 2007.
[36] See Chapter II.

On the other hand, there are civil law *interpretative tools* and *judicial practices* that make possible an adequate reconfiguration of the doctrine precedent. For instance, the civil law distinction between analogy *legis* – the extension of the scope of application of a rule to unanticipated cases – and analogy *juris* – the inference of a principle from a set of rules regulating a common behaviour – can be used to minimise the incoherence among precedents forming sets of judicial decisions capable of being encompassed by a single principle.[37] Likewise, the practice of identifying the ratio decidendi in abstract terms can serve to approximate to the ideal of coherence in precedents. It is as if judges were developing a dynamic code: the canonical formulation of rationes makes it easier to identify tensions among precedents. Similarly, the provision-norm distinction makes it possible, for instance, to justify an overruling. When the understanding of a constitutional provision becomes out-dated in light of legal or axiological changes, it is necessary to ascribe a new meaning to the provision compatible with the current standards of the legal community, even if the text has not been formally amended. In this way, civil lawyers can profit from pre-existing concepts and techniques to tailor the doctrine of precedent according to their endemic challenges.

Therefore, while there is indeed a convergence between legal traditions regarding the relevance of precedent as legal sources, there are also differences and endemic challenges for the civil law. Differences in legal reasoning, the structure of the judiciary and judicial practices urge a reconfiguration of the doctrine of precedent in the civil law context.

I.2. Research Question and Theoretical Relevance

Given the context in which civil law judges are using the doctrine of precedent, the main question that this investigation tries to answer is a normative one: How should civil lawyers reconfigure the common law doctrine of precedent to achieve a reasonable degree of coherence in constitutional judgments?

In this context, coherence is understood as the degree of mutual support and lack of contradiction between a set of precedents linked by common constitutional principles. In turn, coherence can be conceived in two complementary ways. First, it can be an ideal state of affairs in which all sources are compatible and interlinked by constitutional principles. And secondly, it can be a

[37] On analogy legis and juris see e.g., Giovanni Damele, 'Analogia Legis and Analogia Iuris: an Overview from a Rhetorical Perspective' in Henrique Jales Ribeiro (ed), *Systematic Approaches to Argument by Analogy* (Springer, 2014) 243. See also Chapters III and IV.

constraint on interpreters – mainly judges – related to the duty to show that a particular judgment is compatible with a set of pre-existing sources rather than an idiosyncratic or ad hoc judgment.

The *ideal* of coherence in the law, far from being exotic to the civil law, lies at its core aim of being a rational and complete normative system. The maximum expression of legal order and coherence was the enactment of codes in the civil law intended to make it work as a gapless, unitary guide of human behaviour that is free of conflict.[38] In the academic field, the ideal of coherence is particularly close to the concept of a legal system.[39] That is, coherence in the law as an institutional set of organised standards is the product of a legitimate procedure rather than a bundle of whimsical or disconnected commands.

What is relatively novel in the civil law is the understanding of coherence as a *constraint* for judicial interpretation. Common law theorists such as Ronald Dworkin have argued that judgments must not only be grounded on sound arguments but must 'fit'[40] with a relevant set of precedents and principles that form the institutional record of a given jurisdiction. Every judgment must explain and justify not only a set of decisions but also the fundamental political principles of the system as a whole.[41] Thus, the most coherent decision is one that is compatible with a set of sources that mutually support it as far as possible. Similarly, Neil MacCormick claims that precedents or rules must 'hang together',[42] linked by the common values or principles of a legal system. As opposed to consistency – that is, a lack of formal contradiction among propositions – coherence in the law is axiological compatibility among sources linked by means of legal analogy.[43] That is, interpreters bear the burden of argumentation in showing that their claim is compatible with a set of rules linked by common principles.

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[38] Zweigert and Kötz, above n 26, 74-114, 143-150.

[39] See Hans Kelsen, *Introduction to The Problems of Legal Theory* (Stanley L. Paulson and Bonnie Litschewski Paulson trans, Clarendon Press, 1992) [trans of: *Reine Rechtslehr* (first published 1934)] Ch. V; Michel van de Kerchove and François Ost, *Legal System Between Order and Disorder* (Iain Stewart trans, Oxford University Press, 1994) [trans of: *Système juridique entre ordre et désordre* (first published 1988)] 12-16. See also Pierre Legrand, 'European Legal Systems Are Not Converging' [52] (1996) 45(1) *The International and Comparative Law Quarterly* 52, 65-66. (Arguing that common lawyers are not interested in systematizing the law but on solving practical disputes).

[40] Ronald Dworkin, 'Hard Cases' (1975) 88(6) *Harvard Law Review* 1057, 1069.

[41] Ronald Dworkin, *Law's Empire* (Hart Publishing, first published 1986, 1998) 90, 167, 219.

[42] Neil MacCormick, 'Coherence in Legal Justification' in Aleksander Peczenik, Lars Lindahl and Bert Van Roermud (eds), *Theory of Legal Science: Proceedings of the Conference on Legal Theory and Philosophy of Science* (D. Reidel Publishing Company, 1984) 235, 235.

[43] Neil MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005) 47, 190.

In the sense of constraint, coherence is not a given property of the legal system waiting to be found, but an active process of interpretation incorporating a problem-oriented approach intended to solve concrete cases. Interpreters reconstruct legal sources, particularly precedents, to show that a potential judgment will be compatible with a set of rules and principles conceived as rational wholes.

Civil lawyers have also joined the debate about coherence as a constraint. Robert Alexy has noted that even if legal materials are incoherent, 'adjudication has the task to make it as coherent as possible'[44]. In similar vein to MacCormick, Alexy claims that treating similar cases alike linked by common reasons or principles is a requirement of coherence in the law.[45] Likewise, Aleksander Peczenik has noted that precedents should not be understood as static propositions but as evolving reasons that support a particular interpretation of the law. Thus, judges need to persuade fellow participants that a particular judgment flows from a tendency in the law, even if it is not strictly deduced from it.[46] More recently, Amalia Amaya has defended coherence explicitly as a constraint satisfaction approach for selecting claims that are better supported by a set of rules, principles and precedents. Judges need to justify how a particular interpretation of the law coheres with a set of rules, precedents, principles and values of a particular legal system.[47]

In the context of precedents, the conceptions of coherence as an ideal of the *system* and as a *constraint* on judges are interlinked. It is expected that judges develop a system of precedents that is as mutually supported as possible and linked by one or several common principles.[48] Given the high degree of abstraction of certain constitutional provisions, judges should comply with the duty of developing their meaning as a single guide to behaviour for all citizens. However, this production of a system of precedents presupposes a subjective process of interpretation and reconstruction. Lawyers and judges try to form systems of precedents, or at least subsets of them, to support their claims or judgments. Lawyers reconstruct these sets to reduce judicial discretion

[44] Robert Alexy, 'Coherence and Argumentation or the Genuine Twin Criterialess Super Criterion' in Aulis Aarnio et al (eds), *On Coherence Theory of Law* (Juristförlaget i Lund 1998) 39, 45.
[45] Robert Alexy, 'Two or Three?' in Martin Borowsky (ed), *On the Nature of Legal Principles* (Franz Steiner Verlag Stuttgart, 2010) 9, 18.
[46] Aleksander Peczenik, 'The Binding Force of Precedent' in Neil MacCormick and Robert S. Summers (eds), *Interpreting Precedents* (Darthmouth Publishing, 1997) 461, 470; Aleksander Peczenik, 'Sui precedenti vincolanti de facto' (1996) 6 *Ragion Pratica* 35, 39, 42.
[47] Amalia Amaya, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument* (Hart Publishing, 2015) 503-20.
[48] MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning*, above n 43, 231.

and judges do likewise to show that their judgments, rather than being ad hoc or idiosyncratic, find support in pre-existing law, even if there is no clear rule to solve the case.

This investigation joins the theoretical discussion on coherence in the law, but the main goal is to suggest a more practical conception of precedent that is useful for legal practitioners. It takes the understanding of coherence as an ideal and as a constraint as a starting point for analysing the current use of the common law doctrine of precedent in the civil law.

This is a more practical approach to legal coherence, because it stresses the obvious, although not sufficiently emphasized, inter-subjective feature of adjudication. Judges do not achieve coherence in the law in isolation but in a competitive dialogue with fellow participants. This investigation emphasises that coherence between a judgment and a set of precedents is achieved not only intersubjectively, in the sense that what a judge ruled in the past influences and constrains the judge in the present, but more importantly, that coherence in the law is the outcome of contrasting several alternative reconstructions of the law. In short, the judge or the majority of judges bear the burden of argumentation in showing to fellow legal interpreters that their proposed judgement coheres better with pre-existing law than the alternatives suggested by others.

Moreover, the investigation uses the provision-norm distinction, generally accepted in civil law practice but mostly unknown in the common law, to reduce judicial discretion when interpreting constitutions and statutes. Once a judge ascribes a meaning to a given provision, the same or subsequent judges should show that later interpretations are not only compatible with the text but also with previously ascribed norms. Thus, coherence at the level of ascribed norms works as a further constraint on judges, in addition to the semantic constrains at the level of provisions.

The investigation also links the conservative and dynamic elements of coherence with the corresponding elements of a doctrine of precedent. Coherentist theorists are right in stressing the conservative elements of coherence – i.e., past decisions limit today's judicial discretion. On occasion, a judgment must 'fit' or 'hang together' with pre-existing legal sources and thus coherence plays a conservative role. That is, judges apply or expand the ratio of a precedent or set of them to subsequent cases by applying or following precedents. However, coherentists do not pay sufficient attention to the dynamic role of coherence instantiated in judicial decision-making. On other occasions, coherence plays a dynamic role. This occurs, for instance, when new facts or

a new understanding of them in a judgment triggers the revision of pre-existing norms, and coherence in a sub-set of norms is re-established once a norm is modified or abrogated. In this dynamic facet, judges modify pre-existing law by distinguishing or overruling precedents.

I.3. Practical Relevance: The Right to Equality Before Courts of Law

In a constitutional state, in order to safeguard equality, it is insufficient that legislators refrain from enacting discriminatory laws that threaten similar citizens differently without constitutional justification. Judges must also treat litigants in similar situations alike, on pain of infringing their right to equality.[49] Once a judge has interpreted a constitutional provision in a certain sense, it is expected that future litigants in similar situations will receive the same interpretation. Even if there are good reasons to challenge the interpretation of the previous court, the assumption is that the interpretation will be followed.[50]

From the perspective of the norm-subject – i.e., lawyers or parties – equality before the law is more relevant than coherence in the law, though nevertheless, both are complementary. Lawyers, unlike scholars, care about precedents to increase or protect the sphere of their clients. If there is a precedent that favours a particular claim, they will invoke it. The logic here is that if a previous citizen was treated in a certain way, there is at least a prima facie duty for judges to treat later parties in the same way. The more precedents support a claim, the more coherent it is. Thus, although scholars and lawyers have different interests, both may reconstruct a set of precedents to question or scrutinize the role of judges. When two similar cases are treated differently without a reasonable justification, that act directly affects the parties' right to equality. Indirectly, it affects the ideal of coherence in the law, as judges have attached incompatible legal consequences to the same behaviour.

It may be argued that previous civil law institutions protected the right to equality before courts of law prior to the influence of constitutional precedent. Cassation as a third-instance remedy that monitors how lower judges interpret written law safeguarded this right.[51] In parallel, theories of *jurisprudence constante* aimed at safeguarding equality before the law and uniformity in

[49] On the right to equality before the law as a rationale for precedent see Alfonso Ruiz Miguel, 'Equality Before the Law and Precedent' (1997) 10(4) *Ratio Juris* 372; Zenon Bankowski et al, 'Rationales for Precedent' in Zenon Bankowski and Neil MacCormick (eds), *Interpreting Precedents* (Darthmouth Publishing, 1997) 487-90.
[50] Frederick Schauer, 'Precedent' (1987) 39(3) *Standford Law Review* 571, 575.
[51] On cassation and *Jurisprudence constante* see Chapters I and II.

interpretation.[52] Together, cassation and theories of jurisprudence limited the judicial discretion of lower judges.

However, the logic of cassation and *jurisprudence constante* seems inadequate for safeguarding the right to equality before the law. They granted a normative character only to reiterated judgments rather than to single decisions, as is the current trend. Thus they implicitly allowed judges to treat similar cases differently without justification. Moreover, as a third-instance remedy, cassation controlled lower judges in vertical manner but was not concerned with controlling the coherence of the precedents of the same court. The need to control horizontal precedent is particularly relevant for constitutional courts, which are not only last-resort courts but, in virtue of the hierarchy, may trump other supreme courts in administrative or civil law matters. Also, *jurisprudence constante* is concerned with how judgments can clarify the meaning of statutes, but is not concerned with techniques to distinguish or overrule precedents in a transparent and reasonable way.

Further, *jurisprudence constante* seems to reproduce the unrealistic dichotomy that judges do not create law but merely interpret it.[53] The existence of ambiguous constitutional provisions that appeal to abstract ethical and political values seems to blur the line between the interpretation and the creation of constitutional law. In addition, the visible role of constitutional courts as political actors is at odds with the myth of judges as appliers of the law. To quote a few examples, the Mexican Supreme Court has inferred a fundamental right to sexual autonomy from human dignity,[54] and the Colombian Court has declared the unconstitutionality of a constitutional amendment proposed by then President Uribe that would have enabled him to run for a third consecutive term.[55] It is unrealistic to suggest that these decisions were made only by applying the pre-existing meaning of provisions. Instead, the provision-norm distinction reveals that there is a zone of indeterminacy in provisions that allows for judicial creativity.

[52] See e.g., Héctor G. Zertuche García, *La Jurisprudencia en el sistema jurídico mexicano* (Editorial Porrua, 1990); José María Serna de la Garza, 'The Concept of Jurisprudencia in Mexican Law' (2009) 2(1) *Mexican Law Review* 131. The interpretative theory o*f jurisprudence constante* seems to parallel the declaratory theory of law that considered that precedents are not law but evidence of the law. See Allan Beever, 'The Declaratory Theory of Law' (2013) 33(2) *Oxford Journal of Legal Studies* 1.

[53] See e.g., Miguel Carbonell, 'Sobre el Concepto de Jurisprudencia en el Sistema Jurídico Mexicano' (1996) 87 *Boletin Mexicano de Derecho Comparado* 771, 776-785.

[54] A.D.R. 6-2008, Sergio A. Valls Hernández, 6 January 2009**.**

[55] C-141-2010, Humberto Antonio Sierra Porto, 26 February 2010.

This investigation stresses the fact that to safeguard the subjective right to equality before courts of law, precedents, even those that are non-reiterated, should be understood as rules. Through precedential rules, judges create categories that make explicit that each legal subject who engages in a certain pattern of behaviour receives a legal consequence, i.e. they inform whether an action is permitted, commanded or prohibited. Thus, to safeguard citizens' right to equality, the corresponding general judicial practice is to follow precedents and apply relevant categories to all subjects similarly situated. However, the right to equality also entails the judicial possibility of differentiating between subjects despite apparent similarities. As will be discussed in Chapter V, judges can make explicit this differentiation between precedents which subdivides a general category into more specific ones according to the legally relevant circumstances of the case. Likewise, as chapter VI suggests, judges can identify differences between the time a case was decided and the case at hand that justify eliminating a category once the legal community has come to understand that it is no longer justifiable according to current standards as evidenced by surrounding precedents in similar or related questions of law.

Indirectly, the emphasis on categories created by precedential rules safeguards other basic principles of constitutional states such as legal certainty and the predictability of legal decisions. Once a judge has interpreted a provision in a given sense, subsequent judges need first to consider previous decisions, and if they seek to depart from precedents, they should do it explicitly. Later judges do not interpret provisions from scratch, ascribing distinct meanings or creating distinct categories every time they solve a case. Rather, previous decisions reduce the scope of interpretative discretion when reading the constitution or statutes. Thus, given that judges need to show that a judgment is compatible with a set of pre-existing sources, this process of reconstruction of sources is in itself a constraint on judicial discretion that favours stability in the law.

The ideal of coherence between a judgment and a set of sources is thus not only a theoretical concern but has also practical implications that favour citizens. From the perspective of judges, they should show that their judgment is not a whimsical decision triggered by personal preferences but is compatible with the previous interpretations of other judges. From the perspective of citizens, litigants can invoke precedents to put pressure on judges to resolve a case in a given way, even if the judges have substantive reasons to challenge the precedent. In exceptional circumstances there may be reasons to modify the law and thus cause a degree of

instability in the law. However, even in these scenarios, judges should show transparently that the modification of precedents improves the law by making it more coherent.

II. Claim and Purpose of the Thesis

II.1. Main Claim

To reconfigure the common law doctrine of precedent in terms of civil law constitutionalism, the main claim of this thesis is that any constitutional judgment ascribes at least one norm to constitutional provisions that should be applied using Constitutional Reciprocity. These ascribed norms are not absolute but take the form, rather, of prima facie rules. While there can be reasons for revising them, the presumption is in favour of following them, and judges bear the burden of argumentation when departing from them.

Constitutional Reciprocity is an adaptation of John Rawls' coherentist method of Reflective Equilibrium applied to the institutional and intersubjective context of constitutional adjudication in the civil law. As further analysed in Chapter IV, Equilibrium is a method for systematizing and revising moral beliefs in order to develop theories of morality whose components are as mutually supported and conflict-free as possible. [56] Inspired by this method, Constitutional Reciprocity construes ascribed norms as prima facie rules that limit judicial discretion. In this sense, judges bear the burden of argumentation in showing that a potential judgment supports and is supported by a set of constitutional provisions and judicially ascribed norms. They need to show that a particular judgment coheres better with the relevant pre-existing law than its alternatives. Constitutional Reciprocity adapts the method of Equilibrium, originally proposed in the field of Moral Philosophy, to achieve a reasonable degree of coherence in precedents in the civil law.

Constitutional Reciprocity uses civil law concepts and techniques to adapt the method of Equilibrium to the institutional and intersubjective context of adjudication in the civil law. For instance, it uses the distinction between a provision and a norm to highlight the possibility of revising the meaning previously ascribed to a constitutional provision, when such norm does no longer cohere with a set of relevant norms. Judicial norms works as glosses over the constitutional text. Thus these norms may become out-dated or incoherent when they are seen in light of other more recent norms. In this way, the meaning previously ascribed to a constitutional provision can lose force, and constitutional meaning can be revised via judicial interpretation, but

[56] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 18-21, 48-51.

the change is also limited by other norms that evidence progressive changes in the interpretation of provisions.

Constitutional Reciprocity also uses the previously discussed civil law distinction between analogy *legis* and analogy *juris* to achieve reasonable coherence in the law. The first is useful to extend the scope of a rule to unanticipated cases, while the second serves to infer a principle from a set of rules. Together, these techniques are connected with the ideal of coherence in the law as a complete or completable system of rules and principles.

These and other civil law elements suggest that Constitutional Reciprocity is a five-step process for achieving a reasonable degree of coherence between a potential judgment and a set of norms.[57] First, legal participants identify a relevant set of constitutional provisions and norms in light of the facts of the case. Second, they arrange this set according to the institutional record of preferences. That is, they identify previous decisions where a particular constitutional principle has prevailed. Third, they propose an ascribed norm inferred from the set of sources that controls the case. Given that any judgment will produce a norm, they argue as if sources were coherent, but only according to the particular reconstruction of each participant. Fourth, legal participants expand or reduce the set of sources in light of the replies and rebuttals of other participants. Finally, judges must select the most internally coherent set that supports a particular judgment in light of the principle of analogy, the institutional record and the law of balancing that resolves collisions between competing principles.

The object of adopting such method is to provide a mechanism to reduce incoherence among judgments perhaps caused by the overproduction of precedents. In fact, the overproduction of precedents in the civil law may urge the need for a coherentist and holistic approach of precedent.[58] Instead of analysing a single precedent in relation to the case at hand, it may be necessary to analyse a broader set of sources. A court can show that a potential judgment coheres better with relevant pre-existing law by invoking a greater number of ascribed norms, or norms that are backed by higher principles than the alternatives.

In this way, the thesis follows the work of coherentist theorists such as MacCormick, Dworkin, Alexy, Peczenik and Amaya, but tries to provide a more practical framework useful for legal

[57] See Chapter IV.
[58] See Chapters III and V.

practitioners in the civil law to reduce judicial discretion. However, the main goal is to provide a normative framework that can be used by civil lawyers to argue or solve cases using precedents to reduce judicial discretion. Rather than provide a complete theory of legal reasoning or adjudication, the aim is to produce a framework useful for achieving coherence between a potential judgment and a set of constitutional precedents. By linking a concrete decision with a set of pre-existing interpretations, the thesis thus aims to suggest a method that reduces the scope of the interpretative discretion that constitutional judges enjoy when reading indeterminate constitutional texts or inferior laws in light of the constitution

II.2. Scope of the Thesis

Rather than offering a complete theory of legal reasoning or adjuducation, this thesis endorses a framework useful for achieving coherence between a potential judgment and a set of constitutional precedents. Other coherentist theories, such as Dworkin's or Amaya's, are indeed general theories of law or legal reasoning. In contrast, this investigation is explicitly concerned with providing the best framework for minimising incoherence among precedents from the particular perspective of the civil law.

The scope of the thesis is confined to constitutional precedent in the civil law, primarily among intermediate and supreme or constitutional courts. The supremacy of constitutional law vis-à-vis other branches of law gives it sufficient specificity to tackle the issues of coherence. In case of conflict between a constitutional precedent and a non-constitutional one, the first prevails, given that it is considered the authoritative interpretation of the highest legal source of a country. Moreover, the civil law mechanism of abstract constitutional review lacks facts in the traditional sense, which makes it necessary to rethink the traditional common law fact-centred techniques of precedent, originally developed in private law litigation.[59] Furthermore, it is particularly in the field of constitutional law that precedents have become relevant to giving concrete meaning and weight to abstract provisions. Although it may be necessary to develop a general theory of precedent for the civil law in general, this investigation narrows the scope to the specific field of constitutional law.

The analysis of constitutional precedents is primarily focused on the judgments of Supreme and Constitutional Courts, with less analysis of intermediate court judgements. The former are more

[59] See Chapter V.

accessible than lower court judgments but are still adequate for covering vertical and horizontal precedent.[60] In this manner, the thesis analyses how the precedents of the Plenum bind lower organs – the Chambers and intermediate courts – but also analyses the way the Plenum or the Chambers are partially constrained by their own precedents. In fact, the role of horizontal or self-precedent is particularly relevant in Constitutional Courts in the civil law given the vast number of cases that they decide. It is also necessary to focus on last-resort courts to cover the topic of overruling, because usually only last resort courts can overrule their decisions when a special burden of argumentation is met.[61]

Again, the analysis of precedent is focused on judicial interpretation of domestic materials rather than on the use of foreign precedent. Although the use of foreign judicial precedent has become a debated topic in the comparative law literature,[62] this thesis focuses on the role of domestic precedent as a binding source of law. Before engaging in a transnational dialogue between courts, it is necessary to develop a sound normative conception of national precedents. This is particularly relevant for jurisdictions like Colombia or Mexico, in which judicial precedent is a tool to give content to long bills of rights in the context of diverse and stratified societies.

Although the thesis is primarily concerned with how civil lawyers should reconfigure the doctrine of precedent, it may nevertheless also contribute to putting an end to the frequent misconceptions in the common law regarding the relevance of the role of judges and judicial lawmaking in the civil law. For instance, Jeremy Waldron states that 'some systems of law claim not to respect any principle of stare decisis'[63]. More recently, Adam Rigoni has claimed that in civil law jurisdictions a 'judge is free to ignore the results of past cases in reaching her decision'[64]. Less radically, a former Justice of Australian High Court has noted that civil law jurisdictions rarely allow dissenting opinions.[65] Thus, while the primary purpose of the research is to make suggestions for improving the existing practice of precedent in the civil law, the analysis may serve to show that at least in Mexico and Colombia the practice of following

[60] Frederick Schauer, *Thinking Like a Lawyer* (Harvard University Press, 2009) 36-7.
[61] See Chapter VI
[62] See e.g., Carlos F. Rosenkrantz, 'Against Borrowings and other Nonauthoritative uses of Foreign Law' [269] (2003) 1(2) *International Journal of Constitutional law* 269; Eduardo Ferrrer Mac-Gregor and Rubén Sánchez Gil, 'Foreign Precedents in Mexican Constitutional Adjudication' [293] (2012) IV(2) *Mexican Law Review* 293; See generally Ran Hirschl, *Comparative Matters* (Oxford University Press, 2014).
[63] Jeremy Waldron, 'Stare Decisis and The Rule of Law: A Layered Approach' (2012) 112(1) *Michigan Law Review* 1, 9. (Refereeing to John Merryman's 2nd edition of 'The Civil Law Tradition').
[64] Adam Rigoni, 'Common-Law Judicial Reasoning and Analogy' (2014) 20(2) *Legal Theory* 133, 133.
[65] Michael Kirby, 'Precedent Law, Practice and Trends in Australia' (2007) 28 *Australian Bar Review* 243, 245.

precedent and concurring and dissenting opinions is part of everyday constitutional adjudication, as the case studies show.

In the mid-term, the growing interest in precedent from both traditions may lead to a fruitful dialogue between the common and the civil law. The use precedent may be the meeting point of legal cultures with different judicial structures and styles of legal reasoning, where they are nevertheless concerned with safeguarding the right to equality of litigants and the ideal of coherence in the law.

III. Methodology

This thesis links legal theory with comparative constitutional law. It combines the need for abstraction in legal theory to develop general guidelines for legal participants with the context-sensitive approach of constitutional migrations. This interconnection between the universal and the particular serves to develop a conception of constitutional precedent *for* the civil law, particularly for Latin America, rather than a universal theory of adjudication for all jurisdictions.

III.1. Doctrinal Research as an Informed-observer

The thesis carries out extensive doctrinal research on literature concerned with precedent and legal coherence, both in the common and the civil law, and with constitutional judgments from Colombia and Mexico.

This doctrinal research takes the perspective of an 'informed-observer'[66]. This academic perspective requires that enquirers are acquainted and engaged with most of the values, principles and practices of the legal systems analysed, even if they seek to improve them. However, it also recognises that the role of the academic is distinct to that of first-order legal participants such as lawyer or judges.[67] In this way, the engagement of the academic in legal research occupies a middle point between a purely external perspective, such as that of the sociologist, and the internal perspective of judges.

[66] Neil MacCormick, *Institutions of Law* (Oxford University Press, 2007) 5.
[67] Ibid 6-7, 291.

For the purpose of this thesis, the role of the informed-observer is to systematize current practice on precedent and to try to make suggestions to improve it.[68] As previously discussed, this focus on improvement refers to minimising incoherence in precedents. From the academic perspective, these suggestions could increase the rationality of legal systems. From the perspective of first-order participants it may reduce the chances of arbitrariness – in particular, forcing judges to treat cases alike or to give good reasons for deviating from precedent.

The purpose of this doctrinal research is, first, to identify how civil law judges are using common law concepts and techniques, then, in light of this analysis, to suggest how the practice can be improved to safeguard the relevant ideals of the particular system, namely, coherence in constitutional precedent and equality before courts of law.

III.2. Understanding the Use of Precedent as a Migration to the Civil Law

Regarding the use of comparative law methodology, this thesis follows the context-sensitive approach of the migration constitutional ideas as opposed to the universalist method of functionalist comparative law. The functionalist approach assumes convergence between jurisdictions, identifying similarities and disregarding differences.[69] In contrast, the circulation of legal ideas – transplants, borrowings or migration – by analysing how a foreign legal idea arrives in a new and different context.[70] Given the differences between legal cultures, the foreign rule, principle, doctrine or institution may be rejected or modified by the local jurisdiction.[71] In this way, rather than assuming similarities between jurisdictions, the view that legal ideas 'migrate' focuses on how foreign legal ideas may trigger change, even if the idea is eventually modified because of the local legal culture.[72]

[68] In this sense, it is important to acknowledge that my acquaintance and engagement with the Colombian system is not as deep as the one with the Mexican law: 'my' legal system.
[69] See Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2008) 339, 370-376.
[70] Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in Mathias Reimann and Reinhard Zimermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2008) 441.
[71] See e.g., Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) *The Modern Law Review* 11.
[72] Michele Graziadei, 'Legal Transplants and the Frontiers of Legal Knowledge' (2009) 10 *Theorical Enquiries in Law* 723.

The analysis of foreign ideas started with a descriptive analysis of the transplantation of private law rules from one jurisdiction to another.[73] However, critics argued that the meaning of such rules is ultimately developed by the legal culture that embraces such a rule.[74] Thus, while the foreign prestigious jurisdictions may trigger changes in local law, the meaning of law is ultimately developed by the local community. The metaphor of a 'transplant' is therefore inadequate because legal ideas, unlike physical objects, are created and developed by the interpretive community. The transplanted rule disappears as the new community creates a meaning consistent with its mores and values.

The inadequacy of the methodology of transplants lies in the fact is that it assumes that it is the local context that should be altered so that the foreign idea can fit, rather than the foreign idea being modified in light of local need. It also assumes an external perspective in which foreign experts instruct local actors to adopt the legal idea, without a direct engagement with and appraisal of the legal system in question.[75] The assumption that the recipient must adapt to the foreign idea ignores the requirement of a dialogue between local and foreign actors. It also assumes that there can be universal prescriptions for all legal systems irrespective of the legal culture.

An alternative metaphor to the 'migration' of legal ideas and transplants is that of legal or constitutional 'borrowing'.[76] This metaphor suggests that there can be interaction between legal cultures and foreign ideas can be modified to fit the local context. However, as Sujit Choudhry notes, borrowing implies ownership of the idea.[77] Moreover, this ownership may entail an unequal relation between the 'lender' and the 'borrower'. This relation may suggest that a 'successful' borrowing is one that emulates the lender and follows its guidelines, rather than a positive adaptation of foreign ideas in light of local creativity and needs. Moreover, the idea of borrowing seems to reproduce the dichotomy of the legal transplant. Either a foreign idea is

[73] Alan Watson, *Legal Transplants* (Scottish Academic Press 1974) 6.
[74] Pierre Legrand, 'The Impossibility of 'Legal Transplants'' [111] (1997) *Maastricht Journal of European and Comparative Law* 111, 119.
[75] See e.g., Randall Peerenboom, 'Toward a Methodology For Successful Legal Transplants' (2013) 1(1) *The Chinese Journal of Comparative Law* 4.
[76] See e.g., Matthew D. Adler, 'Can Constitutional Borrowing be Justified? A Comment on Tushnet' (1998) 1(2) *University of Pennsylvania Journal of Constitutional Law* 350.
[77] Choudhry, above n 16, 21.

borrowed or is rejected, without the possibility of middle points where a jurisdiction takes inspiration from another but also adapts its ideas to local values and needs.[78]

As an alternative to the metaphors of transplant or borrowing, this thesis follows the idea of migration suggested by Choudhry.[79] Choudhry defends migration as an alternative approach to the dichotomy between borrowing and not borrowing foreign precedent. Instead, Choudhry advances the metaphor of a migration, conceived as a dialogical relation between the universal and the particular, and between the foreign and the local jurisdiction.[80] The comparativist must identify local assumptions to contrast these with foreign law, and this contrast may lead to the embrace of foreign ideas because of the similarity between two jurisdictions, or the rejection of them because of differences. This dialogue is a way of questioning local assumptions and 'facilitating a greater understanding of one's *own* system'.[81]

In contrast to the subordinated relation that legal transplants or borrowing presuppose between the lender and the borrower, usually because of the greater prestige of the former in relation to the latter,[82] migrations presuppose a horizontal dialogue between the legal actors of both jurisdictions or legal traditions. This approach abandons the monological or passive analysis of foreign ideas in favour of a dialogue between jurisdictions.[83] In this sense, the role in migrations of civil lawyers – scholars, lawyers and judges – is not that of mere passive receivers of the common law doctrine of precedent. Instead, they are active producers of knowledge who can contribute to and tailor the concepts that constitute the doctrine of precedent as the ratio decidendi of a case or the techniques of distinguishing cases.

This thesis follow's Choudhry's methodology of constitutional migrations but takes it one step

[78] This middle point between borrowing and not borrowing is what some authors call 'borrowing by adaptation' or 'constitutional reengineering'. See Wiktor Osiatynski, 'Paradoxes of Constitutional Borrowing' [244] (2003) 1(2) *International Journal of Constitutional law* 244, 252; Scott Stephenson, 'Constitutional Reengineering: Dialogue's Migration from Canada to Australia' (2013) 11(4) *International Journal of Constitutional law* 870.
[79] Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' [819] (1999) 74(3) *Indiana Law Journal* 819, 834.
[80] Ibid 824-6, 835-7, 856.
[81] Sujit Choudhry, 'The Lochner Era and Comparative Constitutionalism' [1] (2004) 2(1) *International Journal of Constitutional law* 1, 52. Emphasis in original.
[82] See Jonathan M. Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Proces' (2003) 51(4) *American Journal of Comparative Law* 839, 857.
[83] Vicky Jackson defends a similar approach to migration with the idea of 'constitutional engagement' see Vicky C. Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' [109] (2005) 119(1) *Harvard Law Review* 109. See also, Claire L'Heureux-Dubé, 'The Importance Of Dialogue: Globalization and The International Impact of The Rehnquist Court ' [15] (1998) 34(1) *Tulsa Law Review* 15, 17.

further.[84] First, it acknowledges that the dialogue between jurisdictions can lead not only to accepting or rejecting common law ideas, but also to their reconfiguration according to civil law practices and techniques.[85] That is, awareness of differences between jurisdictions may trigger the modification of foreign ideas to achieve a goal relevant to a local context. Second, the thesis is not concerned with the migration of legal sources in themselves, but with the migration of precedent, understood as a decision-making method, and the doctrine that informs it.

For lack of a better adjective, the migration of the doctrine of precedent to civil law constitutionalism would be *adequate* when a normative framework inspired by civil law concepts and techniques is useful for reducing the degree of incoherence among precedents.[86] Simultaneously, this framework may be useful for enhancing the enforcement of the right to treat like cases alike, or of providing a reasonable justification when there is a need to deviate from precedent. Thus, rather than considering an adequate migration to be one that emulates the common law doctrine, the parameter for success are local: success is measured by the extent to which coherence in precedents and equality before the law are protected.

III.3. The Justification of Mexico and Colombia as Case Studies

There are four reasons that justify the selection of Mexico and Colombia as jurisdictions for analysing the migration of the common law doctrine of precedent to civil law constitutionalism. First, both are representatives of the civil law, yet they have received less attention than they warrant from a comparative law or legal theory perspective. Usually, comparative lawyers focus on France or Germany as exemplars of the civil law and assume that other civil law jurisdictions are a mere reproduction of them.[87] However, civil law jurisdictions in Latin America are good material for case studies given that most of them share a presidential regime, a post-colonial history, Spanish as a common language, and generous bills of rights containing not only liberal, but also socio-economic and cultural, rights.[88] In this sense, Latin American jurisdictions stand in

[84] A preliminary version of the methodology can be found in Rodrigo Camarena Gonzalez, 'From Jurisprudence Constante to Stare Decisis: The Migration of The Doctrine of Precedent To Civil Law Constitutionalism' (2016) 7(2) *Transnational Legal Theory* 257.
[85] See, above, footnote 78.
[86] On the idea of 'success' of legal transplants. See David Nelken, 'The Meaning of Success in Transnational Legal Transfers' (2001) 19 *Windsor Yearbook of Access to Justice* 349.
[87] See e.g., Zweigert and Kötz, above n 38.
[88] See Jorge Carpizo, 'Derecho Constitucional Latinoamericano y Comparado' (2005) 114 *Boletin Mexicano de Derecho Comparado* 949; Rodrigo Uprimny, 'The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges' (2011) 89(7) *Texas Law Review* 1587.

contrast to the mostly parliamentarian regimens of European constitutions, with their less generous bills of rights.

Second, Mexico and Colombia are similar enough to make the comparison manageable.[89] Both jurisdictions feature abstract and concrete constitutional review as mechanisms to enforce the supremacy of the constitution. Concrete constitutional review works similarly to a common law injunction.[90]In Colombia, these mechanisms are *Demandas de Inconstitucionalidad* and *Tutela* respectively. [91] In México, abstract review can occur either through *Acciones de Inconstitucionalidad* or *Controversias Constitucionales*, and the famous remedy of *Amparo* is the mechanism for concrete review.[92] As members of the civil law tradition, these countries also follow the structure and division of labour of the French model of courts of cassation. That is, they work with judges-rapporteurs, and the Courts are divided into Plenums (Full Court) for more important issues, leaving Chambers (smaller panels) to solve less significant cases.

Third, there are sufficient differences between the two jurisdictions to make the comparison fruitful. For instance, Colombia is a unitary state while Mexico is a federation. Also, abstract review is available to all citizens in Colombia,[93] whereas in Mexico it is only available to authorities or ombudsmen.[94] In addition, The Colombian Constitutional Court shares the apex of the judiciary with a Supreme Court in civil and criminal matters and with a State Council that works as a supreme court in administrative matters, while, in contrast, the Mexican Supreme Court works simultaneously as a supreme and as constitutional court and shares the apex of the federal judiciary with an electoral court.

This interaction between similarities and differences in Mexico and Colombia allows for the questioning of assumptions taken for granted in a particular jurisdiction.[95] For instance, Mexico has a legislative doctrine of precedent for all areas of law, whereas Colombia has a judicial doctrine of constitutional precedent developed via judicial practice.[96] The comparison prompts a

[89] On the methodology of Comparative Constitutional Law and the selection of case studies see, Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Edward Elgar Publishing, 2014) 5-8.
[90] Hector Fix-Zamudio, *Ensayos sobre el Derecho de Amparo* (UNAM, 1993) 30.
[91] Colombian Constitution, above n 31, Arts. 86 and 241 1, 4 and 5.
[92] Mexican Constitution, above n 2, Arts. 103, 105 and 107. On Mexican *Amparo* and its multiple functions see Fix-Zamudio, above n 90.
[93] See *Decreto 2067 de 1991* [Law 2067 of 1991] (Colombia) DO, 4 September 1991.
[94] Mexican Constitution, above n 2, Art. 105 II.
[95] See Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation', above n 79, 835-7.
[96] See Chapter I.

critical approach towards the legislative doctrine. Can legislators really regulate how the doctrine of precedent works? Or it is rather judicial practice that determines the scope and bindingness of judicial decisions.

Fourth and finally, both jurisdictions have made contributions to the field of constitutional law and precedent that have passed mostly unnoticed in legal theory and comparative law. Even before Austrian law, Colombian law, since 1910, made abstract constitutional review available to all citizens.[97] Moreover, since its creation in 1991, the Colombian Constitutional Court has developed one of the most innovative bodies of constitutional jurisprudence on social rights of the last decade. In fact, David Landau has stated that it 'must be by any measure one of the strongest courts in the world'.[98] In turn, contrary to the common misconception that civil law jurisdictions lack a doctrine of precedent, the Mexican Constitution has formally recognised reiterated judgements as a binding source of law since 1951.[99] The progressive formal recognition of precedents as a source of law has continued in Mexican law, along with the recognition of its relevance to judicial practice. In 2013 the Mexican Supreme Court became the first judicial organ to earn the United Nations Human Rights Prize for its contribution to enforcing human and constitutional rights,[100] an honour once awarded to Martin Luther King and Nelson Mandela.[101]These four reasons together make Mexico and Colombia fertile units of comparison for analysing the migration of the doctrine of precedent to civil law constitutionalism.

The good balance between similarities and differences between these two jurisdictions makes it possible to offer suggestions that can be useful for other civil law jurisdictions, particularly Latin American countries. All civil law nations share the legacy of codification that still influences how judges ascribe meanings to the constitution. In fact, Colombian and Mexican judges adopted the

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[97] See Manuel José Cepeda Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of The Colombian Constitutional Court' [529] (2004) 3 *Washington University Global Studies Law Review* 529, 537-8. In fact, abstract constitutional review existed in theory since the Federal Constitution of 1863, but was not applied in practice. See ibid, at 692.

[98] David Landau, 'Political Institutions and Judicial Role in Comparative Constitutional Law' [319] (2010) 51(2) *Harvard International Law Journal* 319, 339.

[99] Mexican Constitution, above 31, Art. 107 XIII (as amended 19 February 1951) corresponding to Art 94 [10] (as amended 6 June 2011). See Serna de la Garza, above n 52, 135.

[100] High Comissioner of Human Rights, *2013 United Nations Human Rights Prize* <http://www.ohchr.org/EN/NewsEvents/Pages/hrprize.aspx> (Accessed 24 November 2016).

[101] Suprema Corte de Justicia de la Nación, *Ganadores del Premio de Derechos Humanos de las Naciones Unidas 2013* [Winners of United Nations Human Rights Prize for 2013*]* <http://www.equidad.scjn.gob.mx/spip.php?article1935> (Accessed 9 May 2014).

provision-norm distinction previously developed by Italian scholars.[102] Furthermore, influenced by the work of Hans Kelsen, most civil law jurisdictions feature concentrated and abstract constitutional review as a mechanism for specialised courts to safeguard the supremacy of the constitution vis-à-vis infra-constitutional sources.[103] Moreover, although most Latin American countries have presidential regimes, while other civil law nations have parliamentary ones, most civil law nations have a fragmented judiciary and a supreme or constitutional court that works in Plenum and Chambers. Also, other civil law jurisdictions share the challenge of overproduction of precedents.[104] In addition, at least some courts in other civil law jurisdictions also identify the ratio decidendi of cases in abstract and impersonal terms.[105] Thus, with due precautions regarding cultural, linguistic and political differences among jurisdictions, the critical analysis of Mexican and Colombian constitutional practice will serve as a basis for generalising to other members of the civil law tradition.

IV. Chapter Overview

In order to defend its central claim that precedents develop prima facie rules or norms that should be applied by means of Constitutional Reciprocity, the thesis is divided into six main chapters in addition to the introduction and conclusion.

Chapter I introduces the problem of incoherence in precedents in the civil law. The chapter uses the civil law distinction between a provision and norm to show how similar or identical provisions receive incompatible interpretations without justification, thereby producing incoherence among norms. This lack of justification is an objective threat to the ideal of coherence in the law to the extent that officials fail to interpret the law as a single guide of human behaviour. The lack of justification is also a subjective violation of the right to equality, as similarly situated individuals receive different treatment without any justifying argument.

Chapter II analyses the role of the principle of universalisability in minimising coherence among ascribed norms. A strict interpretation of universalisabilty suggests that once a court has ascribed

[102] For a brief history of the provision-norm distinction see Pierluigi Chiassoni, 'Disposición y Norma: una distinción revolucionaria' in Susana Pozzolo and Rafael Escudero (eds), *Disposición y norma* (Palestra, 2011) 7.
[103] See Tushnet, above n 89, 49-50.
[104] See e.g., Michele Taruffo and Massimo La Torre, 'Precedent in Italy' in Neil MacCormick and Robert S. Summers (eds), *Interpreting Precedents* (Darthmouth Publishing, 1997) 141, 186.
[105] On Italian 'massime' see Francesco Antonio Genovese, 'Per una storia della Corte di Cassazione:l'Ufficio del Massimario e del Ruolo' (2008) 14(2) *Le carte e la storia* 40; on Brazilian *sumulas* see Thomas Bustamante and Evanilda Godoi Bustamante, 'Constitutional Courts as 'Negative Legislators': The Brazilian Case'' [137] (2010) 09 *Pielagus* 137, 146-52.

a norm to a constitutional provision, later courts ought invariably to threat the norm as a fixed rule. Moreover, such an interpretation becomes a source of law backed by formal principles of authority, equality and legal certainty. The chapter argues that the principle of universalisability captures the bindingness of ascribed norms, treating previous judicial interpretations as authentic sources of law. However, it does not consider the possibility that unanticipated circumstances or mistakes in interpretation may justify the revision of ascribed norms.

Chapter III analyses the role of particularism in constitutional adjudication. In opposition to universalists, particularists argue that rules work as mere guidelines rather than fixed or unrevisable standards. Rules yield the best solution for the particular case. The chapter claims that while particular facts may trigger the revision of ascribed norms, these facts must be constitutionally relevant to warrant this revision. Moreover, the revision of norms is also limited by a requirement of coherence with pre-existing law.

Chapter IV analyses the conservative element of precedents, i.e., how a potential judgment must cohere with pre-existing law. The chapter proposes Constitutional Reciprocity as an adaptation of John Rawls's coherentist method of Reflective Equilibrium to the institutional and intersubjective context of constitutional adjudication in the civil law. The subject matter of Reflective Equilibrium is judgments, and its goal is to systematize and revise them to develop coherent theories of morality. In contrast, the subject matter of Constitutional Reciprocity is judicially ascribed norms, and its goal is to issue judgments that cohere with them. The institutional feature of adjudication stresses that ascribed norms are supported by formal principles and thus acquire privileged status in legal discourse over other types of reason. The intersubjective feature of adjudication stresses that legal participants invoke sets of competitive norms to justify opposing claims, and that judges need to select one or propose another set to justify the selection.

Chapter V tackles the first dynamic element of precedents, i.e., how the facts of a potential judgment trigger the partial revision or the reduction of the scope of ascribed norms. The previous court may not have anticipated constitutionally relevant facts present in the case at hand; thus a later court may revise the ascribed norm to cover the case at hand. The chapter suggests that civil law judges can reduce the scope of a norm through the common law techniques of distinguishing or confining. Distinguishing can be justified using the argument of dissociation, i.e., a rule may encompass a category so broad that it is justifiable to dissociate or subdivide that category into more specific ones. In this way, distinguishing can be justified on coherence

grounds, introducing exceptions to general ascribed norms that are nevertheless justified by pre-existing principles. On the other hand, confining is a more holistic approach. Rather than comparing a precedent with the case at hand, it interprets a precedent in light of a set of precedents and serves to reduce its scope to particular facts. These partial revisions may produce incoherence in the law, and thus pave the way for overruling a constitutional precedent.

Chapter VI tackles the second dynamic element of precedents, i.e., the complete revision or abrogation of an ascribed norm through the technique of overruling. The chapter takes the distinction between synchronic and diachronic coherence as a starting point for proposing a coherentist conception of overruling.[106] While synchronic coherence assumes that precedents form part of a static system, diachronic coherence is concerned with legal change through time. Last-resort courts should meet the burden of argumentation by identifying an interpretative path or tendency in precedents that shows that the new ascribed norm is more diachronically coherent than the overruled norm, which has been become outdated in light of recent changes in precedent. In this way, overruling may re-establish coherence in a particular branch of law.

Finally, the thesis ends with a set of conclusions and a program for further research on constitutional precedent from a civil law perspective.

Thus, after showing that incoherence among judgments affects citizens' right to equality before courts of law using the case studies of Colombian and Mexican Constitutional law, the thesis highlights the fact that precedents produce rules or ascribed norms. In this way, a rule-oriented approach to precedents favours stability in the law. However, as particularists note, these norms may be susceptible to modification or abrogation in light of particular situations. Thus, Constitutional Reciprocity finds a balance between the stability of rules and the dynamism of society. On the one hand, it forces judges to consider a set of ascribed norms and to show that the potential judgment is compatible with them. On the other hand, it allows a change in the law, but only a constrained one. It permits the revision of precedents when the modification or abrogation of ascribed norms improves the law by making it more coherent. In this way, the last three chapters demonstrate that Constitutional Reciprocity is the best method for minimising incoherence in precedents in the civil law.

[106] See Aleksander Peczenik, 'Coherence' in Christopher B. Gray (ed), *The Philosophy of Law: An Encyclopedia* (Garland Publishing, 1999) 124.

Chapter I Incoherence Among Judicially Ascribed Norms

This chapter introduces the question of incoherence among judicially ascribed norms. Constitutional judgments ascribe norms that give concrete meaning to abstract constitutional provisions. When judges resolve two similar cases differently without reasonable justification, they produce unjustified incoherence among norms. This lack of justification is an objective threat to the ideal of coherence in the law to the extent that officials fail in interpreting the law as a single guide of human behaviour. The lack of justification is also a subjective violation of the right to equality, as similarly situated individuals receive different treatment without arguments for the distinction being provided.

I. Judicially Ascribed Norms

As discussed in the introductory chapter, coherence among constitutional precedents requires compliance with two interconnected functions.[1] Firstly, coherence is an *ideal* that urges judges to issue precedents that form a set of rules that are as mutually supported as possible, and in such a way that they derive from a common set of principles. Secondly, coherence is a *constraint* that requires judges to show that a particular judgment coheres with relevant pre-existing precedents. Together, these two expressions of coherence contribute to making constitutional law into a set of rules that guide the behaviour of citizens and respect the right to equality of litigants. Contrariwise, when judges treat two or more cases dealing with similar provisions and behaviour differently without justification, the functions are not respected.

This chapter uses the well-known civil law distinction between provisions as uninterpreted texts and norms as the outcome of interpretation, to illustrate the problem of incoherence among precedents. A provision is a legal statement that interpreters find in sources of written law such as statutes, international treaties, and constitutions.[2] In contrast, while texts are indeterminate, a

[1] See, Introduction.
[2] On the provision-norm distinction see, Tulio Ascarelli, 'Jurisprudencia constitucional y teoría de la interpretación' in Susana Pozzolo and Rafael Escudero (eds), *Disposición y norma* (Palestra, 2011) 19; Vezio Crisafulli, *Lezioni di*

norm is the outcome of the selection of one meaning among several alternative readings within the semantic boundaries of the text. Given the indeterminacy of constitutional provisions that appeal to vague and ambiguous concepts such as the right to life or constitutional supremacy, judicial interpretation gives a more concrete meaning to such standards when solving a case.

Civil law scholars have long used the provision-norm distinction to illustrate the indeterminacy of legal texts and the subjectivity of interpretation. Henrik von Wright stresses that a single deontic statement can lead to different, and even incompatible norms. Thus, although legal interpretations can be reasonable justified, its subject matter is not about what law is, but about what it ought to be.[3] Similarly, Friedrich Müller argues that no matter how well formulated a constitutional text is, there is always room for several readings and thus for judicial creativity in the process of the 'concretization' of the law.[4] Likewise, Riccardo Guastini uses the provision-norm distinction to stress the indeterminacy of the law caused by the multiplicity of canons of interpretation, the theoretical presuppositions of the interpreter, and his or her sense of justice.[5] Certainly, constitutional texts are partially indeterminate so that there is room for subjectivity when deciding a case.

Nevertheless, perhaps because their primary objects of interpretation are statutory and constitutional provisions, civil law scholars have not paid sufficient attention to how past exercises in judicial interpretation constrain future judges. Precedent can constrain judges as an ideal and a practical constraint. As an ideal, just as it is expected from legislators that they issue a coherent body of law when they enact a code, likewise it is expected that judges develop coherent doctrines formed by sets of mutually supported rules. This ideal of coherence is ineffective without a practical constraint. However, coherence as an inter-subjective constraint is exactly how precedents operate. The critic may always claim that such an exercise is result-oriented, aimed to mask judicial ideology.[6] There is no doubt that judges can first decide a case according to their ideological preferences, and then cite sources that justify the decision in a post-hoc

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dirrito costitucionale:L'Ordinamento costituzionale italiano (CEDAM, 5th ed, 1984) vol II, 4, 11-4, 26, 34-44. Alf Ross identified a similar distinction that he called the 'semantic basis'. See Alf Ross, *On Law and Justice* (Stevens and Sons Ltd, 1974) [trans of: *Om Ret og Retfærdighed* (first published 1953)] 111-23.

[3] George Henrik von Wright, 'Is and Ought' in Eugenio Bulygin, Jean-Louis Gardies and I. Niiniluoto (eds), *Man, Law and Modern Forms of Life* (1985) 263, 270-2, 278-9.

[4] Friedrich Müller, 'Basic Questions of Constitutional Concretization ' [325] (2000) 31 *Rutgers Law Journal* 325, 325, 341-2.

[5] Riccardo Guastini, 'Rule-Scepticism Restated' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law* (Oxford University Press, 2011) vol 1, 138, 148-9.

[6] See,e.g. Duncan Kennedy, *A Critique of Adjudication* (Harvard University Press, 1997) 158-62.

manner. However, interpreters cite previous interpretations to constrain fellow interpreters. Lawyers cite precedents to reduce judicial discretion, and even judges cite precedents to constrain fellow judges. Once an interpreter cites a previous interpretation of the text, fellow interpreters must reply to the precedent, arguing that it is not applicable, or that it should be modified or abandoned.

Civil law scholars can profit from analysing the constraining effect of what Robert Alexy calls derivative or ascribed norms. When there are several potential interpretations of a constitutional provision, officials ascribe one as if it were attached to the constitutional text.[7] In later scenarios, this ascribed norm is given prima facie preference over other potential readings of the constitutional provision.[8]

Alexy himself has not given sufficient attention to ascribed norms. He has noted that every act of balancing principles produces ascribed norms,[9] thereby adding a new source to the legal system. Alexy has mainly analysed how his theory of proportionality can make the procedure of balancing constitutional provisions with the structure of principles a rational one, but the concept of ascribed norms can also be used to scrutinize how precedents can constrain subsequent exercises of interpretation.[10]

In jurisdictions with constitutional review on legislation, judicially ascribed norms prevail over legislative ones. The constitutional text sets certain semantic boundaries from which legislators via legislation and judges via their precedents ascribe norms to the text and develop constitutional law through interpretation. However, judges can declare legislative provisions unconstitutional. The response of the legislature to an uncomfortable judicial norm may be to amend the constitutional text to override this norm.

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[7] Ibid 35.
[8] Carlos Bernal Pulido, *El principio de proporcionalidad y los derechos fundamentales* (Centro de Estudios Políticos y Constitucionales, 3rd ed, 2007) 104-32.
[9] Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans, Oxford University Press, 2002) [trans of: *Theorie der Grundrechte* (first published 1985)], 54.
[10] Alexy argues that these norms will enjoy a prima facie preference over other combination of principles, but this preference is always potentially defeasible through distinguishing and overruling cases. Ibid, 58, 83-4, 372-7. See also, Robert Alexy, *A Theory of Legal Argumentation* (Ruth Adler and Neil MacCormick trans, Oxford Clarendon Press 1989) [trans of: *Theorie der juriistichien Argumentation: Die Theorie des rationale Diskurses als Theorie der juristichen Begrundng* (first published 1978)] 274-9.

Constitutional judges ascribe these norms when they decide abstract or concrete review cases. In abstract review cases, such as the Colombian *Demanda de Inconstitucionalidad* or the Mexican *Acción de Inconstiucionalidad*, judges issue ascribed norms when contrasting an infra-constitutional provision with a constitutional one in light of an abstract hypothesis.[11] In concrete review cases, such as the Colombian *Tutela* or the Mexican *Amparo*, judges issue ascribed norms when deciding a case in light of the concrete facts of the case.[12] Later judges should not read the constitution *tabula rasa,* but in light of these ascribed norms.

The process by which judges attribute ascribed norms can be implicit in a written judgment, but it can nevertheless be reconstructed in three steps. Firstly, through a mere cognitive act, [13] judges identify the plausible meanings of a provision. The identification of such meanings is generated by canons of interpretation such as so-called literalism, the intention of the historical drafter, the rational legislator, systematic interpretation, and so on.[14] It can also be identified by postulates for resolving conflict among rules, such as *lex posterior derogat priori*, in which the new rule invalidates the old rule, or by balancing, which resolves the tension between principles without invalidating any of them.[15] Secondly, through an act of will,[16] i.e., a subjective act, judges select the norm that regulates the case. This selection can be more or less restricted by law. The canons or postulates are not necessarily explicitly recognised in texts, but their use can be tacitly accepted by judicial conventions. Thirdly, in states ruled by the law, it is expected that judges justify such a selection.

[11] Colombian *Demanda de Inconstitucionalidad* is an abstract review complaint available to authorities and all citizens to challenge the constitutionality of laws without the need of direct harm on their legal sphere. See *Constitución Política de Colombia de 4 de julio de 1991* [Colombian Constitution of 4 July 1991] (Colombia), Art. 241 1-5. Mexican *Acción de Inconstitucionalidad* is also an abstract review complaint but it is only accessible to political authorities or ombudsmen, rather than citizens. See *Constitución Política de los Estados Unidos Mexicanos de 5 de febrero de 1917* [Mexican Constitution of 5 February 1917], Art. 105 II.

[12] Colombian *Tutela* is a summary concrete review complaint available to all particulars when a concrete act or omission of authority or private actor violates constitutional rights. See Colombian Constitution above n 11, Art.86. Mexican *Amparo* is a federal concrete review complaint available to particulars and one of its functions is to protect citizens against act or omissions of authorities that violate constitutional rights, including the enactment of unconstitutional laws. See Mexican Constitution, above n 11, Arts. 103 and 107.

[13] Hans Kelsen, *Introduction to The Problems of Legal Theory* (Stanley L. Paulson and Bonnie Litschewski Paulson trans, Clarendon Press, 1992) [trans of: *Reine Rechtslehr* (first published 1934)] 80.

[14] For instance, the Mexican Supreme Court has recognised at least six valid methods of constitutional interpretation, namely, grammatical, historical, logical, systematic and teleological. See e.g,, A.D.R 1225/2006, Juan Silva Meza, 30 January 2007, recital V.

[15] See Robert Alexy, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16(4) *Ratio Juris* 433, 433, 436.

[16] Kelsen, above n 13, 80-1.

The process of the ascription of norms may be represented as follows:

> A constitutional provision $\mathbf{P}^x$, in light of facts or hypothesis $\mathbf{F}^X$, mediated by methods of interpretation $\mathbf{I}^x$, is susceptible of several interpretations, i.e., an array of plausible norms $N^{1,}\, N^{2,}\, N^3$, of which $\mathbf{N}^1$ is selected.

In jurisdictions with a doctrine of precedent, the scope of application of these ascribed norms extends beyond the case in which it was ascribed. These norms acquire an autonomous existence: they are prima facie preferred to contrary interpretations of the text. Thus, although the constitutional text may have been equivocal, norms give them a more concrete meaning and work as rules for future cases. That is, ascribed norms prescribe that a particular behaviour is prohibited, permitted or commanded, or that a determinate authority is competent to decide a particular issue.

Once judges issue these ascribed norms, future judges are expected to apply them, issue new ones that cohere with them, or provide reasons that justify not applying them. A failure to do so threatens the right to equality, as individuals in case C^1 are treated differently from individuals in case C^2 without rational justification.

The rest of this chapter uses the concept of ascribed norms to illustrate the question of incoherence among constitutional precedents. Section II analyses Colombian and Mexican doctrines of precedent from the perspective of normative coherence. Colombia follows a judicial doctrine of precedent. In contrast, Mexico follows a legislative doctrine of precedent that requires reiteration or qualified votes for precedents to be binding, thereby implicitly authorising the issuing of incoherent norms. Section III illustrates the question of diachronic and synchronic incoherence among ascribed norms with two case studies. Diachronic coherence refers to the degree of mutual support among ascribed norms across time, and synchronic coherence refers to mutual support among norms at a particular time. Without providing a justification, in only twelve years the Colombian Constitutional Court first ruled that the Constitution requires abortion to be punished with imprisonment, then that it is constitutionally permissible not to sanction such crime in extreme circumstances, and finally, that such a crime must not be punished if the foetus threatens the health of the mother, or if the pregnancy was caused by non-

consensual intercourse. Similarly, the Mexican Supreme Court has ruled in two cases that the Constitution authorises the judiciary to review the validity of federal constitutional amendments, while ruling that this is prohibited in another two cases. At the same time, the Court has declared the unconstitutionality of state constitutions, without justifying the different treatment applied to state and federal constitutions. Finally, Section IV concludes with a preliminary diagnosis regarding incoherence among judicially ascribed norms.

II. The Legacy of *Jurisprudence Constante* in Colombian and Mexican Doctrines of Precedent

The French doctrine of *jurisprudence constante* has influenced the entire civil law tradition.[17] This doctrine requires a non-interrupted line of judgments from superior courts before they can be given any weight as a legal source.[18] However, even when judgments are reiterated, their role is merely persuasive. Under a traditional approach to *jurisprudence constante*, the role of judgments is subordinated to legislation, primarily to the civil code.

Inspired by the French approach, civil law jurisdictions have recognised that the role of superior courts is to develop progressively a body of rules that constrain lower judges. Through the remedy of cassation, supreme or last-resort courts not only review judgments from lower courts, but thereby also gradually develop a body of precedents.[19] In addition to deciding private controversies, superior courts also have the public function of clarifying legislation. When lower

[17] Part of this section is based on Rodrigo Camarena Gonzalez, 'From Jurisprudence Constante to Stare Decisis: The Migration of The Doctrine of Precedent To Civil Law Constitutionalism' (2016) 7 (2)*Transnational Legal Theory* 257.

[18] On *jurisprudence constante*, see e.g., Robert L. Henry, 'Jurisprudence Constante and Stare Decisis Contrasted' [11] (1929) 15(1) *American Bar Association Journal* 11.Even before the enactment of the French Civil Code of 1804, Portalis, one of its drafters, celebrated that in absence of clear textual guidance, a line of reiterated judgments had the force of law. Jean E. M. Portalis, 'Discours Préliminaire du Premier Projet de Code Civil' (1801) <http://www.unife.it/giurisprudenza/giurisprudenza/studiare/storia-del-diritto-medievale-e-moderno/materiale-didattico/storia-costituzioni/portalis-discours-preliminaire/at_download/file>. 7 (accessed 18 August 2016). On the influence of jurisprudence constante in other civil law jurisdictions see e.g., Michele Taruffo and Massimo La Torre, 'Precedent in Italy' in Neil MacCormick and Robert S. Summers (eds), *Interpreting Precedents* (Darthmouth Publishing, 1997) 141, 161; Vincy Fon and Francesco Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' [519] (2006) 26 *International Review of Law and Economics* 519.

[19] On cassation, see Piero Calamandrei, *La cassazione civile: storia e legislazioni* (Fratelli Bocca, 1920) ; Piero Calamandrei, *Il ricorso per cassazione* (Universita degli studi, 1956) ;Nina Nichols Pugh, 'The Structure and Role of Courts of Appeal in Civil Law Systems' [1163] (1975) 35(5) *Louisiana Law Review* 1163.

judges deviate from the jurisprudence of superior courts, by not following a series of decisions established by a higher court, this may be ground for reversal.[20]

Cassation links *jurisprudence constante* with the ideal of uniformity in the interpretation of legislation. Although legislative provisions can lead to several interpretations, the function of last-resort courts is to *unify* disparate interpretations by issuing an authoritative reading for lower judges.[21] The judgment of the superior court binds the lower decision-maker, who must abide by the interpretation. However, the effects of the judgment go beyond these parties, as later judges are expected to follow precedents on pain of having their judgements reversed by cassation. Thus, even with a traditional approach to cassation, precedents exert a certain influence on future cases, because disregarding a precedent from a superior court may result in reversal for a low or intermediate court.

There are three basic tenets of *jurisprudence constante*. First, it is a legis-centric doctrine. Judgments only play a role when legislation is unclear or contradictory, or where there is a gap. The role of the legislator is pivotal while that of judicial interpretation is subsidiary. It is only when there is no 'authentic', i.e., authoritative interpretation by the same organ that enacted the provision that judicial interpretation can clarify or fill in gaps in legislation.[22] Legislation occupies the apex of the hierarchy of sources, and only when it is unclear can precedents enjoy a normative status.

Second, *jurisprudence constante* is reiterative. Judgments may enjoy the status of a source of law only after an uninterrupted line of decisions has reiterated the same interpretative criterion. It is called *jurisprudence 'constante'* because it does not consider a mere single precedent binding, but requires a constant and relatively uniform set of decisions before they are granted any kind of normative status.

Third, *in theory* the role of judgments in adjudication is persuasive rather than binding. The legiscentric approach is an effort to reduce judicial law-making to the minimum. Thus judicial interpretation is not theoretically binding for judges in the way statutes are, but is only

[20] See Victoria Iturralde, 'Precedent as Subject of Interpretation (a civil law perspective)' in Thomas Bustamante and Carlos Bernal Pulido (eds), *On the Philosophy of Precedent* (Nomos, 2012) 105, 107-9.
[21] See Calamandrei, *La cassazione civile: storia e legislazioni* above n 19, 533; Calamandrei, *Il ricorso per cassazione*, above n 19, 2-7; Pugh, above n 19, 1167, 1184-6.
[22] On 'authentic' interpretation see e.g., Eduardo García Máynez, *Introducción al estudio del Derecho* (Editorial Porrua, 52 ed, 2002) 329-30.

persuasive. However, in practice the hierarchical structure of the judiciary reveals the normative status of precedents. A superior court interprets a certain provision in sense X, thus if a low or intermediate court later disregards this interpretation, it may be subject to reversal after review by the superior court. Thus a superior court *may* reverse a judgment from a lower court when it departs from a precedent of the superior court. However, the superior court may also concur with the lower court – for instance, because the precedent was not really applicable to the case at hand. Thus there can be attempts by the legislature to reduce the power of judicial interpretation, but judicial practice seems to clash with these efforts.

Influenced by *jurisprudence constante* in civil and criminal law, Colombian and Mexican jurists have developed their own doctrines of constitutional precedent. Colombia follows a judicial doctrine of constitutional precedent, developed by the Constitutional court, that considers single precedents binding. In contrast, Mexico follows a legislative doctrine of precedent that, as a general rule, requires judgments to be reiterated and voted in by a qualified majority before they are binding. The rest of this section analyses both doctrines of precedents in light of the requirement of coherence among ascribed norms.

II.1. Colombia: Abandoning *Jurisprudence Constante* via Judicial Practice

In C-836-2001,[23] based on the right to equality before the law and the ideals of legal certainty, coherence and constitutional supremacy, the Colombian Constitutional Court has consolidated a doctrine of constitutional precedent. Although Article 230 of Colombia's Constitution considers judgments to be an 'auxiliary' source, the Court has ruled that there is a general duty to follow precedents.

The case was an abstract constitutional review complaint against a private law statute that invoked the principle of *doctrina probable*. Inherited from *jurisprudence constante*, the provision stated that a line of three judgments issued by the Supreme Court – the apex court in civil law matters – constituted *doctrina probable* and that judges *may* apply it in analogous cases, although

[23] C-836-01, Rodrigo Escobar Gil, 9 August 2001. See also, C-037-1996, Vladimiro Naranjo Mesa, 5 February 1996. On the progressive evolution towards bindingness of constitutional precedent in Colombia see Carlos Bernal Pulido, *El Derecho de los Derechos* (Universidad Externado de Colombia, 2005) 149-159;Diego López Medina, *El derecho de los jueces* (Legis, 2nd ed, 2006) Ch. II.

acknowledging that the Supreme Court could modify prior incorrect decisions.[24] The plaintiff challenged both the reiteration requirement and the possibility that last-resort Courts could overrule their decisions for infringing the ideal of unification.[25] The Court ruled that such provisions need to be interpreted to imply a prima facie duty on the part of all inferior courts to follow precedents – even those not reiterated – and the exceptional possibility that last-resort courts provide reasons for overruling their own decisions.[26]

In C-836-2001, the Court analysed the then current understanding of Article 230 of the Colombian Constitution regarding the role of precedents. This Article provides that judges are only bound to legislation (*sometidos al imperio de la ley*), and that equity, precedents, general principles of the law, and academic writing are merely 'auxiliary' sources of law. However, the Court interpreted Article 230 in light of Art 13, which recognises the right to equal protection before the law.[27] The Court affirmed that officials need to create categories to regulate human behaviour, and that legislators on their own cannot completely fulfil this function.[28] Thus the Court ruled that applying the law to a particular case presupposes a stage of interpreting the general law. Hence courts must consider not only constitutional and legislative provisions, but also precedents that indicate how previous judges have interpreted those provisions, otherwise similar cases could be treated differently without justification. Therefore, to safeguard the right to equality before courts of law, the current understanding of Art. 230 requires that precedents be treated as a binding source of law.

C-836-2001 was a major breakthrough regarding three basic tenets of *jurisprudence constante*. First, the Court ruled that the need to consider precedents is *imperative*, not optional. Nevertheless, this duty may be overridden when unanticipated circumstances occur; the general duty is to follow precedent, the exception is to modify it. Moreover, it is never justified simply to disregard a relevant precedent. Second, the reiteration requirement is eliminated in constitutional law. Given that the statute regulates private law matters, the general rule for constitutional law is that even single precedents have the force of law. Civil or administrative law may develop their own doctrines of precedent, by means of judicial practice or legislation, and may require reiteration as a criterion for bindingness. However, the doctrine of constitutional precedent entails

[24] *Ley 169 De 1896* [Act 169 of 1896] (Colombia), DO, 14 January 1897, Art. 4.
[25] C-836-01, above n 23, recital V, section 2.
[26] Ibid, recital V, section 4.
[27] Ibid, recital V, section 3.2
[28] Ibid, recital V, section 4.

that any single constitutional precedent is binding for all ordinary courts, including last-resort courts. Third, constitutional precedent prevails over legislation and its interpretation by ordinary judges. In case of conflict between legislation and its interpretation by an ordinary judge, on the one hand, and constitutional precedent, on the other, the latter prevails.

The doctrine of constitutional precedent established in C-836-2001 went beyond the general effects of judgments in abstract review. Like other civil law jurisdictions with abstract review, the Court is empowered to abrogate legislative provisions if they are unconstitutional.[29] However, this doctrine of precedent entails more than abrogating a particular infra-constitutional provision. Even when the legislative provision is declared constitutional, it ascribes a norm to the constitutional text, or to the infra-constitutional text interpreted in light of the constitution. Moreover, *Tutela* cases, i.e., concrete review judgments, also enjoy the status of precedents.[30] In this way, the effects of constitutional judgments affect not only the parties of the case but future judges and litigants as well.

Later judges are then expected to apply such ascribed norms to form a coherent set. In addition to equality, certainty and constitutional supremacy, coherence in the law are among the grounds that justify a doctrine of precedent. The judgement in C-836-2001 ensured that the application and creation of law was to be a coordinated task between different branches of government. It meant that legal texts cannot be applied mechanically but need judges to interpret and integrate them in order to render them coherent.[31]

Before C-836-2001, the quest for coherence was linked only to the constitutional text, not coherence among ascribed norms. Following the ancient civil law distinction between *interpreting* and *integrating* legislative provisions, the Court had previously ruled that only integrative precedents were binding law.[32] According to this distinction, judges interpret when they clarify the meaning of vague or ambiguous provisions.[33] In contrast, judges integrate the law when the meaning of provisions is clear, but there is a gap in the law or an incompatibility

[29] Colombian Constitution, above n 11, Art 243; *Decreto 2067 de 1991* [Law 2067 of 1991] (Colombia) DO, 4 September 1991, Art 21. On the effects of constitutional judgments in European civil law jurisdictions see Alec Stone Sweet *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000) 46-55.
[30] See Bernal Pulido, *El Derecho de los Derechos*, above n 23, 167.
[31] C-836-2001, above n 23, recital V, section V. See also (Manuel José Cepeda Espinosa and Marco Gerardo Monroy Cabra, concurring) section 2.4.
[32] C-083-95, Carlos Gaviria Díaz, 1 March 1995, section 6.2.5. b).
[33] On the intepretation-integration distinction see e.g,, Francesco Carnelutti, *Teoría general del Derecho* (Carlos G. Posada trans, Editorial Comares, 2003) [trans of: *Teoria generale del diritto* (first published 1940)] 118-20.

between two sources of the same rank. Thus, interpretation is linked to the ideal of law as an intelligible legal order, while integration is linked to the ideal of law as a *coherent* legal order. A legal order is coherent when there is a clear and non-contradictory rule for each situation. Thus, although provisions may be incomplete, they can be completed by analogical extension or by appealing to implicit principles of the law.[34] The Court originally held that only integrating the law was an authentic law-making role, because it fills gaps or corrects tensions in the law, while leaving interpretative autonomy for clarifying the meaning of provisions to subsequent judges.

However, it seems that the Court has abandoned the interpretation-integration distinction.[35] Perhaps the distinction was abandoned because it created artificiality regarding the constitutional text. Embracing the distinction reveals that the constitutional text is full of gaps. Although the Colombian Constitution does contain clear constitutional rules, such as Article 11, which states: 'The right to life is inviolable. There shall not be death penalty', there are so many other rights provisions – ones that appeal, for instance, to the 'free development of personality,'[36] or which state that 'freedom of religion is guaranteed.'[37] Moreover, in order to identify and fill gaps, one first needs to interpret the law. Any work of integration ridding the law of gaps or contradictions is already interpretative. Therefore the distinction reveals that most of the judgments do indeed integrate rather than interpret the constitutional text.

In addition, the interpretative-integrative distinction appears artificial regarding infra-constitutional texts. The constitutional text is used as a superior interpretative tool to identify and fill gaps in inferior law. Judges use the constitution to identify not only what Carlos Alchourrón and Eugenio Bulygin have called normative gaps, but also axiological ones.[38] While the first relates to what the authority must regulate from a neutral perspective, the latter relates to what the authority should regulate from an ideological perspective.[39] However, the constitutional principles can be used to challenge legislative decisions, so that they should legislate in another

[34] On the notion that law is not complete, but can always be completable appealing to the interpretation and expansion of other sources see Norberto Bobbio, *Teoria dell' ordinamento giuridico* (Giappichelli-editore, 1960) 23-4, and Chapter IV.
[35] The distinction was briefly mentioned in T-292-2006, Manuel José Cepeda Espinosa, 6 April 2006, recital II, section 14.
[36] Colombian Constitution, above n 11, Art. 16.
[37] Ibid Art. 19.
[38] Carlos E. Alchourrón and Eugenio Bulygin, *Introducción a la metodologia de las ciencias jurídicas y sociales* (Editorial Astrea, 1987) Ch. VI.
[39] Ibid 157-60.

sense considering the constitutional principle.[40] For instance, in the judgment C-239-1997,[41] the Court accepted the fact that the criminal code punished euthanasia (*homicidio por piedad*) with imprisonment and declared this constitutional.[42] However, it ruled that according to the constitution, the law must not punish physicians practicing euthanasia in cases of terminally ill patients when the latter give their free and informed consent, in light of the right to life, the right to the free development of personality, and the right to be free from cruel and unusual treatment.[43] In this way, the Court used constitutional rights to determine that the legislative regulation that would have led to punishing physicians in this context was improper, after identifying the existence of a gap – a gap which the Court filled with norms ascribed to constitutional rights provisions. Thus, in constitutional law the line between axiological and normative gaps is as blurred as the interpretative-integrative distinction.

Another reason for abandoning the interpretative-integrative distinction as a criterion for the bindingness of constitutional precedent, and more relevant to the purposes of this chapter, is that its adoption causes unjustified tensions among precedents. Later judges could claim that the Court merely interpreted the text without making it binding. Thus, even if later cases deal with similar facts and with the same provision, judges could issue incompatible norms.

Recent abstract review judgments have reiterated that constitutional precedents are complementary sources of the constitutional text, rather than subordinated to it. In C-335-2008,[44] with regard to the possibility of committing the crime of perverting the course of justice (*prevaricato por acción*) for disregarding precedent, the Court held that the manifest violation of consolidated constitutional precedent by judges and officials may not only be a ground for reversing the *judgment*, but may also constitute criminal liability. Later, in C-539-2011 and C-634-201, the Court ruled that administrative agencies enjoy less interpretative discretion than judges and thus are strictly bound by abstract review precedents.[45] Likewise, in C-621-2015, the

[40] On the current debate on gaps in the civil law see Fernando Atria et al, *Lagunas en el Derecho* (Marcial Pons, 2005).
[41] C-239-97, Carlos Gaviria Díaz, 20 May 1997.
[42] *Código Penal de 1980, Ley 100 de 1980*. [Criminal Code of 1980, Ley 100 de 1980], DO, 20 February 1980, Art 326.
[43] C-239-97, above n 41 recital II, section C. Using Carnelutti's terminology the Court 'auto-integrated' the law to the extent that majority used a superior law to correct the flaws of an inferior law. However, the Court also 'hetero-integrated' a criminal code because it used a piece alien to the statute to correct its flaws. See Carnelutti, above n 33, 122-31.
[44] C-335-2008, Humberto Antonio Sierra Porto, 16 April 2008, recital VI, section 8.
[45] C-539-2011, Luis Ernesto Vargas Silva, 6 July 2011, recital VI, sections 5 and 6; C-634-2011, Luis Ernesto Vargas Silva, 24 August 2011, recital VI, sections 11, 15 and 19.10.

Court explicitly noted the abandonment of a *jurisprudence constante* approach that treated precedents as auxiliary sources of the law, reminding judges that the general rule is to follow precedent; it is the exception to distinguish or overrule them. [46]

The Court has monitored the abidance of its precedents by lower or ordinary judges through *Tutela*, arguing that ignoring them amounts to a violation of the constitutional rights to equality among litigants and to access to justice. To guarantee that the rest of the judiciary will abide by constitutional precedent, the Court has developed a doctrine of substantive or material fault (*defecto sustantivo*) in judgments. According to the nature of *Tutela*, it is only in exceptional cases that it may be proper to challenge non-constitutional judgments, namely, when the case is one of constitutional relevance that directly affects the rights of citizens, and other non-constitutional remedies have been used to redress the harm.[47] The Court has identified several 'faults' that justify the review of non-constitutional judgments, such as absolute lack of legal competence (*defecto orgánic*o) and substantive fault, the latter referring to the application of unconstitutional norms or disregarding binding norms.[48] A kind of substantive fault that lower judges may commit is that of departing from precedents without a transparent and reasonable justification.[49]

Recently, in judgments SU-053-2015 and SU-297-2015, the Plenum reiterated that although *Tutela* is not generally a mechanism to challenge judgments from ordinary judges, when judges do not provide reasons for departing from precedent, then the Court may redress the violation.[50] In this manner, an otherwise final decision issued by an ordinary judge can on appeal be revised by a Chamber of the Court as a violation of constitutional rights.[51] Thus, *Tutela* works as an extraordinary remedy to safeguard that lower judges will abide by vertical precedent – including judgements by other last-resort courts in non-constitutional matters ie., the Supreme Court or the State Council.

Furthermore, the Court has ruled that in addition to being a threat to subjective entitlements, disobeying precedent endangers coherence in the law as an *objective* ideal. In T-292-2006 the

[46] C-621-2015, Jorge Ignacio Pretelt Chaljub, 30 September 2015, sections 3.5 and 3.6
[47] See e.g., T-781-2011, Humberto Antonio Sierra Porto, 20 October 2011.
[48] See e.g., SU-515-2013, Jorge Iván Palacio Palacio, 1 August 2013, T-123-2016, Luis Ernesto Vargas Silva, 8 March 2016,
[49] See e.g., SU-424-2012, Gabriel Eduardo Mendoza Martelo, 6 June 2012, recital III, sections 3 to 3.6.
[50] SU-053-2015, Gloria Stella Ortiz Delgado, 12 February 2015, recital II, section 19; SU-297-2015, Luis Guillermo Guerrero Pérez, 21 May 2015, recital IV, sections 3 and 4.
[51] See e.g., T-116-2016, Luis Guillermo Guerrero Pérez, 4 March 2016, recital II, section 6.2

Court ruled that given that its judgments ensure the efficacy and prevalence of constitutional provision, disobeying precedents amounts to endangering the unity of the constitution.[52] In order to guarantee the efficacy of the constitution as a single set of rules, values and principles, the Court ensures that all authorities are obliged to follow its interpretations. What the Court is suggesting is that disregarding previous interpretations of constitutional provisions would be tantamount to each interpreter being authorised to develop his or her reading, thus developing a multiplicity of norms even with cases dealing with similar facts or hypotheses and similar provisions.

Sometimes the Court refers to the ideals of uniformity in interpretation and normative coherence as synonyms, while in others it uses them as complementary, but distinct, ideals. In C-1065-2000 the Court held that the function of cassation, rather than being a third-instance remedy aimed at dealing with judicial errors, seeks to ensure the coherence of the legal system.[53] In C-335-2008 the Court ruled that precedents safeguard both internal coherence and uniformity of interpretation.[54] The Court partially clarified both ideals in C-713-2008 by holding that last-resort judicial organs comply with three functions. First, they review interpretative errors of lower courts.[55] Second, all last-resort courts, including the Constitutional Court, unify divergent interpretations and guide lower courts.[56] Last, and most importantly in light of Article 228, the decisions from last-resort courts guarantee the priority of substantive law, including all rights and principles of the constitutional order, over formalities.[57]

For the sake of clarity, it is fundamental to distinguish between the ideals of normative coherence and uniformity of interpretation. Normative coherence, at least when related to judicially ascribed norms, is marked by four distinctive elements. (a) It refers to the extent that a norm is supported by other norms and constitutional principles, both formal, such as legal certainty and the separation of powers, and substantive, such as constitutional rights. (b) It is at least moderately

[52] T-292-2006, above n 35, recital II, section a.
[53] C-1065-2000, Alejandro Martínez Caballero, 16 August 2000, recital VI, sections 7 and 13.
[54] C-335-2008, above n 44, recital VI, sections 8 and 8.1.
[55] C-713-2008, Clara Inés Vargas Hernández, 15 July 2008, recital III, section 5.1
[56] Ibid, recital III, section 5.2.
[57] Ibid, recital III, section 5.3. Colombian Constitution, above n 11, Art. 228: "The administration of justice is a public function. Its decisions are independent. Its proceedings shall be public and permanent with the exceptions established by statute, *and substantive law shall prevail in them.* Legal limits shall be diligently observed and failure to apply them shall be sanctioned. The functioning of the judiciary shall be decentralized and autonomous." (Emphasis added)

holistic.[58] Judges aspire not only to apply an ascribed norm consistently, but to form a set of ascribed norms mutually supported and linked by common principles. (c) It applies both vertically and horizontally. Low and intermediate courts are indeed constrained by superior court precedents, but the latters are also constrained by their own precedents. (d) Conflicts among norms are solved by a criterion of mutual support: the more norms support a judgment, the more it coheres with pre-existing law.

Uniformity in interpretation is marked by four distinctive elements. (a) Its main rationale is to safeguard the formal principle of legal certainty.[59] Regardless of the merits of the decision, what is important is to settle the question in order to guide the behaviour of citizens and constrain future judges. (b) It at least moderately atomistic. It focuses on how a single ascribed norm is applied consistently by several courts. (c) It is predominantly vertical. The last-resort court unifies interpretative discrepancies among low or intermediate courts by issuing a norm, and expects them to follow, even if it does not cohere with a relevant set of norms. (d) Conflicts among norms issued by low or intermediate courts are resolved by a norm issued by the superior court in the sense that *lex superior* derogates the inferior norm.

Although both ideals are intimately related and can be complementary, in cases of conflict, normative coherence prevails. It is expected that Courts will safeguard not only formal principles such as legal certainty, which grounds unification, but also substantive principles such as any constitutional rights, which ground normative coherence. Furthermore, the set of constitutional provisions should be interpreted as forming rational wholes rather than isolated, fragmented or inherently contradictory provisions. When interpretation proceeds along these lines, it produces ascribed norms that ought to form a coherent set. What is more, last-resort courts ought to be bound, at least prima facie, by precedents. Normative coherence, rather than uniformity, explains and justifies the practice of overruling precedent. When a new decision overrules a precedent, the Court ought to show that the new decision makes a certain set of norms more coherent by removing anomalous precedents.[60]

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[58] On holism in the legal justification see Andrei Marmor, 'Coherence, Holism, and Interpretation: The Epistemic Foundations of Dworkin's Legal Theory' (1991) 10(4) *Law and Philosophy* 383, 404-6. For a critique of the excessive holism of Dworkin's, that makes unrealistic demands for the justification of judges, see Amalia Amaya, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument* (Hart Publishing, 2015) 37, 45, 72, 473-4, 534.

[59] The concept of formal principle is Robert Alexy's. See Alexy, *A Theory of Constitutional Rights*, above n 9, 58, 414-22. On the implications of formal principles for judicially ascribed norms see Ch. II.

[60] On overruling see Chapter VI.

In this way, coherence among ascribed norms justifies a doctrine of precedent that resembles the Anglo-American principle of *stare decisis* more than it does the principle of *jurisprudence constante*. The current Colombian doctrine of constitutional precedent abandons the previous tenets of *jurisprudence constante*, namely legis-centrism, reiteration and persuasiveness. Currently, even single constitutional precedents are binding, as in the common law.[61] Also, as in the common law, the obligation to follow precedent treats judgments as binding law unless they can be distinguished by a lower court, or overruled by a competent court.[62]

However, the Colombian doctrine of precedent faces two endemic challenges regarding normative coherence distinctive to the civil law tradition. Firstly, the hierarchy and function of constitutional courts is *fragmented*, as opposed to the centralized function of common law supreme courts. Unlike the United States Supreme Court or the Australian High Court, the Colombian Court decides cases on their merits not only in Plenum but also in Chambers. The Plenum is formed by nine magistrates and decides cases on abstract review or cases where there is a conflict of interpretation among lower courts.[63] In turn, the Chambers are formed by three magistrates and are the last-resort courts for *Tutelas* under a discretionary jurisdiction.[64] Although the Court is considered to be an organ, it is in fact fragmented into its Plenum and its Chambers. Then, when regarding a certain provision in light of set of facts, one Chamber can issue a Norm N^1, another Chamber can issue N^2, while the Plenum can issue N^3. Thus the Colombian doctrine of precedent poses at least two questions unfamiliar to common lawyers: first, is the Plenum bound by ascribed norms issued by the Chambers?, and second, are the Chambers bound by each other's precedents?

To guarantee the efficacy of horizontal constitutional precedent in a fragmented Court, the Court has held that, in exceptional circumstances, firm judgments from its Chambers, and even from the Plenum, may be declared void through a special procedure, if the judgment clearly disregarded binding precedents without justification, thereby affecting the right to due process.[65]

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[61] See Frederick G. Kemping Jr, 'Precedent and Stare Decisis: The Critical Years, 1800 to 1850' (1959) 3(1) *American Journal of Legal History* 28, 50.

[62] On the duty to follow precedent in the common law, see e.g., Stephen R. Perry, 'Judicial Obligation, Precedent and The Common Law ' [215] (1987) 7(2) *Oxford Journal of Legal Studies* 215; Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008) 23-4.

[63] Colombian Constitution, above n 11, Arts. 239 and 241; *Ley 270 de 1996 Estatutaria de la Administración de Justicia* [Judiciary Act] (Colombia), 15 March 1996 DO, Art.44.

[64] *Decreto 2591 de 1991* [Law 2591 of 1991] (Colombia) DO, 19 November 1991, Art. 34.

[65] On the use of nullification as a mechanism to guarantee self-precedent from a comparative perspective see Carlos Bernal Pulido, 'La anulación de sentencias y el defecto sustantivo por desconocimiento del precedente:Dos propuestas de reforma del derecho mexicano para garantizar el respeto del precedente' in Carlos Bernal Pulido (ed),

For instance, in A-008-1993[66] the Plenum nullified the judgment T-120-93 of one of the Chambers for disregarding the precedent of the Plenum C-592-1992. More recently, A-155-2014[67] nullified judgment T-1082-2012 of one Chamber, for disregarding T-1341-2001 and T-387-2009 of Chambers, and also for disregarding C-620-2012 of the Plenum. The Plenum has even accepted the possibility of nullifying its own judgments when it departs from the precedent of the Chambers without justification, particularly when there is a uniform line of decisions at odds with a particular judgment. For example, in A-457-2016,[68] the Plenum analysed the ruling SU-235-2016 as a possible violation of T-243-2014, although it found that the plaintiff failed to identify a clear and consistent set of decisions incompatible with SU-235-2016. In this way the Court has not only monitored how other judges follow vertical precedent, but also how the same Court is respectful of its own decisions.

The second challenge faced by the Colombian court is the overproduction of precedents Without using the terminology, the ideal of coherence among ascribed norms is also present in the common law, but the overproduction of constitutional precedent in the civil law makes the ideal particularly challenging. Lawyers in the common law are concerned with the ideals of uniformity of interpretation and normative coherence.[69] However, as discussed in the introductory chapter, supreme courts from the United States or Australia decide less than a hundred cases a year, and only two or three dozen of these involve constitutional decisions. In contrast, the Colombian Court, like other constitutional courts in the civil law tradition, decide around a thousand constitutional cases each year. On the one hand, this overproduction of precedents make it harder to develop coherent doctrines formed by several norms. On the other hand, it requires a holistic approach to the analysis of precedents.

Section III.1 will analyse the implications of a fragmented judiciary and the overproduction of precedent with regard to satisfying the ideal of coherence among ascribed norms. But before discussing how normative coherence can work in practice, the next section analyses the Mexican

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El precedente constitucional en la Suprema Corte de Justicia (Suprema Corte de Justicia de la Nación, Forthcoming).

[66] A-008-1993, Jorge Arango Mejia, 26 July 1993.

[67] A-155-2014, Jorge Ignacio Pretelt Chaljub, 28 May 2014.

[68] A-457-2016, Gloria Stella Ortiz Delgado, 21 September 2016, especially at sections 61-68. See also A-196-2006, Rodrigo Escobar Gil, 25 July 2006; A-344-2010, Humberto Antonio Sierra Porto, 20 October 2010.

[69] See e.g., Zenon Bankowski, Neil MacCormick and Geoffrey Marshall, 'Precedent in the United Kingdom' in Neil MacCormick and Robert S. Summers (eds), *Interpreting Precedents* (Darthmouth Publishing, 1997) 315 332-4; Robert S. Summers, 'Precedent in the United States (New York State)' in MacCormick Neil and Robert S. Summers (eds), *Interpreting Precedents* (Darthmouth Publishing, 1997) 355, 377, 384; Wayne A. Logan, 'Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment' (2012) 65(5) *Vanderbilt Law Review* 1137.

legislative doctrine of precedent, which shares some of the challenges faced by the Colombian Courts.

II.2. Mexico: Between Legislative Doctrines and Judicial Practice

In contrast to the Colombian judicial doctrine, Mexico has two *legislative* doctrines of precedent. More precisely, Mexico follows one doctrine of jurisprudence and another of precedent. Article 94 [10] states that a statute shall legislate the conditions under which judgments of the federal judiciary become binding.[70]

The doctrine of jurisprudence is found in the *Amparo* Act that regulates the three scenarios in which ascribed norms from superior courts become binding. First, norms become binding because of reiteration. A sequence of five judgments voted in by a qualified majority of the Plenum,[71] the Chambers, the Plenums of Circuit Courts and unanimous Circuit Courts is compulsory for all lower organs.[72] Second, norms become binding because of the unification of criteria. When organs of the same rank have split decisions regarding a common legal question, the superior organ, in an abstract and non-contentious procedure, resolves the discrepancy by selecting one of the criteria or by proposing an alternative one.[73] The Plenum of the Supreme Court resolves discrepancies between the Chambers, the Chambers between the Plenums of Circuit, and so on. Finally, norms become compulsory in virtue of the substitution of criteria. Lower organs are obliged to follow norms issued by superior courts, but after applying them, they can suggest that the superior court changes its criteria. The superior organ, in an abstract and non-contentious procedure, analyses and modifies or confirms the questioned norm.[74]

Although the *Amparo* Act follows the logic of reiteration found in *jurisprudence constante*, it also departs from it in making at least some judgments *binding* for lower organs rather than persuasive. The act works with a strict dichotomy of compulsory judgments known as binding

[70] Mexican Constitution, above n 11, Art 94 [10] (as amended on 6 June 2011). On Mexican *jurisprudencia* see Héctor G. Zertuche García, *La Jurisprudencia en el sistema jurídico mexicano* (Editorial Porrua, 1990); Jorge Mario Magallón Ibarra, *Los sonidos y el silencio de la jurisprudencia mexicana* (UNAM, 2004) 192-291, 317-92; José María Serna de la Garza, 'The Concept of Jurisprudencia in Mexican Law' (2009) 2(1) *Mexican Law Review* 131.
[71] The requirement of five cases is owed to Ignacio L. Vallarta and his 1882 *Amparo* Act Draft see Magallón Ibarra, above n 70, 256.
[72] *Ley de amparo, Reglamentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos* [Amparo act, an act regulating articles 103 and 107 of Mexican Constitution] (Mexico) DOF, 3 April 2013, Arts. 222-224.
[73] Ibid 225-227.
[74] Ibid Art .230.

theses (*tesis juriprudenciales*) and persuasive theses (*tesis aisladas*).[75] The general rule is to require reiteration to make judgments binding, and the exception is to achieve binding status through unification or substitution.

In contrast, the statute that regulates constitutional controversies among authorities abandons the reiteration requirement and declares that single precedents voted in by a qualified majority are binding. Similarly to other constitutional courts in the civil law, Articles 105 I (L) [2] and 105 II (I) [3] of the constitution state that decisions voted in by a qualified majority in controversies between authorities, and declaring a law unconstitutional, have general effects.[76] Moreover, according to the Act that regulates Article 105, the 'reasons' behind judgments voted in by a qualified Supreme Court become binding for all lower judicial organs.[77] This legislative doctrine is more like *stare decisis* than like *jurisprudence constante*, but still involves a qualified majority vote to make single precedents binding.

Both legislative doctrines are at odds with the current understanding of the principle of the separation of powers. The legislative regulation of judgments of *judicial* precedents suggests a subordination of the latter to the former. While it may be argued that this regulation is made in conformity with constitutional provisions, it can be replied that this regulation is redundant. With the enactment of the Constitution of 1917, the original text of Article 14 [5] stated that judgments in non-criminal cases '[..]shall be according to the letter or the juridical interpretation of the law [..]'.[78] Later constitutional amendments explicitly regulated the topic of precedent; thus Article 94 [10]], added in 1951, empowered the federal legislator to legislate on precedent.

Furthermore, these legislative doctrines embody an out-dated version of the separation of powers. The Constitution states that Congress shall legislate the bindingness of precedents, but it can be argued that the *manner* in which it legislates threatens the principle of separation of powers. Also, given that the Court has ruled that provisions of the *Amparo* act can be unconstitutional for violating the constitutional right to remedy by superior courts,[79] there is no reason why the laws

[75]Ibid Arts 218-221. The term theses derives from the practice of Mexican courts and recognised by the act of explicitly identifying the *ratio decidendi* in an abstract and impersonal way as if they were statutory provisions. On Mexican *tesis* see Chapter. II.
[76] Mexican Constitution, above n 11, Arts. 105 I (L) [2] and 105 II (I) [3], (as amended on 29 January 2016).
[77] Ibid Arts .43, 59 and 73.
[78] Ibid, Art. 14 [5] (original text).
[79] First Chamber, A.I.R. 1244-2008, José Ramón Cossío Díaz, 20 January 2010, recital V; Plenum, R.130-2011, Margarita Beatriz Luna Ramos, 26 January 2012, recital VII.

regulating precedent should be found unconstitutional for violating the principle of separation of powers.

While the significance of the implications of a legislative doctrine of precedent for the separation of powers is acknowledged, this section focuses primarily on its consequences regarding normative coherence, as defined in II 1. The use of the a priori logic of the legislative process to regulate the casuistic process of judging affects coherence among ascribed norms. Requiring a fixed number of voters, or cases, or making some precedents more important than others just because they arose in a particular type of precedent, amounts to an implicit authorisation for judges to treat similar cases differently without reasonable justification.

There are three objections to these doctrines of precedent from the perspective of normative coherence. First, the reiteration requirement amounts to an implicit authorisation for lower judges to disregard certain norms issued by a superior court. A unanimous Plenum in four Amparo cases might have ruled that the constitutional provision P^1 implies the norm N^x, and yet lower judges would be able to disregard it until a fifth case arises and issue a contradictory norm N^y. This would create unjustified contradictions between N^x and N^y.

The reiteration requirement of the legislative doctrine of jurisprudence disregards the fact that a single decision can be so relevant as to be found to be an implicit constitutional right. For instance, in *Amparo* A.D.R. 6-2008, the Plenum found an implicit norm (call it N^x) guaranteeing the right to the free development of personality, grounded on human dignity and inferred from several constitutional and international treaty provisions.[80] The right justified the issuing of a new birth certificate to a person who was labelled male at birth, but identified herself as a woman and developed female organs (although the civil code provided a modified certificate rather than issuing a new one).[81] The precedent was not reiterated and thus not binding, but it was one of the reasons for confirming the constitutionality of gay marriage in Mexico.[82] If a lower decision-maker refuses to apply N^x in a later case just because of a lack of a certain number of votes or reiterations, this will create unjustified tensions between norms. In short, the fixed number of votes or judgments required for bindingness threatens the right to equality before the law and

[80] A.D.R. 6-2008, Sergio A. Valls Hernández, 6 January 2009, recital VII, section 2.
[81] Ibid.
[82] A.I. 2-2010, Sergio A. Valls Hernández, 2 August 2010, [251], [263]–[265].

normative coherence, by allowing different treatment of similar cases with no other justification that a lack of cases or voters.

Moreover, a single decision can modify the distribution of competences among courts. For example, in V.912-2010, the Plenum abandoned the decades-old criteria that held that state courts were not empowered to exert constitutional review on legislation as it was a power only available to federal judges, and instead ruled that all judges – from federal and state courts- are empowered to do so.[83]It is unreasonable that state judges should be able to enjoy discretion when exerting constitutional review because of a lack of reiteration of the new criterion. A state judge J^1 may issue norm N^x in reviewing legislation, and J^2 would then be able to issue an incompatible N^2, arguing that J^2 is incompetent to review legislation. The practice of precedent and the search for normative coherence are in tension with the reiteration requirement.

Second, the existence of a doctrine of jurisprudence for *Amparo* and a doctrine of precedents for controversies between authorities creates an unjustified bifurcation. A unanimous Plenum interpreting Provision P^1 could issue a norm N^x in an *Amparo*, and this would lack the character of an autonomous source of law until it met the requirements of reiteration, unification or substitution. On the other hand, a single decision voted in by a qualified majority of the Plenum in a controversy between authorities interpreting P^1 is enough to make N^x a binding source of law. The bifurcation of doctrines suggests that norms derived from controversies between authorities are more important than *Amparo* cases. Furthermore, the doctrines create unreasonable authorization for lower judges to disregard the norms just because they arose in different procedures.

Third, the emphasis on ascribed norms as binding for lower judges suggests that supreme courts are unconstrained by precedent. Given the indeterminacy of constitutional provisions, judges can issue a norm N^x that may be binding for lower organs. However, as doctrines stress that norms are binding for lower judges, the superior court can substitute N^x with N^y without rational justification. Of course, supreme courts can abrogate their norms, but this requires an exercise of justification. This empowerment of supreme courts highlights the relevance of treating all ascribed norms as autonomous sources of law, for all judges including the issuing court.

[83] V.912-2010, José Ramón Cossío Díaz, 14 July 2011, [24-32]. On previous decisions prohibiting state judges to analyse the constitutionality of legislation see, e.g., Third Chamber A.I.R. 2230-70, Mariano Ramírez Vázquez, 8 June 1972; A.R. 1878-1993, José de Jesús Gudiño Pelayo, 9 May 1995, recital III.

Is important to stress that coherence among ascribed norms is not only a stimulating theoretical topic but has attracted the attention of the Supreme Court as a means of guaranteeing the supremacy of the Constitution. Although I am unaware of a precedent in which the Court has linked ascribed norms to normative coherence, there are judgments that have tackled the issue separately. On the one hand, based on the indeterminacy of constitutional and international treaty provisions, the Court has justified its determinative role in ascribing norms to such texts.[84] On the other hand, the Court has stressed the relevance of normative coherence among sources by distinguishing between formal and substantive constitutional supremacy.[85] While formal supremacy relates to the consistency of an inferior source with the formal procedures established by a superior law (e.g,, a regulation is consistent with legislation, an statute is consistent with the constitution), substantive supremacy relates to the correctness of the source in light of what the Court has called 'objective principles' of the legal order, such as human rights recognised by the constitution.[86] When there is a contradiction between an inferior and superior law without involving human rights, the conflict is a non-constitutional issue solved by the hierarchy of sources.[87] When there is a substantive conflict between a human right and another source, the tension is resolved by reconciling both sources in order to safeguard the ideal of 'normative coherence'.[88]

In the midst of a process in which Mexican constitutional judges are empowering themselves as political actors, coherence between a particular judgment and a set of ascribed norms becomes particularly valuable for reducing judicial discretion. Coherence between ascribed norms is not only relevant for encouraging constitutional judges to legitimise their political rulings through legal discourse, but also, and primarily, as a constraint available to litigants for limiting the judiciary. Ascribed norms can constrain judges when legal participants cite them, thereby urging them to issue a judgment that coheres with relevant ascribed norms.

Litigants and judges in Mexico share similar challenges with other civil law jurisdictions such as Colombia, but also face the endemic obstacle of legislative doctrines of precedent. Like their Colombian colleagues, they also face a challenge with the overproduction of ascribed norms.

[84] See Introduction.
[85] C.T. 21-2011-Pl, Alfredo Gutiérrez Ortiz Mena, 9 September 2013, recital III, [96].
[86] Ibid [96-97], [111].
[87] Ibid [124].
[88] Ibid [127].

Also, their Supreme Court, as in the case of the Colombian Court, is fragmented. The Plenum formed by eleven Justices decides controversies among authorities and reviews decisions from the Chambers, whereas the Chambers, composed of five Justices, decide *Amparo* cases.[89] However, unlike the Colombian Court, the judiciary is theoretically limited by two legislative doctrines of precedent that authorise lower judges to disregard some norms or judgements without needing to justify the change of criteria.

II.3. The distinct role of ascribed norms in a doctrine of *Jurisprudence Constante* and in a Doctrine of Precedent

Ascribed norms perform different functions and enjoy distinctive normative status in a doctrine of *jurisprudence constante*, on the one hand, and in a doctrine of precedent, on the other. *Jurisprudence constante* is a legis-centric doctrine and thus subordinates the role of the judge in developing the meaning of legal provisions to the will of the legislator. It does not consider ascribed norms to be autonomous and formal sources of law but merely a persuasive guide that legal interpreters may well consult, or ignore, and even re-interpret, as a text, from scratch. In contrast, a doctrine of precedent regards judgments as autonomous sources of law that ascribe concrete meaning to the provisions enacted by constitutional framers or legislators, and which increase or reduce the legal sphere of citizens.

The following table contrasts the basic features of the two doctrines:

Table I *Jurisprudence Constante* and Precedent

Feature of the Doctrine	Doctrine of *Jurisprudence Constante*	Doctrine of Precedent
Normative status of ascribed norms.	*Persuasive* criteria. Precedents are mere interpretations that clarify the meaning of sources (constitutions, legislation, regulations, etc.) rather than being sources in themselves.	*Binding* sources. Precedents are formal sources of the law (usually rules, but they may also develop principles) that expand or reduced the legal sphere of citizens.
Impact of ascribed	Subsequent judges may re-interpret, without a demanding burden of	The right to equality between litigants imposes

[89] *Ley Orgánica del Poder Judicial de la Federación* [Federal Judiciary Act] (Mexico) DOF, 26 May 1995, Arts. 4-11, 21-2.

norms on subsequent cases.	argumentation, the same provision. They are bound to the 'authentic' meaning of provisions, not to the ascribed interpretation of previous judges. It is only in the case of the absence of clear guidance from the legislator or framers that precedents play an illustrative role, rather than a constraining one.	a burden of argumentation on judges. While subsequent judges may depart from precedents, they need to identify legally relevant differences to distinguish cases, or axiological or legal changes between the time of the precedent and the case at hand that justify overruling a case. Also, the ideal of coherence in precedents partially constrains later judges, as subsequent decisions must be compatible with prior interpretations.
Role of the judge in the task of developing the law.	In theory, the will of the judge is *subordinated* to that of the constitutional framer or legislator. The task of the former is to apply the will of the latter. In practice, the persuasive nature of precedents develops the *interpretative discretion* of subsequent judges, as they are only limited by the text, not by prior judicial interpretations.	The constitutional framers and the three branches work in *coordination.* Framers may enact clear constitutional rules that judges must simply apply. However, they may also enact indeterminate provisions, and judges must progressively develop their meaning via precedent. Moreover, in case of a contradiction between constitutional and legislative provisions, judges may 'correct' legislation and ascribe a constitutional interpretation to the statute.
Function of reiteration	The reiteration of judgments is a constitutive requirement to grant any degree of persuasiveness on precedents. A single precedent is not binding; judges can disregard its constraining effect by noting its lack of reiteration.	A single precedent is prima facie binding. Subsequent decisions may clarify the scope of an ascribed norm, but the more it is reiterated the weightier it becomes. Reiteration works as a mechanism to consolidate doctrine. Judges willing to depart from a single precedent need to provide

		more argument than merely noting the lack of reiteration.

The tendency regarding the normative status of ascribed norms is to consider them as rules. At the same time, the trend is to abandon the idea that judgments are mere illustrative exercises of interpretation. In Mexico there is an ongoing debate concerning the constitutive nature of precedents. In S.M.J. 5-2012, the Second Chamber recognised that judicial criteria may alter duties or confer rights that develop legitimate expectations in litigants, thereby questioning the old approach which did not consider judgments to be sources.[90] This judgment also implies a recognition that precedents work retroactively; when judges decide cases they may apply the pre-existing law but they may also alter it when they distinguish or overrule earlier norms. A similar question applies to the Plenum, which has not yet answered the question relating to the nature of precedents. One of the questions that the Plenum has to answer is whether judgments are 'norms', understood as abstract, impersonal and binding sources.[91] The Justices have not reached agreement on whether precedents are sources similar to legislation with a certain degree of abstraction useful to control an array of cases, or whether they occupy an inferior hierarchical position to statutes, and are more limited in scope, given that precedents only play a role in adjudication.. In Colombia there is a degree of agreement among members of the Constitutional Court that judgments produces 'subrules' that give concrete meaning to abstract constitutional provisions.[92] Therefore the trend is to recognise that judgments may expand or recognise rights and duties in a way not possible through the mere interpretation of the text.

The normative status of ascribed norms impacts on the discretion of subsequent judges. When a judgment is not considered a legal source, later interpreters may re-interpret the same or similar provision and attach a new meaning to it given its indeterminacy. For example, in a dissenting opinion, one Magistrate of the Colombian Court argued that Colombian judges, as members of a civil law jurisdiction, are only bound by the meaning of constitutional and legislative provisions, not to the interpretations given to them by previous judges.[93] Analytically, this approach suggests that judges can take advantage of the indeterminacy of sources, to circumvent a previous

[90] S.M. J. 5-2012, Margarita Beatriz Luna Ramos, 16 May 2012, recital VI.
[91] C.T. 182-2014, Eduardo Medina Mora (pending resolution), discussed on 21 and 25 May 2015.
[92] See e.g., C-1195-2001, Manuel José Cepeda Espinosa and Marco Gerardo Monroy Cabra, 15 November 2001;T-617-2011, Luis Ernesto Vargas Silva, 5 August 2010; C-179-2016, Luis Guillermo Guerrero Pérez, 13 April 2016, section 6.5.
[93] C-335-2008, above n 44, (Jaime Araújo Rentería, dissenting).

interpretation that they find unsatisfactory. Normatively, the indeterminacy of statutes and constitutions highlights the importance of a doctrine of precedent as a means of reducing judicial discretion, even in civil law jurisdictions. Only precedents, understood as sources of law, can constrain future interpreters, who bear the burden of argumentation when they seek to depart from prior interpretations of legal texts.

In turn, the impact of ascribed norms in subsequent cases influences the role of judges in developing the law. According to *jurisprudence constante,* in theory, judges are obliged to apply the meaning of texts enacted by the framers and legislators, who enjoy the political legitimacy that judges lack. However, in practice, given the indeterminacy of legal texts, judges can ascribe a meaning to a certain provision at odds with legislative intention. Subsequent judges may then claim that previous interpretations were incorrect, and thus treat similar cases differently, arguing that the new interpretation is the correct one. This is the reason why the late Hans Kelsen considered that the practice of interpretation and the concept of *res judicata* vested an enormous power in judges.[94] Given the indeterminacy of legal texts, each judgment is a potential act of law creation. Thus under the appearance of the impartial application of the will of the democratic legislator, judges in fact develop the law according to their ideological preferences. While this power is present in jurisdictions that follow either a doctrine of *jurisprudence constante* or precedent, only a doctrine that grants the status of sources to precedents can transparently constrain judges. That is, to reduce judicial discretion, judges need to be bound to the legal text but *also* to the norms that previous judges have ascribed to them. Otherwise judges can ascribe a different meaning to a similar provision each time they decide a case.

Finally, reiteration fulfils different functions in a doctrine of *jurisprudence constante*, on the one hand, and one of precedent, on the other. A simplistic or mechanical understanding of reiteration in *jurisprudence constante* reduces it to counting the number of similar cases that previous judges decided alike. The more reiterated a criterion is, the more persuasive it is. The Mexican legislative doctrine of jurisprudence partially follows this understanding: a criterion that is reiterated five times becomes binding law, otherwise it remains persuasive. In contrast, the starting point of a doctrine of precedent is that even a single judgment is enough to recognise its binding character. Although the number of judgments is the basis for distinguishing both doctrines, there is an interaction between both once reiteration is understood no longer as the

[94] Hans Kelsen, *General Theory of Norms* (Michael Hartney trans, Clarendon Press Oxford, 1991) [trans of: *Allgemeine Theorie der Normen* (first published 1979)] 116.

simplistic task of counting cases but as the argumentative practice of developing the law based on prior decisions. In this sense, reiteration does not merely insist on a criterion laid down by previous judges. Instead, it becomes a matter of linking similarities between cases, polishing legal concepts, and clarifying the meaning of precedents. The judgments that the Colombian Constitutional Court explicitly classifies as 'reiteration judgments' (*sentencias de reiteración*) are those in which the Plenum insists on the validity of an ascribed norm and clarifies its scope.[95] In this argumentative sense, reiteration becomes a progressive path of developing and consolidating ascribed norms in a sequence of judgements.

This dichotomised scheme of *jurisprudence constante* and precedent is used as an ideal type. Real jurisdictions may combine elements of both doctrines and traditions. This is particularly true of civil law jurisdictions where some elements of *jurisprudence constante* precede the elements of doctrines of precedent. For instance, in Mexico the formal requirement of reiteration that requires five cases to make a criterion binding, coexist with a more argumentative understanding of reiteration – one in which judges link today's judgments with past decisions to continue lines of precedents. Likewise, both understandings of reiteration coexist with formal mechanisms that recognise single judgments as a precedent in controversies between authorities. However, whether or not it is a precedent, the more uniform and coherent a sequence of decisions is, the greater is the burden of argumentation in departing from it.

The next section uses ascribed norms as an analytical tool to critically assess similar cases that were treated differently without a reasonable justification, to stress the practical implications of incoherence among judgments.

III. Normative Coherence in Practice

As discussed in Section II, one cause of incoherence among ascribed norms is doctrines of precedent. The now abandoned distinction of the Colombian Court between integrative and interpretive precedents provided an implicit authorisation not to follow interpretive precedent without reasonable justification. However, currently, each ascribed norm from the Constitutional court is binding unless there are reasons to distinguish or overrule. In contrast, the Mexican legislative doctrine requires a fixed number of qualified votes or reiterations to make precedents

[95] See e.g., T- 970-2014, Luis Ernesto Vargas Silva, 15 December 2014. Reiterating the constitutional right to euthanasia recognised in C-239-97.

binding, even if, in practice, some judgements acquire the status of precedents regardless of their reiteration or votes. The solution is to treat single precedents as prima facie binding.

This section illustrates how the ideal of normative coherence can work in practice. Certainly, constitutional interpretation is dynamic, and later judges can abrogate a norm through the technique of overruling, or create exceptions through distinguishing. However, the exception must be justified, showing that the new norm coheres with other norms issued by the Court.

To demonstrate how ascribed norms are valuable for critically assessing constitutional judgments, this section follows Aleksander Peczenik's distinction between *diachronic* and *synchronic* coherence.

Briefly speaking, diachronic coherence is concerned with justifying a change in the law *from one time,* T^1, *to another*, T^2. While the law at T^2 may be in contradiction to the law in force at T^1, it may be a 'coherent evolution' from that law.[96] Relevant for our purposes is that an ascribed norm N^2 may be in contradiction to N^1, but be justified in light of later normative changes (e.g., formal amendments, precedential trends, legislative enactments) that make N^2 more coherent than N^1 and thus justify abrogating N^1 by issuing N^2.

The practical relevance of diachronic coherence for the purposes of constitutional precedent relates to coherence as a constraint on last-resort judges. To justify departing from a precedent, judges should identify a legally relevant change from the time the precedent was decided and the case at hand. Changes in the composition of the Court are an inadequate justification. While a variation in personnel may be the realistic or empirical motor for changing a precedent, this reason on its own is insufficient from an institutional and argumentative point of view. After all, judges are bound by the decisions of the Court as an organ that ascribes interpretations that become sources of law that constrain even the drafter of the judgment, rather than by personal opinions about the law. Likewise, changes of personal opinion on the part of judges about the correct interpretation of a provision are insufficient to modify the law. This is particularly relevant in the heavily ideologically loaded field of constitutional law, where judges with different political ideologies decide matters of political morality in the context of plural societies. If judges could change the law every time a new member was appointed, or whenever they had

[96] Aleksander Peczenik, 'Coherence' in Christopher B. Gray (ed), *The Philosophy of Law: An Encyclopedia* (Garland Publishing, 1999) 124, 124.

new reflections on the meaning of a given provision, constitutional law would be unstable and decision-making arbitrary. Instead, judges are expected to identify a change in the legal order independent of their personal opinions – e.g., in the hierarchy of principles of the legal community or in formal amendments that justify modifying or abrogating an ascribed norm. The central question for judges regarding diachronic coherence, therefore, is: What changed in the legal system from time T^1 to T^2?

Conversely, synchronic coherence refers to the degree, extension and interconnection of a statement in light of other statements *at a particular time*.[97] Relevant for our purposes is that N^A ought to be preferred to N^B when it finds mutual support in N^C, N^D and N^E that are contradictory to or difficult to reconcile with N^B.

The practical relevance of synchronic coherence relates to the right to equality of citizens within the same time frame. Unlike diachronic coherence, the burden of argumentation lies not in identifying changes from one time to other, but rather in differences between the subject-matter or facts of the precedent and the case at hand. The differences between cases may allow justifying the creation of exceptions to general rules. A judge may have developed an apparent categorical or universal rule, yet later decisions may question such categories, adding justified exceptions without overruling.

This assessment of the coherence – both diachronic and synchronic – of precedents presupposes a process of what Neil MacCormick calls an exercise of 'rational reconstruction'[98] of the law. That is, the task of the scholar is to reconstruct apparently unrelated legal materials so as to make them part of comprehensible wholes unified by common principles.[99] The subject matter of reconstruction may be statutes,[100] precedents,[101] or, as in the present enquiry, constitutional provisions and judicially ascribed norms. In the context of constitutional adjudication, the process of reconstruction is more challenging the less the constitutional text regulates, and the more it is regulated by, precedent. In turn, the more precedents there are, the more demanding it is. This is

[97] Ibid.
[98] Neil Maccormick, 'Reconstruction after Deconstruction: A Response to CLS (Book Review)' [539] (1990) 10(4) *Oxford Journal of Legal Studies* 539, 556.
[99] Ibid 556-8.
[100] Zenon Bankowski, Neil MacCormick and Jerzy Wróblewski, 'On Method and Methodology' in Neil MacCormick and Robert S. Summers (eds), *Interpreting Statues: A Comparative Study* (Darthmouth Publishing, 1991) 9, 18-24.
[101] Neil MacCormick and Robert S. Summers, 'Introduction' in Neil MacCormick and Robert S. Summers (eds), *Interpreting Precedents* (Darmouth Publishing, 1997) 1, 10-1.

particularly relevant for jurisdictions with precedent over-production, such as Colombia and Mexico.

Although MacCormick is not explicit on this matter, diverse legal participants, i.e., lawyers, judges, scholars, can pursue this process of rational reconstruction with different, although not necessarily incompatible, political or scientific interests.[102] Legal participants deploy this process according to their particular political or scientific agenda, albeit partially constrained by legal sources. First, judges reconstruct the law to show that an ascribed norm coheres with pre-existing law, to acquire or consolidate political legitimacy through legal discourse. Then, lawyers reconstruct the law to reduce judicial discretion and obtain a favourable ruling according to both their interests and those of their client. Finally, scholars reconstruct the law to identify deficiencies, in the hope of being heard by legislators or judges who are aiming to reconfigure general practices or rethink particular decisions. What is more, this process of reconstruction takes place in the already politically loaded context of the 'rule of law' or 'constitutionalism'.

Thus the next subsections use the tool of ascribed norms to stress the perils of unjustified or incoherent decisions from the scholarly perspective, aiming to improve the practice of constitutional decision-making. However, the general strategy and the concrete arguments could also be useful for other legal participants. The decision-maker can reconstruct relevant ascribed norms to justify a ruling and also to reduce the discretion of fellow judges in multi-member courts. Likewise, lawyers can reconstruct ascribed norms to reduce judicial discretion when defending a claim, or to stress the existence of arbitrariness after a case is decided.

III.1.Unjustified Diachronic Incoherence: The Right to Abortion in Colombia

From 1994 to 2006, and without any formal amendment of the constitutional text, the Plenum of the Colombian Constitutional Court issued three incompatible norms without formal overruling. First, the Court ruled that the Constitution requires that abortion be punished with imprisonment in all circumstances,[103] later it held that it is permissible not to punish it in extreme

[102] MacCormick correctly observers that this process of rational reconstruction is not neutral but rather is influenced by the substantive principles and values found implicit in the legal system. See Neil MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005-9, 156.
[103] C-133-94, Antonio Barrera Carbonell, 17 March 1994.

circumstances,[104] and, most recently, it ruled that the prosecution of the mother or physician is prohibited when the life of the foetus threatens the mental and physical health of the mother or in cases of non-consensual intercourse.[105]

There are certain constitutional provisions that seem to count against the right to abortion and others that seem to count against it. On the one hand, the constitution acknowledges the duty of authorities to protect a person's life, the importance of family as a basic social institution, the right to life as a subjective entitlement, the special protection of pregnancy, the right of children to life, and the special protection of women as workers and their right to maternity leave.[106] On the other hand, the Constitution recognises the right to no-discrimination because of gender, the right to the free development of personality, freedom of conscience, freedom of religion, the right to planned parenthood, and equality among men and women. [107] Thus the Court can interpret the constitution both to justify punishing abortion to protect the life of the foetus and to justify not punishing it to protect the autonomy of women.

Before the question reached the Plenum, a Chamber analysed the legal personhood of the foetus. In the *Tutela* T-179-93, the Chamber held that the foetus has independent rights in relation to those of the mother, and the right to life is at the apex of constitutional values.[108] The case arose after a mother filed a petition against the father of a child requiring him to pay the pregnancy and birth expenses. Given that the mother lacked any ordinary remedy, the Chamber granted constitutional protection for paying the expenses.[109]

Then, in C-133-94, the Court insisted on the personhood of the foetus as a right-bearer. However, on this occasion it was the Plenum in an abstract review complaint regarding the constitutionality of the crime of abortion. The Plenum validated a provision of the criminal code that punished women and physicians with prison for the crime of abortion.[110] In the same judgment, the Plenum contradicted itself. First it held that the right to life starts with conception, making the foetus a right-holder entitled to subjective protection of his or her constitutional rights.[111] However, the Court also argued that even if the foetus is not a person entitled to subjective protection, its life is

[104] C-647-01, Alfredo Beltrán Sierra, 20 June 2001.
[105] C-355-06, Jaime Araujo Rentería and Clara Inés Vargas Hernández, 10 May 2006.
[106] Colombian Constitution, above n 11, Arts. 2, 5, 11, 42 [1], 44 [1-2] and 53 [2].
[107] Ibid, Arts. 13 [1], 18, 19, 42 [6] and 43.
[108] T-179-93, Alejandro Martínez Caballero, 7 November 1993, recital II, sections 3.1 and 3.2.
[109] Ibid, recital VI.
[110] Código Penal de 1980, above n 42 Article 343.
[111] C-133-94, above n 103, recital VII, section 4.

still objectively protected by a general duty to protect life.[112] Without clarifying the tension between these statements, the Court validated the sanction of prison for abortion even in cases of non-consensual intercourse.[113]

Thus the ascribed norm of C-133-94 can be expressed as follows:

> **N[1]**: The Constitution *commands* the punishment of abortion with prison under all circumstances.

Later, in C-647-2001, only seven years after the first ruling, and without any formal amendment of the relevant constitutional provisions, the Plenum revisited the question of abortion. In this case the plaintiff challenged an amendment of the criminal code that allowed judges to avoid punishing (*excusa absolutoria*) defendants guilty of abortion in extraordinary cases of non-consensual intercourse.[114] Without even citing C-133-94, the Plenum accepted that the crime of abortion was constitutional, but now it ruled that it was constitutionally permitted not to sanction it with prison under extraordinary circumstances. The Plenum did not formally overrule the prior decision. The Plenum could have justified its validation by appealing to the democratic legitimacy of the legislator, arguing that recent legislative deliberations have transformed the scope of the protection of women. However, the Court failed to provide this or any other justification. The Plenum did not explain why women and physicians in 1994 could be constitutionally punished with prison, but not in 2001, even if the facts were the same.

The new ascribed norm can be expressed as follows:

> **N[2]**: The Constitution *permits* not punishing abortion with prison in extreme circumstances such as non-consensual intercourse.

Finally, in C-355-2006, only five years after the second ruling on abortion, and again without any formal amendment or explicit overruling, the Plenum issued a new norm in contradiction to C-133-94 and in tension with C-647-2001. On this occasion the Court analysed a set of provisions of the same law regulating abortion, exceptions to criminal liability, and alternatives to prison in extreme circumstances.[115] The Plenum declared the constitutionality of the crime of abortion to

[112] Ibid, recital VII, section 5.1.
[113] Ibid, recital VII, section 2.
[114] *Código Penal de 2000, Ley 599 del 2000* [Criminal Code of 2000, Law 599 of 2000] 24 July 2000, Art 124 Par.
[115] Criminal Code of 2000, above n 114, Arts. 32.7, 122, 123, 124 Par.

protect the foetus, but it ruled that the relevant provisions must be interpreted so that there is no crime when (a) the foetus is non-viable, (b) pregnancy threatens the mother's health (physical and mental) and (c) in cases of non-consensual intercourse.[116] Unlike in C-133-94, the Plenum held that there is no absolute prevalence of the life of the foetus over the rights of women. The legislator must protect the life of the foetus, but constitutional provisions regarding the rights of women, human dignity, free development of personality and the right to health all count against an absolute prohibition on abortion.[117]

Now, the current norm is:

> **N**^{3}: The Constitution *prohibits* the punishment of abortion when (a) the foetus is non-viable, (b) the pregnancy threatens the woman's health and (c) the pregnancy is the result of non-consensual intercourse

Interpreting the same provisions, and in light of similar hypothesis, the Court reached three incompatible decisions without justification in a very short period of time. In virtue of the same facts, a woman could have been imprisoned in 1994, avoided prison in 2001, and in 2006, beyond the possibility of state prosecution. All these changes occurred without any formal reform of the constitutional text or a documented informal amendment to the evolution of constitutional principles from T^1 to T^2. The Court appealed to the special constitutional protection of women,[118] but this protection had existed since 1991, thus for the sake of normative coherence, previous decisions should have been formally overruled.

In this manner, ascribed norms were useful for identifying unjustified diachronic coherence. In C-647-2001, the Plenum simply ignored C-133-94 and T-179-93. Then, although the Court did discuss C-647-2001 in C-355-2006,[119] it discussed mainly with regard to the bindingness of *res judicata*, rather than as a precedential issue. The Plenum did not justify any change of criteria from T^1 to T^2 and thus failed to honour the ideal of normative coherence that it itself cherishes.

As shown by the case study, a commitment to diachronic coherence is twofold. First, it requires courts to overrule an ascribed norm explicitly. Second, it requires justifying the abrogation of an

[116] C-355-06, above n 105, recital VI, section 10.
[117] Ibid, recital VI, sections 7, 8.1, 8.2, 8.3.
[118] Ibid, recital VI, section 7.
[119] C-355-2006, above n 105, recital VI, section 4.

N^x with the introduction of an N^y by documenting changes in the constitutional text or via precedents that demonstrate that the legal community has become aware of change in the preferences.

III.2. Unjustified Diachronic and Synchronic Incoherence: Constitutional Review Of Constitutional Amendments in Mexico

The next case study of Mexican constitutional law shows the implications of both diachronic and synchronic incoherence. Diachronically, in just eleven years the Plenum had switched from recognising the competence of courts to reviewing the constitutionality of constitutional amendments on formal grounds and declaring that they lack competence. Synchronically, the Plenum had ruled that the Constitution does not authorize the review of federal amendments while declaring the unconstitutionality of state amendments without justifying the different treatment. In addition, the case study confirms the disadvantage of having a legislative doctrine of precedents with fixed requirements for making ascribed norms binding.

Are federal constitutional amendments subject to constitutional review? The relevant provisions of the Mexican constitution do not resolve this question determinately. Article 135 states that the Constitution may be added or reformed by a vote of two thirds of members present in the Congress and approved by a majority of state legislatures. Article 103 [I to III] regulates the *Amparo* competence empowering all courts of the federal judiciary to resolve controversies regarding 'general norms', acts or omission that infringe human rights recognised by the constitution or that invade competences of authorities affecting particulars. Article 105 regulates the function of the Supreme Court as a constitutional court. Article 105 [I] recognises the competence of the Court to resolve controversies among authorities (*controversia constitucional*), including controversies regarding 'general provisions'. Finally, Article 105 [II] recognises the competence of the Court to resolve abstract review cases (*acciones de inconstitucionalidad*) that involve a controversy over a 'norm of general character' or 'laws' (*leyes*) and the Constitution.

In A.I. R. 2996-1996, a 6 to 5 majority of the Plenum held that *Amparo* lawsuits challenging the constitutional amendment procedure must be admitted, as they are not patently frivolous.[120] The

[120] A.I. R. 2996-1996, Genaro David Góngora Pimentel, 3 February 1997.

plaintiff was a former mayor of Mexico City who contested the procedure of a constitutional amendment that prevented him and other former mayors to run for the same position, once it became a position directly elected by voters rather than designated by the President. The Plenum explicitly interpreted constitutional provisions in a teleological and systematic way, then, given that the essence of *Amparo* is to protect rights, the Justices interpreted the expression 'general norms' to include constitutional amendment bills because of the possible violation of Article 135.[121]In A.I.R.1334-1998 the Court ruled on the merits and held that the procedure had been constitutional,[122] but it nevertheless set a norm of competence allowing federal courts to hear such claims.

The norm may be phrased as follows:

> N^A: Federal Courts are competent to solve *Amparos* regarding the procedure of federal constitutional amendments.

Later precedents reiterated N^A and extended its application to state constitutional amendments and controversies between authorities. In a controversy between a legislative minority and a state congress, the Court held that it had the competence to analyse the potential contradictions between state constitutional amendments and the federal constitution. The Plenum interpreted the expression 'general norms' to include not only legislation but also state constitutions.[123] The Plenum ruled that although the Federal Constitution prohibits state legislatures from amending their electoral matters during periods of election, this ban has to be interpreted in the sense that the reform applied to an ongoing election.[124] While the Court did not rule in favour of the plaintiffs, it did insist on its competence to review constitutional amendments. Later, the Plenum declared unconstitutional an amendment that suppressed secondary elections in the absence of the governor and arrogating to the legislature the power to elect a substitute.[125] Again, the Court interpreted the expression 'general norms' to include state constitutions reinforcing N^a.[126]

Nevertheless, only five years after A.I.R.2996-96, the Plenum disputed N^a without justifying the change of criteria. In C.C.82-2001, an 8 to 3 majority of the Court held that it lacked the competence to analyse the constitutionality of the procedure of federal constitutional

[121] Ibid, recital V.
[122] A.I. R. 1334-1998, Mariano Azuela Güitrón, 9 September 1999.
[123] A.I. 23-2000, Sergio Salvador Aguirre Anguiano, 11 December 2000, recital V.
[124] Ibid.
[125] A.I.9-2001, Guillermo I. Ortiz Mayagoitia, 8 March 2001.
[126] Ibid, recital I, section 2.

amendments.[127] This case involved a controversy between a municipality and the Federal government regarding a federal amendment on indigenous rights in which the plaintiff argued that it was not properly consulted. Although the plaintiff cited N^a,[128] the Court failed to justify its abrogation and the issuing of a new contradictory norm.[129] The Court referred to the text and the intention of the historical legislator to interpret restrictively the expression 'general provisions' so as not to include the procedure of federal amendments to the constitution.[130] It also argued that the amending power was a sovereign subject, thus excluding bills of amendment from review.[131]

The new norm may be phrased as follows:

> N^B: Federal Courts lack the competence to solve *Amparos* or controversies between authorities regarding the procedure of federal constitutional amendments.

However, less than six years later the Plenum once again contradicted the norm in a series of cases relating to a federal amendment on electoral matters. A minority of the federal Congress challenged the amending procedure that prevented particulars from buying time in the media for political purposes because of irregularities in the legislative process and the right to freedom of expression. By a 6 to 5 majority, the Plenum implicitly overruled N^b without providing a justification. The majority ensured that given that the Constitution did not define 'laws' or 'norms of general character', it was not up to the Court to distinguish, thus lawsuits challenging the procedure of federal amendments must be heard.[132]

Later, the Court reiterated this ruling in an *Amparo* by a 6 to 4 majority. This time, the Court did cite A.I.D 1334-1998 and C-C. 82-2001 but considered that instead of focusing on which precedent was binding, it was more practically relevant to decide on the nature of the challenged

[127] C.C. 82-2001, Olga María del Carmen Sánchez Cordero de García Villegas, 6 September 2002.
[128] Ibid, antecedent III.
[129] The minority argued that the Court had competence to review such lawsuits. See Ibid, (Sergio Salvador Aguirre Anguiano, Mariano Azuela Güitrón and Juan Silva Meza, dissenting)
[130] Ibid, recital unique, at 81-90.
[131] Ibid, recital unique, at 85-6.
[132] R.R. 33-2007, José Ramón Cossío Díaz, 28 April 2008, recital VII.

act.[133] The majority held that the amending power was a limited organ subordinated to law and, most importantly, to the constitution.[134] The Plenum ruled that Courts have the competence to review the procedure of federal amendments, whether through *Amparo* or controversies between authorities, because the amending power can violate constitutional rights when it disregards the amending procedure established in Article 135.

Without justifying the abrogation of N^B, the Court fell back on a norm similar to N^A which triggered contradictory rulings by intermediate courts. Given that the most recent judgements were not binding because of a lack of qualified votes and reiteration, lower judges were free to disregard them. A District Court followed N^A, and declared that irregularities such as starting legislative sessions at times unannounced by the Congress, over-extended sessions, or a failure to record the counting of votes of state legislatures vitiated the amendment procedure so as to declare it unconstitutional.[135] In contrast, another District Court followed N^B and ruled that the amendment procedure was not even subject to constitutional review.[136]

Again, the Plenum implicitly overruled such norms and issued a norm similar to N^B. A 7 to 4 majority of the Plenum ruled, in A.I. 2021-2009, that the *Amparo* was designed to protect only the plaintiffs and declaring the unconstitutionality of an amendment would also benefit broadcasting companies.[137] Thus, without discussing the latest precedents, the majority held that the invalidation of a constitutional amendment would distort the essence of the remedy of *Amparo,* as its protection would benefit not only the parties but other subjects as well.[138] Later, a unanimous Second Chamber followed the same criteria – which was theoretically persuasive – and in a series of *Amparos* re-established N^b as a binding norm.[139]

Similarly to the Colombian case study, the Mexican case study shows the implications of unjustified diachronic coherence. The Court did not identify a normative change between T^1 and T^2 that supported abrogating a norm and issuing another. The Plenum switched between N^A and

[133] A.I. R.186-2008, José Ramón Cossío Díaz, 29 September 2008, recital VI , topic 3. See also (José de Jesús Gudiño Pelayo, dissenting).
[134] Ibid, recital VI, topics 3, 4 and 5.
[135] Fifth District Court of the XVIII Circuit, A.I. 1753-2007, 8 May 2009, 88-101.
[136] Fourteenth District Court on Administrative Matters of the First Circuit, A.I. 1566-2007, 16 October 2009.
[137] A.I.R. 2021-2009, Guillermo I. Ortíz Mayagoitia, 28 March 2011, recital III.
[138] But see (José Ramón Cossío Díaz, disssenting). Cossío argued that the Plenum should respect A.I. R.186-2008 (n 133), the criteria that he had proposed.
[139] Second Chamber, A.I.R. 488-2010, Sergio Salvador Aguirre Anguiano, 5 October 2011, recital III. See also A.I.R 1858-2009, A.I.R. 1989-2009, A.I.R.2008-2009, A.I.R. 488-2010 decided by the Second Chamber the same day.

N^B on occasion without even mentioning the precedent, and when it mentioned it, failed to justify the overruling. In 1997 it established that courts have competence to analyse the procedure of amendments. In 2002 the Court abrogated that norm without justification. In 2008 the prior norm was again overruled without justification. Finally, in 2011, the Court went back to declaring that the judiciary lacks the competence to review the amendment procedure. If there was no formal amendment during all these years, then what justified the change? Why were litigants treated differently in 1997 and in 2002 and then again in 2008 and 2011? The Court decided each case *tabula rasa*, interpreting the text through different canons of interpretation and without granting prior judgments the status of norms.

The case study also illustrates the implications of unjustified synchronic coherence. In the latest ruling, the Court failed to show that the new judgment forms part of current set of mutually supported ascribed norms. The Court ruled that an *Amparo* is not the proper mechanism for challenging the procedure for the amendment of the federal constitution, given its individual rather than general effects.

The most recent norm is at odds with at least three other ascribed norms. First, as mentioned above, the Plenum declared unconstitutional the provisions of state constitutions, thereby interpreting 'general provisions' and the like to include state constitutions, and treating the state's amending power as limited to law.[140] Similarly, the First Chamber has repeatedly declared that state constitutional provisions banning gay marriage are unconstitutional because they violate the right to non-discrimination.[141]

Second, while it can be argued that Courts have the power to revise state but not federal amendments, the differentiation still needs to be justified. In fact, the now extinct Third Chamber repeatedly ruled that there is no subordination between the federal and state government, but only a distribution of competencies.[142] But then, if a state constitutional provision is inferior to a constitutional right, there are reasons to consider a bill seeking to amend the federal constitution also to be inferior, unless it follows the procedure of amendment.

[140] A.I. 23-2000, above n 123 and A.I.9-2001 above n 125.
[141] See e.g., A.I.R. 615-2013, Jorge Mario Pardo Rebolledo, 4 June 2014 (Art 147, Constitution of Colima); A.I.R.122-2014, Jorge Mario Pardo Rebolledo, 25 June 2014 (Art 7, Constitution of Baja California).
[142] A.I. R 1838-89, Jorge Carpizo MacGregor, 14 May 1990. See also, A.I.R. 3776-89, A.I.R. 252-90, A.I. R. 2118-89. A.I. R. 2010/90. See Mexican Constitution above n 11, Arts. 40, 41, 116 and 124.

Third, on the very same day that the Plenum ruled that the *Amparo* rulings have only particular effects, a 6 to 5 majority of the Plenum ruled, in another case, that *Amparo* can have *ultra partes* effects. According to the majority, on the current understanding of *Amparo*, it can protect social rights, such as the right to health, that indirectly benefit other members of the same group who are not parties of the case.[143]

The case study also highlights the disadvantages of legislative requirements for granting precedents the status of binding norms. Requiring a fixed number of cases or votes to make an ascribed norm binding amounts to authorising lower judges to ignore such norms. This authorisation violates the right to equality, as similarly situated individuals are treated differently without reasonable justification. What is more, such requirements also affect citizens beyond the parties of the case, as authorities fail to prevent the creation of contradictory norms, thus diminishing the effective enforcement of the constitution.

IV. A Preliminary Diagnosis of Coherence Among Ascribed Norms

This chapter has used the concept of ascribed norms to illustrate incoherence among constitutional precedents. Ascribed norms are useful not only for stressing how similar cases have been treated differently without a justification from the perspective of the scholar. They are also available for lawyers to reduce judicial discretion and for judges to reduce the discretion of fellow judges, given an awareness that any judgment *will* become a norm and thus must cohere with surrounding ascribed norms.

In this sense, the overproduction of ascribed norms is a particularly challenging element of the reasonable use of constitutional precedent in the civil law. The fact that constitutional or supreme courts have exclusive jurisdiction on abstract review and discretionary jurisdiction on concrete review increases the production of norms, and simultaneously makes their rational reconstruction more challenging. Moreover, overproduction of precedents also may require a constant revisiting of prior decisions. The more cases a court decides, the more chance there is that the same hypothesis or set of facts will be reviewed in later cases.

[143] A.I.R 315-2010, José Ramón Cossío Díaz, 28 March 2011.

In light of the overproduction of precedents, it is reasonable to make four preliminary suggestions regarding coherence among ascribed norms – suggestions whose force will become clearer in later chapters:

1. *Bindingness of ascribed norms.* For the sake of the right to equality and the ideal of coherence, it is preferable to assume that any relevant case is binding regardless of its reiteration. When an intermediate court deals with a lower court decision that challenges precedent, the former is empowered to reverse the decision.
2. *Overemphasis on vertical precedent and lack of explicit overruling.* The fact that superior courts emphasise that precedents are binding for *lower* courts makes ascribed norms unstable. Superior courts usually abandon prior criteria without providing reasons for such changes. Overruling is indeed part of the practice of precedent and any complete theory of precedent must explain and justify such a practice. However, any change of criteria requires meeting the burden of argumentation that shows that it is preferable to change the law rather than follow ascribing norms. Therefore judges should give reasons that justify the claim that the new norm coheres better with the relevant set of norms than the overruled one. When high court judges overrule, they are not just changing their mind; they are reforming the law.
3. *The absence of frequent explicit comparison of cases.* Judges do not usually engage explicitly in the comparison of similar but not identical cases. Justifying the claim that there are differences would allow them to treat cases differently. However, failure to make the comparison makes it reasonable to presume the contradiction is an instance of arbitrariness.
4. *The lack of systematic interpretation of ascribed norms.* Although interpreting constitutional provisions in light of others is a canon of interpretation commonly accepted by civil law courts, it is not usually applied to ascribed norms. It is indeed challenging to interpret sets of ascribed norms so as to form a rational unity, but this approach is useful for minimising incoherence among judgments

Chapter II The Principle of Universalisability of Precedent and its Limits

This chapter analyses the principle of universalisability, which requires that similar cases ought to be treated alike, as applied to constitutional precedent in the civil law. Once a constitutional court ascribed a norm to a constitutional provision, later courts ought to subsume the facts of later cases under this norm. The principle of universalisability captures the bindingness of ascribed norms, treating previous judicial interpretations as authentic sources of law. However, it fails to consider that unanticipated circumstances or mistakes in interpretation may justify later judges in departing from precedents, even if the case is apparently subsumable under the ascribed norm. While judgements in fact produce ascribed norms, judges can modify or abrogate these norms, provided that they meet coherence requirements.

I. The Principle of Formal Justice and Universalisability

The previous chapter introduced the problem of incoherence among constitutional precedents. This problem occurs when courts resolve cases with similar facts and provisions with different conclusions and without reasonable justification. For instance, this occurred when the Colombian Constitutional Court ruled in 1994 that the constitutional right to life requires authorities to punish abortion with imprisonment in all cases.[1] However, in 2001 the Court then ruled that it was permitted for judges not to sanction with prison when 'extreme circumstances', such as non-consensual intercourse, triggered the abortion.[2] The judgment of 2001 treats individuals differently than in 1994, and without justification, and does therefore fails to cohere with previous decisions.

The problem of incoherence in precedents may be caused or aggravated by doctrines of precedent that do not take into account that each judgment will become a universal or universalisable rule that controls future cases. This is the case, for instance, with the Mexican doctrine of *jurisprudencia* discussed in the previous chapter, which considers non-reiterated judgments to be

[1] C-133-94, Antonio Barrera Carbonell, 17 March 1994.
[2] C-647-2001, Alfredo Beltrán Sierra. 20 January 2001.

merely persuasive criteria. Since judges are bound only by the meaning of provisions enacted by constitutional framers and legislators, rather than the meaning that previous judges ascribed to them, subsequent judges may ascribe new norms to each individual case, thereby treating similar cases differently without a transparent justification.

This chapter analyses the principle of universalisability as a mechanism for reducing incoherence among ascribed norms. Perhaps the well-known principle of *formal justice* identified by Chaïm Perelman, that requires that similar cases ought to be treated alike, would reduce the degree of incoherence among precedents.[3] Abiding absolutely by this principle would require that once the court laid down a precedent, all later cases would be treated alike.[4] Abiding by the principle of formal justice would require treating the precedent as a categorical rule that later judges need to apply, even if they have reasons to question the grounds of such rule.

Perelman argued that formal justice requires treating individuals that share essential features as members of the same category.[5] It is 'formal' because it urges that similar members be treated alike, but does not formulate the substantive standard of similarity. Thus, implicit in Perelman's conception of formal justice is the need for an official to use discretion and make a value judgment about what justice actually requires when creating categories. The formality lies in the fact that later legal participants are, at least prima facie, bound to such value judgments.

In practice, formal justice requires that some authority – a constitutional framer, legislator, judge, etc. - alone or in coordination with another authority, identifies a set of relevant features that distinguish some subject from others in a way that such features justify creating a particular category. Later authorities are then expected to follow such categorical rules, without questioning the grounds that justified the categories. Authorities express these categories through rules aiming to cover all possible circumstances, and attach a single consequence to each rule.

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[3] On formal justice see Chaïm Perelman, *De la justicia* (Ricardo Guerra trans, UNAM, 1964) [trans of: *De la justice* (first published 1947)] Ch. II.

[4] This chapter follows the distinction introduced in previous chapters between provision as un-interpreted text and norm as the product of interpretation. However, norm and rules are used interchangeably to refer to a standard with a clear antecedent formed by a set of facts and a consequence whether such facts are permitted, prohibited or commanded.

[5] Perelman, above n 3, 27-8; Chaïm Perelman and Lucie Olbrecths-Tyteca, *Tratado de la argumentación* (Julia Sevilla Muñoz trans, Editorial Gredos, 1989) [trans of: *Traité de l'argumentation, la nouvelle rhétorique* (first published 1958)] 340-3.

Indeed, one of the political goals of civil law codification in post-revolutionary France was to reduce judicial discretion by enacting categorical *legislative* rules in an effort to anticipate all the possible cases.[6] The French ideal of codification, as a uniform set of standards for all subjects, influenced the civil law in general, including Mexico and Colombia.[7] In light of the ideals of a unified and homogenous society, authorities used codes as a universal standard to unify once disparate communities with different mores and legal traditions, but which are now part of a single nation-state.[8] Under the ideal of codification, at least according to its exegetical supporters, the role of the judge was limited to applying a categorical rule – drafted by the legislator – to a set of facts that regulates uniformly and applies equally to all citizens.

However, not long afterwards, it became evident that code provisions were subject to a plurality of interpretations. Thus there was a need for a *judicial* mechanism to discipline this discretion. The central role of cassation or similar third-instance remedies, such as the Mexican *Amparo Directo* in the civil law, was to discipline lower judges by achieving uniformity in the interpretation of legislation, rather than by resolving concrete controversies.[9] The purpose of cassation was to approximate to the ideal of uniformity of interpretation, thereby reducing the discretion of lower courts. If the legislators failed in issuing clear and comprehensive rules, then the last-resort court issued such rules, that bind the rest of the judiciary.

Since early 20th century, Italian scholar Piero Calamandrei, the greatest theorist of cassation, argued that one of the purposes of this remedy was for superior courts to issue or identify a 'maxim.' [10] A maxim is a kind of abstract norm, applicable to all similar cases, that functions as a general premise in the syllogism that lower courts follow. Progressively, a set of reiterative cassation judgments developed *jurisprudence constante* as discussed in the previous chapter.

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[6] Mauro Cappelletti, '¿Renegar de Montesquieu? La expansión y la legitimidad de la "justicia constitucional"' [9] (1986)(17) *Revista Española de Derecho Constitucional* 9, 24.

[7] See Alejandro Guzmán Brito, *La codificación civil en Iberoamérica: Siglos XIX y XX* (Editorial jurídica de Chile, 2000) 190-228, 249-254, 303-306, 385-401.

[8] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir trans, Clarendon Press, 3rd ed, 1998) 75-77; John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition* (Stanford University Press, 3rd ed, 2007) 12-9, 21-2, 27-31.

[9] In the civil law, appeal is a second-instance remedy in which a superior court reviews matter of fact and law of private controversies whereas cassation is a third-instance remedy in which the last-resort court reviews the public interpretation of the law made by lower courts and affirms, modifies or rejects it. See Nina Nichols Pugh, 'The Structure and Role of Courts of Appeal in Civil Law Systems' [1163] (1975) 35(5) *Louisiana Law Review* 1163,,1167;J. A. Jolowicz, 'Appeal, Cassation, Amparo and All That: What And Why?', *Estudios en Homenaje al Doctor Hector Fix-Zamudio en Sus Treinta Años Como Investigador de las Ciencias Juridicas* (UNAM, 1998) vol III, 2045, 2060-5.

[10] Piero Calamandrei, *La cassazione civile: storia e legislazioni* (Fratelli Bocca, 1920) 539. See also Piero Calamandrei, *Il ricorso per cassazione* (Universita degli studi, 1956) 54-6; Francesco Antonio Genovese, 'Per una storia della Corte di Cassazione:l'Ufficio del Massimario e del Ruolo' (2008) 14(2) *Le carte e la storia* 40.

Currently, jurists from both the common and the civil law traditions agree that precedents not only bind lower judges but even supreme courts. Then Justice of the U.S. Court, Antonin Scalia, noted that when a superior judge drafts a judgment, he binds himself to the rule in the opinion.[11] Similarly, civil law scholar Marina Gascón reasons that a strong attachment to self-precedent enhances the rationality of judgments and produces better precedential rules.[12] By issuing rules that cover the facts of the case, judges inform the standard that will govern all similar cases. In this way, precedent vertically binds lower judges, and horizontally, they constrain themselves.

In this sense, Neil MacCormick has proposed the principle of *universalisability* of judgments by arguing that legal justification needs be based on universal reasons that apply to the case at hand, but also will apply to all similar situations.[13] More precisely, he has argued that the forward-looking dimension of universalisablity requires that 'I must decide today's case *on grounds* which I am willing to adopt for the decision of *future* similar cases.'[14] MacCormick exhorts judges to anticipate that a judgment today will become a precedent tomorrow. Hence they need to issue judgments that control all similar scenarios, working not by a case-by-case justice but instead according to a universal rule.

Universalisability, understood as the requirement that each value judgment becomes a universal rule for later cases, stands out as a contemporary instantiation of formal justice manifested in adjudication. Unlike the project of codification, which was a legislative effort to subordinate the judiciary to the congress, it is an attempt by the bench to constrain itself. Also, unlike cassation, it is not only a mechanism for constraining only lower judges (vertical precedent) but also for constraining apex courts (horizontal and self-precedent). Moreover, unlike *jurisprudence constante*, the constraint to follow precedent appears even in single cases, without any need of reiteration. In brief, universalisability urges judges to constrain others and constrain themselves by issuing precedents that control all similar situations in the future.

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[11] Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56(4) *The University of Chicago Law Review* 1175, 1179.

[12] Marina Gascón, 'Rationality and (Self) Precedent: Brief Consideration Concerning the Grounding and Implications of the Rule of Self Precedent' in Thomas Bustamante and Carlos Bernal Pulido (eds), *On the Philosophy of Precedent* (Franz Steiner Verlag, 2012) 35, 38-9.

[13] Neil MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005) 88-91.

[14] Neil MacCormick, *Legal Theory and Legal Reasoning* (Oxford Clarendon Press, 2nd ed, 1994) 75. Emphasis added.

Given the problem of incoherence among precedents, the question is whether universalisability is an absolute constraint on later judges? This would mean that once a Constitutional Court ascribes a norm to a constitutional provision, all later courts, including this Constitutional Court itself, need to follow such precedent, and that is enough to achieve coherence among precedents. On the other hand, if universalisability is understood as a general rather than an absolute constraint, it would mean that, at least in some scenarios, treating cases differently is justified. The previous court may fail to anticipate other circumstances that require the modification of the rule. Also, the court may have issued a mistaken precedential rule that needs to be abrogated.

This chapter defends a nuanced approach to universalizability, one that can yield to coherence when constitutional principles warrant a different treatment between litigants. The rest of this chapter analyses the implications of the principle of universalisability in constitutional adjudication. Section II analyses the two dimensions of the principle of universalisability. Forward-looking universalisability urges judges to justify their judgments on constitutional grounds that they are willing to apply in future cases. Backward-looking universalisability requires judges to follow prior decisions. Section III analyses the strengths and weaknesses of the principle of universalisability. On the one hand, considering precedents as strict rules constrains judges and safeguards formal principles such as authority, equality and certainty. Once a precedent is issued, all similar future scenarios must be treated alike. On the other hand, a strict conception of universalisability does not guide judges regarding the coherence of judgments with principles. A precedent may have failed to anticipate all the implications of a ruling with regard to surrounding constitutional principles. Also, rules may need to be abrogated when the constitutional community recognises a precedent as an incorrect interpretation of constitutional principles. Section IV concludes by recognising the need for a nuanced approach to universalizability. Rather than an absolute constraint, universalisability must be understood as a presumption in favour of following precedents that can be outweighed, provided that the burden of argumentation is met.

II. The Two Dimensions of Universalisability

II.1 The Forward-Looking Dimension of Universalisability

According to MacCormick, the principle of universalisability is not only backward-looking, as the aphorism of treating like cases alike suggests, but also forward-looking. It is forward looking because judges ought to anticipate that their judgments *will* become precedents.[15] MacCormick argues that judges need to justify their judgments on the basis of universal reasons and be willing to apply such criteria in all future similar cases.[16] MacCormick urges that the point is universalisability and not generality, because the former is absolute while the latter is a matter of degree.[17] To say that a precedent is universalisable is to say that the judge would come to the same legal conclusion every time similar or identical facts appear in a case.

Similarly, Robert Alexy argues that formal justice requires that legal participants cite universal rules applicable to similar cases.[18] Alexy, together with Aleksander Peczenik, argues that universal concepts or categories are ones that designate '*all* things belonging to a certain class, not merely names of individual objects'.[19] Hence, judges need to abstract themselves from the peculiarities of the context, identify the relevant facts that justify a particular conclusion in a controversy, and apply that rule or principle to all similar scenarios.

Thus the requirement of universalisability can be understood in three ways. Firstly, universability is an *ethical commitment* to issue judgments that could pass a Kantian test of universalisability.[20] According to Kant, the categorical imperative urges moral agents to behave in such a way that their behaviour could become a universal law.[21] The agent needs to identify the relevant facts that prompted a particular action and be willing to accept it as a maxim in all future cases. Thus, the

[15] Ibid. See also, Frederick Schauer, 'Precedent' (1987) 39(3) *Standford Law Review* 571, 572-5, 589.
[16] Neil MacCormick, 'Why Cases Have Rationes And What These Are' in Laurence Goldstein (ed), *Precedent in Law* (Oxford Clarendon Press, 1987) 155-182, 162.
[17] Ibid 165.
[18] Robert Alexy, *A Theory of Legal Argumentation* (Ruth Adler and Neil MacCormick trans, Oxford Clarendon Press 1989) [trans of: *Theorie der juriistichien Argumentation: Die Theorie des rationale Diskurses als Theorie der juristichen Begrundng* (first published 1978)] 223.
[19] Robert Alexy and Aleksander Peczenik, 'The Concept of Coherence and Its Significance for Discursive Rationality' [130] (1990) 3(1 bis) *Ratio Juris* 130, 140. Emphasis in original.
[20] Maksymilian del Mar, 'The Forward-Looking Requirement of Formal Justice: Neil MacCormick on Consequential Reasoning' (2015) 6(3) *Jurisprudence* 429, 437-8.
[21] Immanuel Kant, *Fundamentación de la metafícia de las costumbres* (Manuel García Morente trans, Pedro M. Rosario Barbosa, 2007) [trans of: *Grundlegung zur Metaphysik der Sitten* (first published 1785)] 15-17, 29-35, 66.

conventional example to justify universalisability is that promises must be kept. The agent will identify the relevant facts that suggest that promises must be kept. The facts may be represented as follows: when F^1 a free and F^2 informed agent F^3 makes a commitment to someone else, then he or she *always* ought to honour such commitment.

MacCormick acknowledges that universalisability in legal justification is similar to the Kantian categorical imperative, but argues that it is limited by the legal sources of a particular jurisdiction.[22] In this sense, universalisalibity is indeed an ethical commitment, but one that should be compatible with the principles and values of a legal system, rather than with the individual morality of a person. Thus, issuing a judgment that covers all members of a category with the disposition to apply it to all similar cases is not enough. Instead, the judge is at least partially constrained by constitutional provisions, statutes and judicially ascribed norms. Thus judges honour universalisability when they identify an abstract legal source and issue a more concrete rule that will control all similar cases.

This ethical commitment to issue universalisable judgments according to the principles of a legal system applies to all officials who occupy a material law-making role. It applies to legislators who develop the meaning of constitutions via statutes, and to judges that do likewise when they ascribe meanings to provisions through their judgments. Both legislators and judges are lawmakers whose value judgements should be, firstly, compatible with the principles recognised by the legal system, and secondly, such that their value judgments become sources of law that subsequent legal participants should apply to all individuals that form part of the same category created by a given rule.

The source of the duty of universalisability is twofold. First, from the standpoint of the official who issues the value judgment, universalisability derives from their duty to provide general reasons that justify coercion. In the civil law tradition, all officials, and judges above all, have a formal duty, imposed by constitutions or implied by due process, to explicitly identify the binding sources (*fundar*) that authorise the act of authority, and link the concrete facts of the case to such abstract sources (*motivar*).[23] Implicitly, such a duty suggests that every time judges face

[22] MacCormick, above n 16, 166.
[23] See *Constitución Política de los Estados Unidos Mexicanos de 5 de febrero de 1917* [Mexican Constitution of 5 February 1917], Art. 16 [1]; For an interpretation of such duty see e.g., First Chamber, C.T.133-2004 PS, Olga Sanchez Cordero de Garcia Villegas, 31 August 2005 '*Constitución Política de Colombia de 4 de julio de 1991* [Colombian Constitution of 4 July 1991] (Colombia)', Art. 29. On the duty of judges to justify decisions and the

similar cases they should apply the same interpretation of the source. Second, from the perspective of the litigant to whom the value judgment is applied, as further discussed in Section III, the source is the constitutional right to equality and non-discrimination. Once officials have ascribed a certain meaning to a provision and linked the facts to such source, litigants in future cases have a prima facie right to be treated alike. Together, both sources give legal grounds why officials should honour the Kantian categorical imperative by issuing universalisable judgements.

In constitutional adjudication, a judgment needs to be universalisable according to the principles of a particular constitutional system. A misogynist judge could issue a judgment that prohibits all women from voting and be willing to apply that rule in all similar cases. However, a constitutional provision can ban discrimination in general, or there can be a concrete rule recognising woman suffrage that limits the scope of judicial discretion. In jurisdictions with written constitutions, such as Mexico or Colombia, the ethical commitment to universalisability requires that the judgment must be subsumable under at least one constitutional principle, and be applicable to all similar scenarios.

At the same time, the judgment will give a more concrete meaning to indeterminate provisions. Constitutional provisions may be ambiguous, having several plausible meanings, or they can be vague, where their scope is difficult to ascertain. [24] In this way, constitutional judges honour the ethical commitment to universalisalibility, first, by subsuming their ruling under a constitutional rule or principle, and second, by issuing a more concrete ascribed norm to the text that is universalisable – that is, abstract, impersonal and impartial, rather than ad hoc.

In a second sense, universalisability is a *logical* constraint that judges impose upon themselves and later judges.[25] In line with the efforts of codification and cassation to reduce judicial discretion, universalisability urges judges to issue judgments that cover the facts of the case and to replicate the conclusion in all similar cases, even if the judge is unsympathetic to the party supported by the precedent. In this sense, the *ratio decidendi* of a case will become the major premise that later courts need to introduce into the legal syllogism by which they arrive at a

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corresponding right of citizens to receive explanations see e.g., T-214-2012, Luis Ernesto Vargas Silva, 16 March 2012, recital II, section 4.

[24] On the difference between ambiguity and vagueness see e.g., Genaro Carrió, *Notas sobre derecho y lenguaje* (Abeledo-Pierrot, 1965) 26-33; Lawrence Solum, 'The Interpretation-Construction Distinction' [95] (2011) 27 *Constitutional Comment* 95, 97-8.

[25] MacCormick, above n 16, 164. See also MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning*, above n 13, 88.

conclusion consistent with the precedent. Later judges only need to identify the *ratio decidendi* and apply it by following the rules of deductive logic.

Finally, in a third sense, there is universalisability as a *semantic* constraint. Understanding universalisability as an ethical commitment or a logical constraint is not enough to explain what it is precisely that will constrain the courts. MacCormick and Alexy acknowledge the influence of R.M. Hare's notion of universalisability, which requires moral agents to describe situations according to a finite set of properties that are universal and impersonal, and thus commit the agent to treat similarly all future scenarios that fit such a description, on pain of being inconsistent.[26]

But then the problem is how judges formulate, express or identify universal rules in adjudication. This leads to the still unanswered questions of what a *ratio decidendi* is and how lawyers find it.[27] Alternatively, to connect the term with universalisability: what is it exactly that constrains future judges and other legal participants? Does the constraining element consist in the *facts* of the case as described by the court in connection with the solution, or does the constraining element also include *normative statements*? Regardless of the grounds that judges had in mind when they decided a case, later interpreters will have access only to the written formulation of the judgment and how it represented the facts and formulated or identified rules.

Then, as MacCormick notes, the *ratio decidendi* is a ruling 'sufficient to settle a point of law' that can be implicit or explicit.[28] An implicit ratio is the one that later interpreters infer from a set of relevant facts as described by the court in connection with the conclusion of the case. In turn, an explicit ratio is the one expressly formulated by the same court that decided the case. An implicit ratio has the advantage that it limits the role of judges in resolving particular controversies without requiring them to issue general rules, as if they were legislators. However, it reduces the scope of universalisability, as no two cases will be identical, enabling subsequent interpreters to narrow the ratio to cover only very specific scenarios. In contrast, the explicit ratio places judges in the apparently undemocratic position of issuing general rules as if they were legislators, instead of deciding concrete cases by applying the law. Nevertheless, it has the advantage that it confines judges to the rules as they were formulated, with less scope for

[26] R. M. Hare, *Freedom and Reason* (Oxford University Press, 1963) 12-4; MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning*, above n 13, 103; Alexy, *A Theory of Legal Argumentation*, above n 18, 65, 100.
[27] See H L A Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) 131-2, 134.
[28] MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning*, above n 13, 154.

narrowing the ratio in future similar scenarios. In short, implicit rationes seems to favour a fact-oriented role whereas explicit rationes appear to support a rule-oriented one.

The manner in which the drafter of a judgment chooses to describe facts or formulate rules partially constrains future interpreters when inferring the ratio from the facts or identifying it from the normative statements. The drafter of a judgment can be very precise in their description of the facts, or be very abstract, or simply ignore the facts. Likewise, the drafter can issue normative statements – that is, arguments about the rules or principles applicable to the set of facts – with different levels of semantic abstraction. There is what Herman Oliphant called a 'gradation of generalizations'[29]. The way judges choose to draft their judgments will partially constrain other interpreters. The requirement of universalisability requires that judges refer to categories rather than to particular individuals, but these categories can be framed under several degrees of abstraction. The broader the category, the more cases it encompasses and the stricter is the constraint. Conversely, the narrower the category, the fewer cases it encompasses and the more discretion is left for later interpreters.

The semantic constraint of universalisability regarding *facts* refers to the degree of abstraction of the description of the events that prompted the resolution of a case. Instead of focusing on general rules or principles, a fact-oriented approach anticipates that the set of facts linked to a decision will constrain the court to rule according to all facts. In short, it presupposes that what constrains in a precedent is what courts *do* in relation to a pattern of facts, not what they *state* about the law.[30] The judicial description of facts, no less than the description of applicable law, is subject to subjectivity. What is relevant for our purposes is that the degree of abstraction with which the drafter chooses to describe the facts will bind the court and lower courts in future scenarios.

In turn, the semantic constraint of universalisability regarding *normative statements* refers to the degree of abstraction of the rules or principles that decide the case. The drafter may choose to

[29] Herman Oliphant, 'A Return to Stare Decisis' (1928) 14(2) *American Bar Association Journal* 71, 73. As a legal realist, Oliphant was questioning universalisability of legal formalism but he argued in favour of radical empiricism in law. For him, the facts of a case produce some stimulus to the judge and he or she responses with a decision. He was concerned with what courts *do* (the facts) rather with what they *say* (normative statements). Ultimately, both facts and normative statements are important to interpret a precedent. Moreover, the description of the facts is also influenced by the subjectivity of the drafter. On Oliphant's contribution to stare decisis, see Charles W. Collier, 'Precedent and Legal Authority: A Critical History' (1988) *Wisconsin Law Review* 771, 781-7.

[30] Oliphant, above n 29, 74. For a fact-oriented approach to the ratio decidendi see Arthur L. Goodhart, 'The Ratio Decidendi of a Case' [117] (1959) 22(2) *Modern Law Review* 117.

formulate normative statements that cover not only the facts of the case but a group of factual situations.[31] Furthermore, these statements can be very concrete, moderately abstract, or highly abstract.

An example from the Mexican constitutional law illustrates the scope of universalisability as a semantic constraint. In A.D. 28-2010, the First Chamber of the Mexican Supreme Court held that freedom of expression prohibits judges from awarding damages to a newspaper publicly accused by another newspaper as an accomplice of terrorism, thereby violating its right to honour, provided that the information is not clearly false.[32] Article 6 of Mexican Constitution recognises that the right to freedom of expression is only limited when it affects public morality, personal privacy or third-party rights, or causes a crime, and Article 7 recognises the right to freedom of the press, prohibits prior censorship, and holds that the only limits are the ones recognised by Article 6. Thus, the constitutional text provides some guidance but it does not solve the question and judges may clarify the constitutional meaning when solving the case.

The judgment abounds with facts, with a low degree of abstraction. It identifies the parties: two mass media companies "A" and "B".[33] It incorporates the public exchange of three notes between parties.[34] One note, by A, accuses B of being an accomplice of terrorism because of its connection with a third journal sympathetic to a separatist movement in Spain's Basque country. Another note is B's reply, stressing that it condemns terrorism, that its alliance with the Basque journal is legal, and that the accusation of terrorism is groundless. A third note, by A, replies to this, applauding B's condemnation of terrorism but insisting that the accusation is founded on evidence. The judgment then describes the trial proceedings regarding B's lawsuit against A for damaging its right to honour.[35] A was acquitted on first-instance because the judge considered that there was no evidence proving the damage to honour. Then a superior court reversed this, on appeal, because it considered that damaging the honour of a person – an individual or collective – constituted an exception to freedom of expression, and thus awarded damages in favour of B. Later, five *amparo* judgments analysed legality issues such as the amount of damages, the judicial assessment of evidence, and the damage to the right to honour, which was not proved, according to a Circuit Court. Finally, the case reached the Supreme Court for a ruling on matters

[31] Oliphant, above n 29, 72.
[32] A.D 28-2010, Arturo Zaldívar Lelo De Larrea, 23 November 2011, 10-11.
[33] Ibid 10.
[34] Ibid 11-15
[35] Ibid 16-42.

of constitutionality. In light of the said facts, the Court confirmed the most recent judgment and did not award damages in favour of B. It argued that it was prohibited from awarding damages. In this way, the facts appear to constrain future courts only in the case of a very specific scenario.

Conversely, the judgment abounds with normative statements with *low*, *moderate* and *high* levels of abstraction.[36] For instance – a *low* level of abstraction – the Court argued that the note published by A accusing B of being an accomplice to terrorism was an action protected by the right to freedom of expression, and thus it was prohibited from awarding damages in this case.[37] An example of a *moderate* level of abstraction is that it argued that the controversy was a conflict between the principle of the right to honour and the principle of freedom of expression, in which the latter prevailed.[38] Finally – illustrating a *high* degree of abstraction – the Court stressed that the general prevalence of freedom of expression over honour is grounded on the collective function that the first fulfils in a constitutional democracy regarding the free diffusion of ideas.[39] These three examples of normative statements cover the facts of the case but also express more general categories that will constrain future interpreters.

The example illustrates the apparent dilemma concerning semantic universalisability, between a fact-oriented approach and a rule-oriented one. On the one hand, if the constraining elements are only the facts as described by the deciding court, then the constraining effect will be quite limited. Only a public accusation of a crime between journals will be protected by freedom of expression. On the other hand, if the constraining elements are also the normative statements, then the effect will be broad. This rule-oriented approach also runs the risk of issuing abstract standards that are decontextualized from the concrete facts of the case. What is more, a rule-oriented approach seems to equate the drafting of judgments with the enactment of legislation, by identifying or formulating them in abstract and general terms. It is important to resolve the dilemma between these two approaches.

The example also suggests that honour always, or almost always, needs to yield to freedom of expression. In fact, Justice Cossío concurred with the result, but stressed that the prevalence of freedom of expression over honour could not be universalisable, as it presupposed a symmetrical

[36] This classification of the degree of abstraction is inspired on Alexy's weight formula see Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans, Oxford University Press, 2002) [trans of: *Theorie der Grundrechte* (first published 1985)] 402.
[37] A.D. 28-2010, above n 32, 99-101.
[38] Ibid recital VI, sections 1 and 2.
[39] Ibid recital VI, section 2.1

relation between speakers.[40] Therefore, when drafting judgments, courts need to find a balance between particular facts and general normative statements, to make judgments work as precedents, thus covering the case but also a reasonable set of similar factual scenarios. In order to be achievable in practice, the requirement of universalisability seems to require a rule-oriented approach to judgments.

In this sense, Jeremy Waldron seems to favour a rule-oriented approach to precedent. In a similar vein to what MacCormick and Alexy argued, Waldron claims that judges do not only need to *ground* their decisions in universal terms, but he goes further by stating that they 'should *cite* a general norm or *establish* it as law'[41]. He joins MacCormick and Alexy in defending the ideal that *rationes decidendi* must be derived from general norms and reasons. But he also adds that judges must formulate this rule in an abstract, impersonal way, as a means of guaranteeing judicial impartiality, even if the semantic expression of such norm is subject to re-interpretation by later judges.[42]

What is interesting about Waldron's suggestion is that the aftermath of codification and cassation influence how constitutional courts in the civil law draft *rationes* as explicit, general, abstract and impersonal rules.

Perhaps influenced by the work of Calamandrei and his idea of judicial maxims, Mexican courts seek to identify the *rationes* as general rules known as *tesis.* According to the internal regulations of the Mexican Supreme Court, a *tesis* is the 'written and abstract expression of judicial criterion established when solving a case'.[43] These presumptive explicit *rationes* are identified and re-drafted by clerks and administrative officials. Later, the court that decided the case ratifies its wording. Finally, an administrative organ dependent of the Court publishes them online or in the official report of the Federal Judiciary.[44] This practice of making explicit the *ratio decidendi* of a case is similar to the U.S. holding, where courts explicitly try to identify the rule, rather than it

[40] Ibid (José Ramón Cossío Díaz, concurring), section 5.
[41] Jeremy Waldron, 'Stare Decisis and The Rule of Law: A Layered Approach' (2012) 112(1) *Michigan Law Review* 1, 20. Emphasis added.
[42] Ibid 25.
[43] *Acuerdo Número 20/2013 Relativo a las reglas para la elaboración, envío y publicación de las tesis que emitan los organos del poder judicial de la federación* [Rule 20/2013 Concerning the rules for the drafting, submission and publication of thesis issued by federal courts] 12 December 2013 DOF (México), Section 2.A. *Author translation.
[44] Ibid Arts. 6 to 18.

being inferred from the facts by subsequent interpreters.[45] However, Mexican *tesis* are more formalistic and bureaucratic than U.S holdings, given the influence of clerks and administrative organs in their drafting. Despite their bureaucratic element, *tesis* may be rethought as a practical effort to establish rules, as Waldron has suggested, even if their written formulation is only prima facie binding and subject to later interpretations.

In the Colombian Constitutional Court, the approach to the *ratio decidendi* by the deciding court is less formalistic than in Mexico, but it is still rule-oriented. According to its internal regulations, until 2015 one of the functions of the clerks was to identify the *tesis* held in a particular judgment.[46] Since 2015 the binding criterion is no longer formally known as *tesis* but as *ratio decidendi*. Still, the identification of rules in light of the legal question to be answered is still a duty of the law clerks.[47] Moreover, as discussed in Chapter I, the Court has explicitly acknowledged that its judgments produce binding 'subrules' that bind later courts in similar cases.[48] Colombian judges use these subrules to systematise precedents that have tackled a similar question of law. They reconstruct them to form rational wholes, and may even represent them in informative tables.[49] Without the formalism of Mexican *tesis,* Colombian judges also use subrules, first, to detect the standard identified or developed in an individual precedent, and then to interpret such rule as a member of a sub-set of rules in a systematic way.

Despite it being a deep-rooted practice of the Mexican judiciary – or perhaps precisely because of it – scholars such as Ana L. Magaloni and Diego López have questioned the use of *tesis,* implying that it should be abandoned. According to Magaloni, *tesis* are a remnant of legal formalism that favours literalism in the interpretation of judgments and creates rules that are actually detached from the facts of the case.[50] Likewise, López has questioned the formalistic and

[45] On the holding of a case in U.S judicial practice see Peter M. Tiersma, 'The Textualization of Precedent' [1187] (2006) 82(3) *Nortre Dame Law Review* 1187, 1213, 1244-60. See also,Frederick Schauer, 'Opinions as Rules' (1995) 62 *The University of Chicago Law Review* 1455; Frederick Schauer, *Thinking Like a Lawyer* (Harvard University Press, 2009) 51-6.

[46] *Reglamento Interno de la Corte Constitucional* [Internal rules of Constitutional Court] 21 October 1992 DO (Colombia*)*. Art. 22, f, 2.

[47] Ibid, as amended on April 30 2015, Art 22, a).

[48] T-1317-01, Rodrigo Uprimny Yepes, 7 December 2001, recital II, section 6; T-110-2011, Luis Ernesto Vargas Silva, 22 February 2011, recital II, section 10; C-634-2011, Luis Ernesto Vargas Silva, 24 August 2011, recital VI, section 11.3.

[49] See e.g .,T-617-2010, Luis Ernesto Vargas Silva, 5 August 2010, Appendix 1.

[50] Ana Laura Magaloni Kerpel, '¿Por qué la Suprema Corte no ha sido un instrumento para la defensa de los derechos fundamentales?' in Eduardo Ferrrer Mac-Gregor and Aturo Zaldívar Lelo de Larrea (eds), *La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho.* (UNAM, 2008) vol II Tribunales constitucionales y democracia., 271, 281 footnote 21; Ana Laura

bureaucratic approach of *tesis* towards *rationes* for neglecting the facts of case.[51] Both seem to favour a more fact-oriented approach to adjudication.

Members of the Mexican judiciary have also questioned the adequacy of *tesis* for creating abstract rules. Justice Zaldívar has noted that, given the process of drafting, *tesis* may be detached not only from the facts of the case but from the original judgment itself.[52] Likewise, Justice Cossío, writing extrajudicially, has suggested that later judges and parties should be the ones who infer the *ratio decidendi*, not the deciding court.[53]

Critics of *tesis* are correct in stressing that drafting abstract rules distances courts from the concrete facts of a case, but a certain degree of abstraction is necessary for universalisability to work in practice. The influence of bureaucratic officials may affect the accuracy of the *tesis,* presenting as ratio what was in fact obiter. Moreover, for a time only *tesis* were available, and the judgment was not publicly available, however, the tendency is to make public all judgements from superior courts. Also, the practice of judges of formulating abstract and impersonal rules can be valuable for universalisability.

Instead of abandoning the practice, *tesis* might be *reformed*. Judges may strive to articulate the universal rule that covers the case and will control future scenarios, even if it can be re-interpreted by later judges. The deciding court can assume the responsibility of identifying the material facts, reformulating them with a moderate level of abstraction, and justify the rule, based on a constitutional rule or principle. The *tesis* must have the structure of a rule. As rules, *tesis* must have a clear antecedent that describes a pattern of behaviour formed by the set of facts of the case, and a consequent that states that such behaviour is permitted, prohibited or commanded.[54] In fact, this judicial effort at formulating, in writing, a comprehensive antecedent and the corresponding legal consequent, is the most practical instantiation of universalisability in adjudication.

Magaloni Kerpel, 'La Suprema Corte y el obsoleto sistema de jurisprudencia constitucional' (2011) 57 *Working Papers: Centro de Investigación y Docencia Económicas (CIDE)*.

[51] Diego López Medina, *El derecho de los jueces* (Legis, 2nd ed, 2006146, footnote 9.

[52] Public session of the Plenum of Mexican Supreme Court, 25 May 2015 (discussing C.T.182-2014, pending resolution), 27.

[53] José Ramón Cossío Díaz, *La controversia constitucional* (Editorial Porrúa, 2014) 696.

[54] The antecedent of a rule is also known as a protasis or a hypothesis. See e.g., Hans Kelsen, *General Theory of Norms* (Michael Hartney trans, Clarendon Press Oxford, 1991) [trans of: *Allgemeine Theorie der Normen* (first published 1979)] 19-21.;Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford University Press, 1991) 23.

The reform of *tesis* may be grounded on four basic guidelines. Firstly, only some constitutional judgments, even from last-resort courts, are worthy of *tesis*. In fact, the current legal framework already stipulates that only criteria that are 'relevant'[55] or 'new'[56] require the formulation of a *tesis*; other judgements are a mere application of the relevant pre-existing law. Nevertheless, the meaning of 'relevance' and 'novelty' is unclear. It may be suggested that a novel combination of facts is one that has not been considered in previous decisions and that such facts are subsumable under a rule or principle not yet interpreted. Thus, the formulation of *tesis* presupposes an exercise of comparison in which the author of the rule bears the burden of argumentation in showing its novelty in contrast with previous decisions on the same subject matter. This limitation on the production of *tesis* could achieve two goals. On the one hand, it is a political constraint on the lawmaking role of judges: not all judgements meet the requirements of developing or creating the law. When there is a clear and non-distinguishable ascribed norm, the role of subsequent judges is limited to applying the law rather than developing it. On the other hand, *tesis* could fulfil the function of a filter for granting precedential value to judgments. In this way the overproduction of judgments is reduced and they become more manageable for legal participants, as not every judgment will produce new rules.

Secondly, authors of *tesis* should explicitly identify the source(s) – i.e., the constitutional or legislative provision or ascribed norm – that is being interpreted. The identification may serve to prevent the production of redundant *tesis* that merely reproduce the text of prior interpretations. More importantly, the textual identification makes transparent the constraint on interpreters. It is within the semantic borders of a given source that subsequent interpreters can develop the law creatively. Every statement outside the semantic boundaries of a source becomes an illegitimate use of the judicial lawmaking role. This semantic constraint limits value judgments on the part of judges. This constraint makes clear that universalisability in law is relative to the rules, principles, and values currently recognised by the constitutional system.

Thirdly, authors of a *tesis* should formulate it as an authentic rule with a degree of abstraction greater than the facts of the case but more concrete than the source interpreted. The formulation of *tesis* should clearly identify the decisive facts that prompted the Court to rule that a certain

[55] *Ley de amparo, Reglamentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos* [Amparo act, an act regulating articles 103 and 107 of Mexican Constitution] (Mexico) DOF, 3 April 2013, Art. 218.
[56] *Acuerdo Número 20/2013,* above n 43, Art. 4 E.

pattern of behaviour is permitted, required or prohibited. For example, in the discussed judgment A.D. 28-2010, the Court would have needed to identify the relevant fact that prohibited awarding damages in the case at hand but that permits it in other cases. Was the relevant fact the symmetry between journals that allows equal exchange of arguments? Or was it the good faith of the accusation of the accuser? The explicit identification of the facts makes plain which rule will be applicable not only to identical cases but also to similar ones.

Fourthly, and most importantly, fellow members of the Court need to assess the universalibility of the rule for future scenarios. Following MacCormick's conception of universalisability, but considering the institutional nature of multimember courts,[57] an individual judge proposes a *tesis* that he or she is willing to apply as a universal rule, yet the Court is the one that finally approves it, taking into account the consequences for future scenarios. The task of ratifying the wording of the *tesis* should not be understood only as the administrative task of selecting the text that makes a criterion publicly known through its inclusion in law reports. Instead, judges should be conscious that such rule will affect the legal sphere of citizens who engage in similar behaviour. A *tesis* is not a rule that a person is willing to convert into a universal rule to guide his or her behaviour, but a proposal that fellow judges need to refine and polish as representatives of the constitutional community.

In this way, a reformation of *tesis* understood as rules that cover the facts reformulated at a moderate level of abstraction appears to be a current adaptation of past efforts of formal justice to reduce judicial discretion. This understanding of *tesis* seems to fit well with current constitutional adjudication in the civil law, where the three branches of government enjoy an equal political status. Unlike code provisions, *tesis* are not developed *ex ante* by legislators, and aimed at subordinating other branches of the government. Rather, they are developed by judges when deciding a case, to reduce judicial discretion. Also, unlike the maxims of cassation, that progressively develop *jurisprudence constante* over the course of a sequence of similar cases, so as to limit and guide lower judges, this understanding of *tesis* not only reduces the discretion of judges vertically, but also constrains superior court judges, who make the commitment to follow a rule that they themselves formulated.

[57] On the need to test rulings according to universalisability and their possible consequences see MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning*, above n 13, 96, 100, 101-20. See also, del Mar, above n 20, 429.

What is more, this understanding of *tesis* favours, at least prima facie, a rule-oriented approach to adjudication and universalisability. As Jerzy Wróblewski correctly notes, facts about the world are only relevant to adjudication if they can be linked to a norm or a value recognised by the legal system.[58] That is, in order to be legally relevant, a set of facts needs to be subsumable under a rule or a principle. Hence, when judges identify or create a universal norm in light of a set of facts, they commit themselves to treating future cases alike, and the way this commitment is evidenced is by formulating that rule.

Yet, it must be acknowledged that the rule-oriented defence of *tesis* as a practical materialisation of universalisabiity faces the challenge of decontextualisation. The objection critics raise against *tesis* as abstract rules detached from concrete controversies seems to be based on two grounds, one practical and one normative. The practical reason is that the formulation of abstract, impersonal rules is at odds with the casuistic practice of judicial decision-making that develops the law progressively through a case-by-case approach rather than by the radical transformation of law through general statutes. The normative reason is that it is not the proper task for an unelected judiciary to create general rules, but to apply and interpret the law regarding concrete cases. Thus these critics seems to defend a more minimalistic approach to decision-making, that reduce the creation of explicit rules as much as possible.

Despite the relevance of the criticism, a modification of *tesis* can overcome the problem of decontextualisation. Legal participants in subsequent cases can challenge the wording of apocryphal *tesis* – that is, *obiter dicta* that judges illegitimately transform into binding rules. Interpreters may notice that the *tesis* actually deviates from the facts of the case or the concrete question that parties raised in the previous case. For instance, one *tesis* of A.D. 28-2010 held that the Mexican Constitution does not recognise a right to insult.[59] However, one participant could argue that the legal question in A.D. 28-210 was not about the constitutional protection of freedom of speech when a speaker offends another, but rather a case of a false accusation regarding a crime. Consequently, subsequent interpreters could rebut the presumptive force of the *tesis* and find the 'real' *ratio decidendi* of the case.

[58] Jerzy Wróblewski, 'Il precedente nei sistemi di "civil law"' in Giovanna Visintini (ed), *La giurisprudenza per massime e il valore del precedente: con particolare riguardo alla responsabilità civile* (CEDAM, 1988) 25, 29-30. See also Jerzy Wróblewsky, *The Judicial Application of Law* (Kluwer Academic Publishers, 1992) 317-8, 320.
[59] First Chamber, Book XIX, April 2013, Volume 1, 537, SJF.

As a further point against this criticism of *tesis*, it can be argued that universalibility cannot work in practice without the creation or identification of rules. At some point in the decision-making process the judge needs to subsume the facts under a rule. Then excessive attention to particular facts of previous cases may be used to circumvent binding precedential rules laid down in the past. Given that no two cases are identical, subsequent judges, under the guise of minimalism, may illegitimately reduce the scope of application of a precedent and create a new rule for the case at hand.[60] Hence, a rule-oriented approach can actually reduce judicial discretion when the deciding Court as explicitly identifies the relevant facts and links them by formulating an explicit rule.

Thus the most practical way to honour the forward-looking dimension of universalisabilty is by issuing rules that cover the facts of a case as well as similar scenarios. Mexican *tesis* or Colombian sub-rules can be a concrete tool for complying with universalisability. By drafting universal rules, judges commit themselves to abiding by them in similar scenarios, unless and until relevant circumstances trigger the revision of these rules.

II.2. The Backward-Looking Dimension of Universalisability

While the forward-looking dimension of universalibility urges judges to anticipate future scenarios and issue universal rules, the backward-looking dimension urges them to treat past rules as universal categories.[61] When a previous judge issues a universal rule that covers the facts of the case at hand, later judges must limit their creative role to applying the rule. More precisely, the backward-looking dimension of universalisability requires consecutive consistency.[62] If a court issued a general rule X in light of facts F^1, F^2 and F^3 at time T^1, then at T2, when such facts are instantiated, the later court must be consistent with X.

Once a court has committed to issuing a universal rule compatible with at least one constitutional principle, and formulated it in an explicit way, the later courts are expected to *subsume* facts under the rule and treat similar cases alike. When the rule issued by the previous court is clear enough and faithful to the facts of the case, the later court uses that rule as a premise along with other facts and reaches a conclusion consistent with the precedent.

[60] On distinguishing see Chapters. III and V.
[61] See MacCormick, *Legal Theory and Legal Reasoning*, above n 14, 75.
[62] Lewis A. Kornhauser and Lawrence G. Sager, 'Unpacking the Court' (1986) 96(1) *Yale Law Journal* 82, 105.

However, the previous court may have failed in issuing a clear rule that is faithful to the facts of the case, or it may be an inadequate interpretation of constitutional principles. Perhaps the previous court reproduced the ambiguity and vagueness of the constitutional text, formulating a normative statement that is as indeterminate as the constitutional provision itself. It can also be the case that the rule is clear, but is detached from the point of law actually being discussed, i.e., it is *obiter dicta*. In such scenarios, the later court reconstructs what the previous court decided and infers a rule from the facts of the case. Thus the forward-looking dimension – issuing a precedent – and the backward-looking dimension – interpreting and applying it – interact.

The backward-looking dimension urges later judges at T^2 to be as faithful and charitable to the judgment at T^1 as possible, but not necessarily to its explicit wording, when identifying a rule. The Court at T^1 may have endeavoured to ground its judgement in universal terms, but ultimately the later court at T^2 will interpret the wording of the judgment. Just as legislators cannot fully control how future interpreters will read a statutory provision, likewise, judges at T^1 cannot fully determine how interpreters at T^2 will understand the ratio.

The backward-looking dimension also rationalises the power of the previous court when issuing explicit *rationes* such as Mexican *tesis*. Later interpreters at T^2 can question the apparent canonical nature of a *tesis* by pointing out that its wording is detached from the legal question decided by the court at T^1. The exact wording of a *tesis* may not represent the legal issue decided by the court, in which case its function as a presumptive *ratio decidendi* is subject to rebuttal. In fact, the Second Chamber of the Mexican Court has distinguished two senses of the term 'judgment': as a legal act of deciding a dispute, and as a legal document that represents such an act.[63] In case of discrepancies between the two, as when there is incorrect data in the written judgment, the rest of judicial record is used to interpret the act of judging in light of the stages that anticipated it. Therefore, by the same token, the presumptive ratio needs to be interpreted in light of the judgment as a whole. In case of a discrepancy between the particular presumptive ratio and the judgment as a whole, the latter prevails.

In this way the forward-looking and backward-looking dimensions of universalisability are connected. The previous court tries to formulate a rule as clear and faithful to the facts and

[63] A.I. 279-2007, Mariano Azuela Güitrón, 31 October 2007, recital IV, 27-30.

constitutional text as possible. The later court tries to reconstruct this rule and apply it to the pending case. Applying the universal rule presupposes a previous stage of interpreting the judgment. This process is partially constrained by the degree of abstraction with which the previous court described the facts and ascribed normative statements to it. While the later court can dismiss some normative statements as *obiter dicta*, the description of the facts limits the distinction between what is a binding criterion and a merely persuasive statement. The Mexican case on freedom of expression clarifies this. Later courts will be constrained when one media institution accuses another of a crime, but they will be less constrained regarding the prevalence of freedom of expression over honour, and even less constrained by the importance of the first for the adequate development of democracy. In order for universability to work, a middle ground rule between particular facts and abstract statements is necessary.

Once the later court identifies or reconstructs this rule, it need only follow the requirements of deductive logic to issue a conclusion. The general rule works as a major premise in the legal syllogism, which the court applies to a set of facts ($F^{1,}$ F^2, F^3) and reaches a conclusion about such facts.[64] In a very similar case at T^2, the identified or reconstructed rule might be, for instance: 'When one media institution "A", F^1, accuses another "B", of being guilty of a crime, F^2 B enjoys a symmetrical relation that allows it to reply to A, and F^3 such accusation is not patently false, then it is constitutionally prohibited to award damages in favour of B. The Court at T^1 is committed to a rule that the Court in T^2 honours by applying the identified or reconstructed rule.

To sum up, the backward-looking dimension of universalisability can be reconstructed in three steps. Firstly, universalisability as an ethical commitment urges judges at T^2 to consider what previous courts have ruled in similar cases. Secondly, to honour such commitment, judges at T^2 need to identify or reconstruct the rule laid down in the judgment issued at T^1. Judges identify the rule when there is a clear norm formulated with antecedent and consequent that is faithful to the legal question decided by the court. When the court at T^1 failed to issue such rule, or it is detached from the legal question, then the court at T^2 reconstructs rather than identifies such a rule in light of the legal question. Thirdly, and finally, the court at T_2 uses the identified or reconstructed rule as a premise of the judgment and reaches a conclusion that is consistent with what was ruled at T^1.

[64] See Robert Alexy, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16(4) *Ratio Juris* 433, 448.

III. Strengths and Weaknesses of Universalisability

III.1. Strengths of Universalisability: the Burden of Argumentation for Deviating from Precedent

Universalisability protects the ideal of formal justice identified by Perelman. Once a judge issues a universal rule at T^1, the role of subsequent judges in similar cases (at T^2, T^3 and so on) is expected to be limited to identifying or reconstructing that rule to arrive to the same conclusion already reached at T^1.

In this manner, universalisability safeguards at least three formal principles. According to Alexy, principles are 'optimization requirements' that demand that 'something be realized to the greatest extent possible given the legal and factual possibilities'[65]. These principles can be substantive or formal. Substantive principles safeguard certain contents, such as the right to freedom of expression. In contrast, formal principles back or add weight to certain decisions regardless of their content, and instead because they were the outcome of a legitimate procedure and issued by a competent authority.[66] Usually, formal principles are used to support or protect the decisions of the democratic legislator that followed a deliberative procedure against constitutional review of judges, but formal principles can also be used to protect the decisions of judges following a judicial procedure against the revision of subsequent judges.[67] Regardless of their content, precedents are also backed by formal principles that include authority, equality and legal certainty.

First, universalisability protects the *principle of authority*. Perhaps the constitutional provision was intentionally drafted in vague or ambiguous terms. Constitutional courts at the apex of the judiciary issue rules that ought to be followed by lower judges, or by ordinary judges who lack competence on constitutional questions. The universal rules issued by superior courts bind lower judges vertically.[68] Lower judges may disagree with the conclusion reached by the court, but it is precisely when they disagree that precedent matters.[69] The judicial interpretation of the

[65] Alexy, *A Theory of Constitutional Rights*, above n 36, 47.
[66] Ibid 58, 416.
[67] See Martin Borowski, 'The Structure of Formal Principles- Robert Alexy's 'Law of Combination'' in Martin Borowski (ed), *On the Nature of Legal Principles* (Franz Steiner Verlag 2010) 19, 25 footnote 37.
[68] Schauer, *Thinking Like a Lawyer*, above n 45, 36-42.
[69] Schauer, 'Precedent', above n 15, 575.

constitutional text acquires a preferential hierarchy over other plausible interpretations just because the judicial interpretation followed a legitimate decision-making procedure. The supremacy of the text is reiterated now with the authority of the court that interpreted it. This judicial interpretation acquires autonomy as a source of law.

The enactment of the constitution as a supreme but indeterminate text together with the duty of the judiciary enforce it may be give an implicit authorisation to superior courts to function not only as supreme arbitrators but also interpreters of the constitution. When courts decide a controversy through their judgments, they at the same time develop the constitutional meaning through their precedents.

Framers recognised in the constitutional text a large catalogue of indeterminate rights but, at the same time, they empowered the judiciary to enforce them. On the one hand, Mexican and Colombian Constitutions do not only recognise liberal, but also social and cultural rights. They recognise traditional liberal rights such as freedom of expression, but also other more unconventional rights such as the right to culture.[70] On the other hand, their constitutions recognises the function of constitutional courts as supreme arbitrators and as interpreters. As arbitrators, the Mexican Supreme Court and the Colombian Constitutional Court occupy the apex of the judiciary regarding particular constitutional controversies.[71] As interpreters, these court's rulings become sources of law for later scenarios. The Mexican Constitution states that in non-criminal cases judgements must be grounded in the text or its legal interpretation, and in the absence of this, in general principles of the law.[72] If the constitutional text is unclear, the judicial interpretation of the constitution becomes law. Similarly, in Colombia, as discussed in Chapter I, although Article 230 considers precedents to be an auxiliary source of law, the Court has held that giving precedential value to their judgment fulfils several constitutional goals – inter alia, this guarantees the supremacy of the Constitution.[73] At the same time that they interpret indeterminate provisions, constitutional courts give them a more concrete meaning that guides future cases.

[70] Mexican Constitution, above n 23, Art. 4 [12]; Colombian Constitution, above n 23, Art. 70.
[71] Mexican Constitution, above n 23, Art. 94 [1st] paragraph, Art. 105, Art 107. sections V, VIII, IX; Colombian Constitution, above n 23, Arts. 116 and 241.
[72] Mexican Constitution, above n 23, Art. 14 [4th] paragraph.
[73] C-836-2001, Rodrigo Escobar Gil, 9 August 2001, recital V, section 3.1;T-116-2004, Eduardo Montealegre Lynett, 12 February 2004, recital II, sections 11-2 C-539-2011, Luis Ernesto Vargas Silva, 6 July 2011, recital VI, recital 5.2.7.

The principle of authority may be formulated as follows:

> Judges at T^2 have a duty to reach the same conclusion that was reached in T^1 because the superior court has already clarified the meaning of the constitutional provision X by ascribing a judicial norm Y.

Second, universalisability safeguards the right to *equality before the law*. Judges are forced to treat individuals as members of the same category, and at the same time, later judges are impeded from second-guessing the justification of the categories.[74] In this sense, judges protect the subjective right to equality of citizens in its aspect of requiring treating like members of the same category alike.[75] The Mexican and Colombian Constitutions recognise equality not only as an objective value but also as a subjective entitlement that citizens can claim before judges and superior and intermediate courts, and which the latter can enforce.[76]

Just as legislators must refrain from enacting legislation that treats individuals differently without a rational justification, likewise judges must refrain from issuing judgements in which similarly situated litigants are treated differently without justification. Courts enforce the right to equality when they apply a previous judicial interpretation to other individuals in cases dealing with similar facts and provisions.[77] When inferior courts fail to abide by precedent, superior courts can reverse the judgment and enforce the right to equality.

The meaning of a constitutional provision may be controversial, but once courts issue a universal rule, then the content becomes less indeterminate. When drafting a judgment, judges can choose one canon of interpretation over another. They can choose a so-called literalist interpretation of a particular provision over a systematic reading of several provisions that aim to form a rational

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[74] See Joseph Raz, 'The Problem Of Authority: Revisiting The Service Conception' (2006) 90(4) *Minnesota Law Review* 1003.

[75] On the two facets of the right to equality as treating similarly members of the same category, and treating different members because of their difference. See Carlos Bernal Pulido, *El Derecho de los Derechos* (Universidad Externado de Colombia, 2005) 257-261.

[76] Mexican Constitution, above n 23, Art. 1; Colombian Constitution, above n 23, Art. 13.

[77] See Alfonso Ruiz Miguel, 'Equality Before the Law and Precedent' (1997) 10(4) *Ratio Juris* 372, 379, 382-4.

whole. In turn, this canon of interpretation may be justified on a normative theory of the constitution or on the role of judges. A libertarian judge may seek to protect freedom of expression over honour, given his or her reservations against restricting speech in a free society. Other judges, sceptical of libertarian approach, may favour a more restricted reading, linking freedom of speech provisions with non-discrimination prohibitions that suggest that hate speech should be regulated. Once the court has issued a liberal rule, equality before the law grounds the presumption that in later similar cases, liberal *and* non-liberal judges will apply that same standard.

The principle of equality before the law can be formulated as follows:

> Litigants at T^2 are entitled to receive the same judgement that was reached in T^1 because they are members of the same category laid down in the norm Y at T^1.

Third, universalisability safeguards the *principle of legal certainty*.[78] In the case where the constitutional text did not lay down the specific rule needed for deciding a case, once the court performs its function as supreme interpreter of the constitution, this interpretation becomes a positive legal source. In later cases, all courts are expected to follow that interpretation rather than question it and modify the law, thereby defeating the legitimate expectations of citizens.

Analogously to the ideal of equality, certainty is not only an abstract value, but can also be a subjective entitlement, or at least a legitimate expectation, of litigants. In states adhering to the rule of law, there is a presumption that authorities must not modify the law in the process of applying it. When there is a need to modify the law, formal amendments to the text can alter its content with prospective effects. By the same token, once courts have issued a rule that has clarified the meaning of the constitutional text, there is a presumption that later courts will follow it. The Mexican Constitution prohibits the retroactive application of legislation when it prejudices individuals, and recognises the right to due process following pre-existing laws.[79] The right to the non-retroactive application of legislation is so fundamental that even in cases of emergency

[78] On legal certainty as a necessary, although conflictive element of the law always in tension with justice and expediency see Gustav Radbruch, 'Legal Philosophy by Gustav Radbruch', *The Legal Philosophies of Lask, Radbruch, and Dabin* (Kurt Wilk trans, Harvard University Press, 1950) 107-112, 118, 131. See also, Jean Dabin, 'General Theory of Law by Jean Dabin', *The Legal Philosophies of Lask, Radbruch, and Dabin* (Kurt Wilk trans, Harvard University Press, 1950) 411-5. See also, Robert Alexy, 'Legal Certainty and Correctness' (2015) 28(4) *Ratio Juris* 441, especially at 443.

[79] Mexican Constitution, above n 23, Art. 14 [1] and [2].

decrees by the President, it is one of the rights that cannot be suspended.[80] Analogously, the Colombian Constitution requires judges to apply pre-existing legislation when making judgements, unless new legislation is more beneficial.[81] Thus, if judges are bound by legislation, and in case this is unclear, they are bound by a previous interpretation of it.

There is a presumption against modifying the precedent similar to the mandate against issuing retroactive legislation. When one judgment is no longer subject to any kind of judicial review, it becomes the legal truth for the parties of the case, i.e., it becomes *res judicata*. The final judgment is one to which the loser party is duty bound, while it becomes the right of the winning party. The judgment becomes a concrete norm, part of the legal sphere of the parties that no judicial authority can abrogate. [82] The influence of the judgment in the sphere of other citizens is not absolute, but still grounds a legitimate expectation that similar cases dealing with like facts and provisions will be treated alike.

The principle of legal certainty can be formulated as follows:

> Litigants at T^2 are entitled to receive the same judgement that was reached at T^1, because the norm Y laid down at T^1 grounds a legitimate expectation that future cases will be treated alike.

Thus, anchored in the principles of authority, equality and certainty, the principle of universalisability urges judges to treat precedents as *fixed* legal rules. The forward-looking dimension urges judges to issue universal rules that cover the facts of the case at T^1 and future similar cases. The backward-looking dimension urges later judges to identify or reconstruct the norm laid down at T^1 and apply it consistently at T^2, T^3, and so on, without modifying or abrogating these rules at the time they apply them. This understanding of universalisability presupposes that judges only need to clarify the meaning of a provision once and for all, so that the role of subsequent judges is limited to apply such interpretation. Conscious that their judgments will become precedents, judges of the past made an effort to issue universal rules that cover the facts of a given case but also similar cases through the passage of time. By issuing

[80] Ibid, Art. 29 [2].
[81] Colombian Constitution, above n 23, Art 29 [2].
[82] On res judicata as non-derogable norm, see Kelsen, above n 54, 110.

such universal rules, they communicate to citizens that whenever they engage in the behaviour described by the rule, then they will be treated consistently with the precedent.

In this way, there can be no doubt that universalisability safeguards formal justice in treating similarly situated people alike, but it also revives the old ideal of the perfect legislator pursued by the ideology of codification, now presupposing the ideal of the perfect judge. Nowadays, rational judges issue canonical rules ex post facto and thereby substitute the wise legislators who issued canonical laws ex ante. Before, the source of uniformity was in the code; now the source of uniformity is in judicial precedents. However, both codification and universalisability share a link with the past. Today's decisions will constrain decision-makers in future cases. When the constitution drafter enacts a text that is unclear, it is necessary that judges clarify its meaning via interpretation so that later judges will be constrained in later cases.

III.2. Weaknesses of Universalisability: Disregarding a Plurality of Constitutional Principles and the Dynamism of Society

In light of the ideal of universalisability, once the Court decided a constitutional controversy, it appears that the only role of later judges will be to *apply* the precedential norm. For instance, after a majority of judges have interpreted the constitution and ruled that punishing abortion is constitutionally required in all cases, or that accusing a journal of being an accomplice to terrorism is constitutionally permitted, later courts just need to subsume the facts of the case under that rule.

The problems with universalisability begin when we consider that constitutional law deals with a plurality of principles and aims to regulate a heterogeneous and dynamic society.[83] Later cases may deal with similar but also different facts, and in turn, these facts are also subsumable under competing and evolving constitutional principles. Returning to the example of freedom of expression, there can be at least three scenarios that cast doubt upon the universalisability of precedent as instantiated in constitutional adjudication. Firstly, there can be other facts that warrant a different conclusion, if one principle is more affected at T^2 than at T^1. What if a newspaper accuses a small communitarian radio station of committing a crime? The relationship here is not symmetrical, in that the radio station does not have the same rhetorical power as the

[83] On decision-making procedures in the face of disagreement see Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) especially at 116, 306-9.

radio station. In this scenario, the right to equality is in tension with freedom of speech, because speakers do not enjoy equal standing, as the norm at T^1 seems to presuppose.

Secondly, there can be other facts that warrant a different conclusion in light of other constitutional principles. What if one journalist publishes belittling remarks about other journalists with regard to their being indigenous, women, homosexual, or members of some other minority? Here freedom of expression clashes with the right to non-discrimination. In this scenario, the liberal and individualist conception that prioritises speech grounded on formal equality is in tension with provisions that recognise material inequality and acknowledge the duty to put an end to discrimination.[84]

Thirdly, universalisability seems to be inadequate for correcting past mistakes of interpretation. For example, as analysed in Chapter I, in 1994 the Colombian Court issued a universal rule asserting that punishing abortion is constitutionally compulsory in all cases, including instances of rape and foetus malformation.[85] The majority of justices may have been willing to apply such rule to all future cases, thereby complying with the forward-looking aspect of universalisability. What is more, the ruling is subsumable under the principle of protection of life.[86] Nevertheless, it is at least plausible to argue that such a universal rule is at odds with the health and autonomy of women, even if the life of the foetus is worthy of protection. Should correctness therefore be sacrificed for the sake of consistency?

In this sense, Leonor Moral, following Luc Wintgens, argues that coherence in law justifies departing from precedents, even if this is at odds with consistency and universalisability.[87] Moral claims that modifying or abrogating judicial norms is inconsistent with precedents, but it can still be justified by appealing to a higher level of coherence.[88]

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[84] Mexican Constitution, above n 23, Art. 1 [5]; Colombian Constitution, above n 23, Art 13 [2-3]

[85] C-133-94, above n 1.

[86] Colombian Constitution, above n 23, Art. 11 recognises the inviolable right to life. Article 44 recognises the fundamental of children to life. Furthermore, The Preamble and Article 2 recognise life as a value worthy of constitutional protection.

[87] Leonor Moral Soriano, 'Precedents: Reasoning by Rules and Reasoning by Principles.(Rhetoric and the Rule of Law: An Author's Day with Neil MacCormick)' (2008) 59(1) *Northern Ireland Legal Quarterly* 33, 35-6. See, Luc. J. Wintgens, 'Some Critical Comments On Coherence In Law' in Bob Brouwer et al (eds), *Coherence and Conflict in Law: Proceedings of the 3rd Benelux-Scandinavian Symposium in Legal Theory, Amsterdam, 1992* (Kluwer Law and Taxation Publishers 1992) 109; Luc. J. Wintgens, 'Coherence of the Law' (1993) 79(4) *Archiv für Rechts- und Sozialphilosophie* 483.

[88] Moral Soriano, 'Precedents: Reasoning by Rules and Reasoning by Principles.(Rhetoric and the Rule of Law: An Author's Day with Neil MacCormick)', above n 87, 39-40.

This appeal to coherence can take place through the techniques of distinguishing, when the scope of a previous judicial rule is reduced, or that of overruling, when a previous rule is abrogated.[89]In turn, such justification refers to 'the relation between the new ruling or interpretative criterion and the rest of norms, values and principles'[90]. To link her theoretical claim with practical reality, she shows how the German Constitutional Court usually follows precedents due to its respect for equality, but can also distinguish and overrule precedent for the sake of the correct evolution of the law.[91] While it was not Moral's goal to propose a coherentist theory of precedent, her assertion illustrates how coherence can triumph over universalisability, allowing flexibility and dynamism in judicial decision-making.

In order to clarify Moral's claim about the limits of universalisability, it is necessary to discuss Wintgens' conception of legal coherence. His claims regarding legal coherence appear to be threefold. First, coherence is a matter of *degree* rather than an all-or-nothing matter.[92] A legal system can have a few inconsistent rules and still be a coherent system as a whole.

Second, according to Wintgens, there are three levels of coherence in the law. At the first level, there are *rules* in isolation that judges apply to concrete cases.[93] Consistency will require judges to apply a particular rule uniformly in all cases controlled by that rule. At the second level, rules are no longer seen in isolation but as members of a *set of rules*.[94] Judges do not resolve cases by applying a single rule. Rather they interpret them as part of a rational whole, reading one in light of the other and trying to reconcile apparently incompatible rules. This canon of interpretation that urges interpreters to see rules as part of a whole is what civil lawyers call a systematic interpretation.[95] Finally, the third level of coherence refers to ideological antinomies between competing branches of law that cannot be resolved by systematic interpretation but are settled by choosing one extra-legal principle over another.[96] For instance, Wintgens argues that the principle of legality, i.e. 'what is not forbidden is permitted' can be interpreted as a defence of the autonomy of individuals and as a implicit authorisation for citizens to act as they will. However,

[89] Ibid 34, 40-2. On distinguishing and overruling see Chapters V and VI respectively.
[90] Ibid 40.
[91] Ibid 40; Leonor Moral Soriano, *El Precedente Judicial* (Marcial Pons, 2002) 216-8.
[92] Wintgens, 'Some Critical Comments On Coherence In Law', above n 87, 115. On the practice of distinguishing cases in Germany see, Robert Alexy and Ralf Dreier, 'Precedent in the Federal Republic of Germany' in Neil MacCormick and Robert S. Summers (eds), *Intepreting Precedents* (Darthmouth Publishing, 1997) 17, 55.
[93] Wintgens, 'Some Critical Comments On Coherence In Law', above n 87, 117-9.
[94] Ibid 119-20.
[95] On systematic interpretation of legislation, see e.g Riccardo Guastini, *Estudios sobre la interpretación jurídica* (Marina Gascón and Miguel Carbonell trans, UNAM, 1999) 43-7.
[96] Wintgens, 'Some Critical Comments On Coherence In Law', above n 87, 120-3, 130-2.

on grounds of a liberal outlook, he notes that such protection of autonomy does not apply to officials, who, in their public character, may not act unless there is explicit authorisation empowering to act in a certain way[97] Thus, it seems that Wintgens suggests that the division between private and public law is justified because the silence of the law should be interpreted in the sense of favouring the freedom of citizens, rather than enabling officials to punish wrongdoers for acts not publicly regarded as crimes.

Third, Wintgens distinguishes between internal and external rationality, where these are nevertheless interrelated in practice. *'Internal rationality'* refers to the lack of logical or formal contradiction between rules, given that the law aspires to be a set of non-contradictory rules that form a unitary system.[98] '*External rationality'* refers to the lack of contradiction between the substantive purposes or moral goals that rules pursue, where, in cases of tension, this prevails over internal rationality.[99] In short, internal rationality refers to formal consistency and external rationality to principles, goals or values worthy of pursuit.

Wintgens' theory is valuable for understanding the limits of universalisability in constitutional adjudication, although it needs two clarifications and one qualification. Wintgens is right in asserting that coherence is indeed a matter of *degree*. As will be further discussed in chapter IV, in the argumentative context of adjudication this notion of grades of coherence implies that judges need to show that a judgment is *more* coherent with precedents than its alternative solutions. Although Wintgens's piece is unclear about what counts as more coherent,[100] it can be suggested that the dimension can be both quantitative and qualitative. There is greater quantitative coherence when one precedential rule is supported by a larger set of rules than its alternatives. It is qualitatively more coherent when a judgment at T^1 is grounded in a higher principle or is more relevant at T^2 than at T^1. In cases where judges seek to distinguish or overrule a case, thereby defeating the principle of universalisability, they need to show that the new precedent is more coherent because a larger set of rules support it, or another principle warrants an exception, or a higher principle justifies the overruling.

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[97] Ibid 121-3.
[98] Ibid 112-3,
[99] Ibid 112.
[100] Ibid 115. Wintgens states that:´A legal system is proportionally better if there are less inconsistencies, hence when it is more coherent. Being "better" is not merely an aesthetic qualification, but is thought of as a moral quality. To see this point, one can refer to one of the dimensions of Fuller's "internal morality of law", namely the requirement of the absence of contradictions in the laws´. See, Lon L. Fuller, *The Morality Of Law* (Yale University Press, 1969) 65-70.

Another clarification of Wintgens work is that the levels of coherence in constitutional law are limited to two rather than three. Constitutional law is in itself an autonomous branch of public law concerned with the limitation and competences of authorities and the fundamental rights of citizens as established by the supreme text or developed by Courts. Given the supreme position of the constitution, in cases of tension between constitutional law and other branches, the first prevails. For example, if a certain provision of the civil code states that damage to honour may be susceptible to civil liability, and courts interpret it the sense that honour encompasses corporate prestige,[101] but the Constitutional Court rules that the constitutional right to freedom of expression pre-empts the awarding of damages in such a scenario, then the civil code and its interpretation by ordinary courts yields to the constitution and its interpretation.[102] Therefore, at least at first sight, constitutional coherence is limited to two levels: judicial rules interpreting the text, and constitutional doctrines developed to form a set of rules and linked by a common principle, without encompassing coherence with all other branches of the law, and the legal system as a whole.

The most debatable aspect of Wintgens' theory is the distinction between internal and external rationality. In a constitutional state, it is questionable to argue that the assessment of values or goals that rules pursue is a matter of 'external' rationality. The principles or values are the ones recognised explicitly by the constitutional text or developed by precedents that clarified its meaning. The constitutional text already recognises a plurality of principles, and the tension between them in concrete cases is internal to law. While judges may enjoy a degree of discretion regarding the conflict of principles, much of the time this choice is partly determined by the law.[103] The burden of argumentation for a judge to challenge universalisability and consistency requires that the new ruling is more coherent than the previous decision.

The grounds to distinguish or overrule precedents, and thus to defeat universalisability, are not external to the law. Rather, the constitution must recognise that a judge is able to justify not following a precedent if the precedent did not anticipate circumstances that are relevant to the legal system. One constitutional principle can make relevant some features at T^2 that were not considered at T^1. For instance, the principle of non-discrimination at T^2 made relevant the fact

[101] *Código Civil para el Distrito Federal*, [Civil Code of Mexico Central District], 26 May 1928 DOF, (Mexico). Article 1916; First Chamber, C.T.100-2003, Juan Silva Meza, 1 December 2004.
[102] A.D.R. 28-2010, above n 32.
[103] G. Marshall, 'Positivism, Adjudication, and Democracy' in P.M.S Hacker and Joseph Raz (eds), *Law, Morality, and Society: Essays in Honour of H. L.A. Hart* (1977) 132-144, 143-4.

that using homophobic expressions may defeat the norm established at T^1 grounded on the principle of freedom of expression. The justification not to follow a precedent needs to be internal to the law; only in that way can a judge identify other relevant facts to justify a different treatment at T^2. This is how constitutional principles serve to challenge previous exercises of categorisations.

Once it is acknowledged that the grounds for not following precedents are internal to the law rather than external, it starts to become evident that universalizability, and the ideal of uniform categorisation, are in tension with the *plurality* of principles that constitutions safeguard. The same facts can be subsumed under competing principles that warrant incompatible conclusions. For example, according to A, expressing homophobic expressions is a kind of behaviour protected by the principle of freedom of speech, but for B, such expressions are prohibited by the principle of non-discrimination. It is possible that two judges might comply with the principle of universalisability and yet arrive at incompatible judgements. A libertarian judge can invoke the right to freedom of expression as a universal principle while a socio-democrat judge can appeal to the right to non-discrimination. The discussion is indeed ideological, but the ideology of each judge can also find a basis in the constitution.

The tension between the universalisabilty of precedent and the plurality of principles is particularly acute when constitutions recognise antagonistic principles based in competing ideologies. The Mexican and Colombian Constitutions recognise liberal rights grounded on the idea of formal equality, such as freedom of profession, freedom expression, and freedom of religion.[104] These constitutions also recognise social rights that, instead of presupposing free and equal individuals, recognise inequality and seek to achieve material equality for groups vulnerable to discrimination, appealing to such rights as the right not to be discriminated in virtue of gender or sexual preferences, or the right to health care for children.[105]Moreover, these constitutions also recognise communitarian rights that require authorities to respect the autonomy of indigenous peoples and their right to cultural diversity and survival.[106] The judge at T^1 may have favoured one constitutional principle and issued a rule that clarified its meaning, but this rule will interact at T^2 with other principles that may cast doubt in other circumstances.

[104] Mexican Constitution, above n 23, Arts. 5[1], 6 [1], 24[1]; Colombian Constitution, above n 23, Arts. 19, 20, 26.
[105] Mexican Constitution, above n 23, Art. 1[5], 4 [9]; Colombian Constitution, above n 23, Arts. 13[1-2], 44.
[106] Mexican Constitution, above n 23, Art. 2; Colombian Constitution, above n 23, Arts. 246-8, 286.

In turn, the plurality of constitutional principles parallels the *heterogeneity* of society. Rules express categories of facts linked to individuals who engage in certain behaviour. At first sight, these categories appear as precise, comprehensive and fixed classes. However, a similar set of facts or a similar group of individuals can be subsumed under several categories. On occasion, categories can be complementary and overlapping, but on other occasions, they can be incompatible or even contradictory. The expression of homophobic attitudes can be framed as a legitimate exercise of freedom of expression, but it can also be framed as an undemocratic act that perpetuates prejudice and discrimination. The ideal that precedential rules work as universal categories becomes less plausible once these are seen in light of more principles.

The heterogeneity of society reminds us of another facet of the right to equality: treat members of different categories differently.[107] The right to equality is not a right to treat others uniformly or identically. Rather, it is a right to justify similar or different treatment on constitutional grounds. Thus subsequent judges can invoke a principle to justify not following a precedential rule because the category previously identified or created at T^1 should not include the individuals at T^2 because they manifest different features to the individuals in T^1, differences that are constitutionally relevant in light of a recognised constitutional principle.

Furthermore, societies are not only formed by individuals whose behaviour can be classified under heterogeneous categories, but the grounds that justify such categories are *dynamic.* While it is possible that at T^1 judges interpreted the constitutional principles as faithfully as possible to prioritise the right principles, this ranking could evolve through time. The evolving interpretation of the constitutional text casts doubt on the ostensibly timeless quality of universalibility, to the extent that it is possible that the legal community at T^2 might become aware that the norm issued in T^1 was a mistake, or at least that it became out-dated.

Thus, while the formal principles of justice that support universalisability aspire to see constitutional law as a set of stable and uniform sets of categorical rules, the plurality of substantive principles suggests that such categories are flexible and dynamic. The substantive elements are as fundamental as the formal ones. Constitutional law is not only anchored in the principles of authority, equality, and certainty but also on all other substantive elements that ground its axiological basis.

[107] Bernal Pulido, *El Derecho de los Derechos*, above n 75, 257.

Certainly, universalisability understood as an ethical commitment is valuable for constitutional adjudication. The forward-looking dimension urges judges to cite a constitutional a principle that grounds their decisions and anticipates that their judgment will become a precedent for later cases. It urges judges to decide a case and to justify it in such a way that all essentially similar cases will be treated alike. The backward-looking dimension urges judges to identify or reconstruct precedential rules and be consistent with them as far as possible. In combination, both dimensions of universalisability ground a presumption in favour of following precedents. Such presumption can only be rebutted by meeting the burden of argumentation.

However, universalisability understood as a logical constraint is not necessarily valuable for constitutions that recognise a plurality of principles. Later judges can appeal to constitutional principles to justify not following precedents and being inconsistent with them. Formal or logical consistency can yield to susbtantive coherence with principles when the facts of the later case are relevant in light of a principle that was not considered by the previous court and that justifies a different conclusion. The presumption in favour of following precedential rules is subject to rebuttal by appealing to principles found in the constitutional text or developed by a greater set of precedents.

IV. A Nuanced Approach to Universalisability

The commitment to coherence between constitutional precedents requires a nuanced approach to universalisability. As an ethical commitment, universalisability serves to reduce incoherence among precedents to the extent that judges need to identify the norms ascribed by past judges. This requirement is itself valuable for constitutional adjudication. Instead of starting from scratch every time they decide a case, judges consult previous decisions that tackled similar questions. In this manner, universalisabilty can help to reduce blatant inconsistencies that occur when courts do not cite or discuss previous decisions and thus do not justify the modification or abrogation of norms.

The greatest strength of universalisability is that it imposes a burden of argumentation on later judges. By forcing judges to honour the formal principles of authority, equality, and certainty that ground judicial norms, it reduces their discretion. Later courts are not only bound by the

constitutional text issued by framers, but also by the judicially ascribed norms. Together these principles create a presumption in favour of following precedent rather than distinguishing or overruling.

Nonetheless, when the ethical commitment to universaliability is confused with the logical conception of it, the presumption in favour of following precedents may become an unreasonable constraint. Rather than a presumption in favour of following precedents, it becomes a dogma. While precedents usually produce rules, principles can be used to challenge a given rule. Subsequent legal participants can stress the presence of different facts in the case at hand that are relevant according to a pre-existing constitutional principle. In this way, the subsequent decision may be in tension with the precedent, but it is, nevertheless, justifiable according to the constitution.

A nuanced approach to universalisability requires judges to identify or reconstruct past norms, but it also requires them to consider the facts of later cases in light of constitutional principles. The presumption in favour of following precedents may succumb when the category created by the rule disregarded facts that become relevant in later cases and thus warrant the modification or abrogation of the rule.

The proposal to reform the practice of Mexican *tesis* that identifies *rationes decidendi* with abstract and impersonal rules can serve to realise this nuanced approach to universalisability. In cases of first impression, judges have the prima facie responsibility of identifying the rule used to decide the case and that will control future cases. The explicit formulation of a rule not only makes the lawmaking role of judges evident but also limits it. Once a previous court has issued a clear rule, later interpreters need first to identify it and then are prima facie bound to it. Then, if later judges consider unanticipated circumstances in the controversy at hand, or a past mistakes in interpretation leads them to reformulate a settled rule as an exception to the principle of universalisability, *tesis* makes this process transparent similarly to the way a modification or abrogation of an enacted legislative rule makes evident the tension or incompatibility between ascribed norms.

Chapter III. The Constrained Role of Particulars in Constitutional Adjudication

Moral particularists claim that there are no unrevisable principles and that competent moral decision-makers do not need to apply them to make rational decisions. Rather, an analysis of the holism of reasons that arises from particular situations, some reasons counting in favour and other against and action, is the way particularists make decisions. While particularism has emerged in the field of moral philosophy, legal scholars have developed a parallel discussion, arguing that the meaning ascribed to legal sources is revisable in light of particular situations. In this way, legal particularism arises as an alternative to the universalism that treats rules as relatively fixed and unrevisable. This chapter claims that legal particularists are not sufficiently sensitive to the distinction between the context in which the moral agent makes decisions and the context in which constitutional judges resolve cases. While particular facts may trigger the revision of the meaning ascribed to a source, these facts must be constitutionally relevant to warrant its revision. Thus, the holism of reasons is mediated and partially constrained by the interpretation of legal sources.

I. Particularism in Practical Reasoning

The last chapter critically assessed the principle of universalisability that requires judges to solve similar cases alike. Universalisability, understood as a logical constraint, urges judges to subsume facts under a judicially ascribed norm. However, judges can reject the presumption in favour of following precedent by identifying constitutionally relevant differences between the precedent and the case at hand that justify distinguishing cases. Universalisability does capture the constraint that rules exert when judges apply or follow precedent, but it does not explain or justify the practice of distinguishing cases when there are unanticipated facts that trigger the revision of the precedent, or when judges overrule a mistaken decision. In these scenarios, universalisability must be understood as a constitutional commitment by legal officials, particularly judges, to consider previous cases, rather than a categorical or unsurmountable logical constraint. Judges ought to consider previously ascribed norms, but they can also justify distinguishing a precedent and even overruling it.

This Chapter analyses the role of particularism in law as opposed to the ideal of universalisability. For the purposes of this Chapter, universalism, principlism and generalism are used interchangeably to refer to approaches that consider that general principles or rules do inform and constrain decision-makers. Moral particularists hold that general standards – rules or principles – are irrelevant for deciding concrete cases or justifying moral judgements; rather, the decision is made in light of the particular features of the situation. Legal particularists argue that the meaning ascribed to sources can be defeated in light of unanticipated circumstances. Both moral and legal particularists stress the significance of particular situations as distinct from general standards to decide cases.

Moral particularism is linked to the work of the moral philosopher Jonathan Dancy.[1] Dancy questions the significance of general moral principles without giving up on morality as a rational practice.[2] Against the static, closed, and codifiable portrait of morality defended by 'generalism'[3], he proposes the 'holism of reasons'[4] as a more accurate and satisfactory account of what competent moral agents do when judging an action. Against the generalist who infers rules or principles from cases, Dancy claims that '[w]hatever is a reason in one case may perfectly well be no reason at all in others, and so there can be no sense in appealing to other cases in support of one's view of how things are here.'[5] One key tenet of particularism is the 'holism of reasons', which works by analysing how reasons contribute in favour or against a particular action to make it right or wrong,[6] without extracting any standard for future cases.[7]

Dancy's particularism is concerned with morality, not with legality. For instance, he argues that morality is not a set of stable or predictable standards, the latter seeming to him like 'traffic regulations'[8]. According to him morality 'was not invented by a group of experts in council to serve the purposes of social control'[9]. Dancy also says that to be a competent decision-maker one

[1] See Gerald Dworkin, 'Theory, Practice And Moral Reasoning' in David Copp (ed), *Oxford Handbook of Ethical Theory* (2006) 626, 634-6.
[2] Jonathan Dancy, *Ethics without Principles* (Oxford University Press, 2004) 1; Jonathan Dancy, Moral Particularism (2013) *The Stanford Encyclopedia of Philosophy (Fall 2013 Edition)* <http://plato.stanford.edu/archives/fall2013/entries/moral-particularism/> .
[3] Dancy, *Ethics without Principles*, above n 2, 7.
[4] Ibid 77.
[5] Ibid 156.
[6] Ibid 73-93.
[7] Ibid 88-9, 156.
[8] Ibid 83.
[9] Ibid.

need not to be a 'competent rulehandler'[10]. Dancy believes that all those efforts to anticipate and regulate general cases in a relatively stable manner may be relevant for other fields, but not to morality.

Moral particularism seems to clash with the generalist perspective implicit in the law. Legal sources regulate sets of facts not only for a transitory situation, but regarding human behaviour in general, and attach legal consequences to all similar situations.[11]It is thanks to the generality of sources that the law can guide the behaviour of a plurality of individuals. Citizens can consult the legal sources in advance to establish whether a given act is permitted, prohibited or commanded by the law. Such standards apply equally to all individuals of the same category, rather than to a single person. Constitutional provisions regulate a set of scenarios *a priori* and for all general situations that are subsumable under their description. When these provisions are ambiguous or vague, judges ascribe *a posteriori* concrete meaning in the inter-subjective process of adjudication by issuing norms, i.e., they create precedents that control future cases. Moreover, lawyers and judges do need to be competent rule-handlers. Constitutional provisions and judicial norms may not regulate all cases, but they do influence future scenarios and constrain judges. The general rule is to apply or follow precedent, and the exception is to distinguish it. The mere fact that judges need to give reasons for distinguishing precedents shows that the precedent exerts an influence, and the distinguished norm will also apply to future scenarios. The generality of sources applies to all legal rules, and in particular to precedents. Even when there is an unregulated case, once a judge decides a controversy in a certain sense, the ruling becomes a general rule that controls future cases.

Despite the apparent differences between morality and legality, particularist decision-making has attracted the attention of legal scholars. In the common law, Frederick Schauer argues that the rule-based approach based on generalisation and particularism are both present in legal systems, though he questions pure particularism.[12]

[10] Ibid 190.
[11] See Lon L. Fuller, *The Morality Of Law* (Yale University Press, 1969) 46-9.
[12] Frederick Schauer, 'Harry Kalven and the Perils of Particularism (Book Review)' (1989) 56(1) *The University of Chicago Law Review* 397, 403-5, 411, 414. However, Schauer seems to be more interested in the debate between substantive justice and the formality of rules than with moral particularism.

Schauer claims that the relation between rule-based decision-making based on generalisation and particularistic decision-making is gradual rather than a strict dichotomy.[13] At one extreme, the pure rule-based approach grants special status to rules over other reasons without considering their background justifications.[14] At the other extreme, pure particularistic decision-making considers rules to be mere guides rather than autonomous or especially protected reasons. The particularist can always revise rules by linking the situation to the underlying justification of the rule or any other factor that the judge finds relevant.[15] Thus, it seems that pure particularism in the law would emulate Dancy's approach: rules enjoy the same weight or status as any other reasons; what really matters is a conscious evaluation of the situation rather than applying rules. Yet, Schauer notes that rule-sensitive particularism is a middle point between two extremes because it expects judges to make the best decision about the case while considering the act of following rules as an important factor that must be weighed in.[16] Thus rule-sensitive particularism combines the rule-based approach with the pure particularist approach by granting rules a privileged status over other reasons but also accepting that decision-makers can depart from rules, provided they meet the corresponding burden of argumentation.

In turn, George R. Wright has argued that both principlism and particularism play a role in legal reasoning.[17] While the generalist stresses the role of abstract rules or principles, the particularist stresses the importance of concrete features of cases.[18] In reality, rather than being antagonists, Wright argues, principlism and particularism are complementary in adjudication. Concrete facts make judges re-evaluate the justification of a general rule or principle of the past and prompt its revision.[19] At the same time, the decision made today based on the particular will be tomorrow's general rule.[20] Thus, while both approaches may be in tension, they may also complement each other.

Legal particularism has also been discussed in the civil law tradition. Hernán G. Bouvier has used particularism to reject the understanding of legal sources as strict logical universals.[21] Bouvier

[13] Frederick Schauer, 'Rules and the Rule of Law' (1991) 14(3) *Harvard Journal of Law & Public Policy* 645, 650.
[14] Ibid 646-9.
[15] Ibid 646, 648-9.
[16] Ibid 649-51, 674-6.
[17] R. George Wright, 'Dreams and Formulas: The Roles of Particularism and Principlism in The Law' (2008) 37(1) *Hofstra Law Review* 195.
[18] Ibid 196, 204-9.
[19] Ibid 210.
[20] Ibid.
[21] Hernán G. Bouvier, *Particularismo y Derecho: un abordaje pospositivista en el ámbito práctico* (Marcial Pons, 2012) 20.

considers universalism in justification to be problematic when facing unanticipated circumstances, or when judges apply principles instead of rules, or when there are gaps and conflicts of norms.[22] Without embracing an overall scepticism, Bouvier argues that particular features of cases and experience may enjoy a preference over legal rules.[23]

In turn, and in contrast to Schauer, María Cristina Redondo has argued that universalism and particularism are mutually exclusive approaches. Legal interpreters treat rules either as strict universal standards or as defeasible ones that can be modified when they are applied.[24] For Redondo, there is no middle ground between pure universalism or generalism, based on general rules, and pure particularistic decision-making, based on the concrete situation.

This Chapter argues against pure particularism, while it concedes that rule-sensitive or weak particularism should play a role in adjudication, albeit a constrained one. Section II critically assesses two basic tenets of particularism relevant to precedent in the civil law. The first tenet is the preference for particular features of situations over general standards. The second tenet is that general standards are insignificant, because concrete features can always trigger the revision of general standards. While sources can be revised, this does not mean that this is always legally justifiable. The section also notes the possibility of constitutional judges in the civil law revising the meaning of ascribed norms while applying them. Section III raises one objection against and two qualifications of particularism, anchored in the distinction between moral agents and judges. Firstly, against the particularist, it is argued that legal participants invoke ascribed norms to constraint judges. Moreover, ascribed norms give concrete weight to constitutional principles, independently of the preferences of the presiding judge. Thus, the later judge bears the burden of argumentation in identifying any facts that are legally relevant to warrant differences in treatment between cases. Secondly, the section favours the reconstruction of a set of norms over the more particularistic approach of seeking analogies between two cases. Thirdly, the section stresses the significance of a constitutional criterion of relevance for modifying norms. Thus the holism of reasons is actually mediated by the interpretation of legal sources. Finally, Section IV ends with a preliminary conclusion arguing for reasonable coherence among ascribed norms. Coherence between norms is a middle path between strict universalism and unrestrained particularism that allows the revision of a certain norm when it is justified in light of other sources.

[22] Ibid 22, 309.
[23] Ibid 309-334, 350, 354.
[24] María Cristina Redondo, 'Legal Reasons: Between Universalism and Particularism' (2005) 2(1) *Journal of Moral Philosophy* 47, 55-68.

II. The Role of Particulars in Constitutional Adjudication in the Civil Law

Although the wide-ranging debate between universalists and particularists is about the role of standards in general, it is possible to reconstruct their arguments to apply to the narrower scope of this investigation. The scope of particularism is wide, as at is core is the rejection of any general standards – principles, rules, and precedents – for controlling future situations relevant for any moral agent. However, this Chapter focuses specifically on the relevance of ascribed norms that judges ascribe to constitutional provisions when deciding a case to control future situations.

To identify the domain of particularism in constitutional adjudication, it is crucial to answer to two questions. First, it is necessary to clarify the practical significance of the basic tenets of particularism in the specific field of constitutional adjudication. Second, it is essential to ascertain whether particularism is a decision-making approach possible in the civil law tradition.

II.1. The Role of Particular Features of Situations in Constitutional Adjudication

According to the interpretation advanced in this Chapter of the work of Dancy, the first basic tenet of moral particularism is the preference for *particular features* over general standards. Dancy considers that there is no necessary connection between being a skilled moral agent and following moral principles.[25] Instead of subsuming the facts of cases under one or several principles, the particularist focuses on the 'features' of situations and the 'holism of reasons'.[26] The holism of reasons approach is about giving reasons for or against the rightness of an action without granting any special status to any reason or feature.[27]

In a similar vein, legal particularists stress the importance of particular features of a situation over general standards. Wright argues that legal particularism prefers 'vivid and concrete analogies, hypotheticals, stories'[28] and similar 'narratives' over general principles and rules.[29] Following

[25] Dancy, *Ethics without Principles*, above n 2, 1-2.
[26] Ibid 7.
[27] Ibid 73-93.
[28] Wright, above n 17, 196.

Dancy, Wright views particularism as a kind of intuitionism, hence he contends that 'moral judgment that does not follow logically from any set of premises'[30]. In turn, abstract constitutional provisions that refer, for instance, to due process or equality appeal to particularist moral judgments.[31] Particular features of cases appeal to the moral intuitions of judges, who can use them to revise rules or principles and generalize to future cases.[32] Thus, Wright argues, we find both generality and particularity in coherentism;[33] rather than being in opposition, their role is 'synergetic'.[34]

Having found this link between general standards and particular narratives, Wright suggests that judges should rearrange their intuitions to form coherent systems of beliefs that justify a particular decision.[35] Wright links a rich description of the facts of a case with the generalist nature of law. The agent may change his or her beliefs about the law in light of the concrete features of the case. In such cases, the agent restructures their belief system in light of particular features of a situation to form a coherent scheme of intuitions.

It must be conceded that legal judgments usually correspond to particular situations, but facts of the case and reasons that flow from them become *legally* relevant only when they can be linked to a legal standard, either found in a constitutional provision or an ascribed norm.[36] On the one hand, few, currently, would dispute that adjudication requires more than subsuming facts under general rules. Before applying rules, lawyers narrate concrete facts in their lawsuits framing certain behaviour – from their particular point of view – as subsumable under certain rules and or principles. Similarly, judges narrate the relevant facts that preceded the resolution of a case from their own perspective. Then there is a process of interpreting indeterminate constitutional provisions. Later, the interpretation of these provisions leads to the ascription of judicial norms. On the other hand, the arguments that legal participants raise need to be linked to the interpretation of a particular provision. Legal argumentation does not take place in a vacuum but in the institutional context of adjudication guided and partially constrained by legal sources.

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[29] Ibid 196, 198.
[30] Ibid 199; Dancy, *Ethics without Principles*, above n 2, 156.
[31] Wright, above n 17, 202-3.
[32] Ibid 217-8.
[33] Ibid 219.
[34] Ibid 196, 215.
[35] Ibid 220-1. On the role of intuitions in coherentist decision-making see, Michael R. DePaul, 'Intuitions in Moral Inquiry' in David Copp (ed), *Oxford Handbook of Ethical Theory* (Oxford University Press, 2006) 595.
[36] See Chapter II and Section III of this Chapter.

Moreover, in addition to the application of rules, legal participants solve collisions between principles by balancing them.[37] When the facts of a situation are subsumable under two or more principles, judges need to select which principle must prevail and justify the selection in a general way. As Robert Alexy observes, this process of balancing is the justification of a concrete preference of principle over a competing principle in light of the facts of a case.[38]

Legal participants need something more than their own system of intuitions to determine how an action is regulated by the law. They need a common parameter that applies to them and their fellow participants. Not only do judges need to justify their decisions bearing in mind future scenarios, but they are also constrained by past exercises of judicial justification that have become precedents. Thus, while Wright is right in pointing out the relevance of coherence in the law, what matters is the coherence of a judgment with a set of legal sources, not coherence within the individual's system of beliefs. Judges need more than a set of intuitions or hunches when solving a particular case. They need to ensure that their decision is not only grounded in clear reasoning but on an appropriate interpretation of the law. That is, they need to identify relevant sources, interpret them through accepted conventions – which include the convention of following precedents – and show that the new judgment is compatible with such sources. In this sense, the requirement of mutual support relevant for adjudication is not about mutual support between a set of reasons about what is right according to the personal decision-maker but about mutual support between constitutional provisions and ascribed norms produced in the institutional and intersubjective context of adjudication. Instead of arguing that the right thing to do is X according to the features of the case and in light of a set of individual reasons in favour and against, judges need to ascertain whether X is permitted, prohibited or commanded according to the set of legally relevant sources as interpreted by previous judges.

The relevance of particular facts or arguments is a matter of their significance to the legal system, as evidenced by legal sources. Of course, lawyers and judges do more than just cite and apply sources. But any argument they raise, or any fact that they highlight needs to be relevant from the perspective of the legal system.[39] Also, judges need to justify their decisions transparently before fellow legal participants. Even if what triggers a judgment is an individual intuition, the judge

[37] Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans, Oxford University Press, 2002) [trans of: *Theorie der Grundrechte* (first published 1985)] 88.
[38] Ibid 100-2, 407-8.
[39] See Neil MacCormick, 'Argumentation and Interpretation in Law' (1993) 6(1) *Ratio Juris* 16, 18 (Arguing that adjudication implies more than applying sources, but any argument needs to be linked to them).

will need to show that that intuition is better than its alternatives. A decision is better justified when it is backed by a greater number of sources and higher principles than its alternatives. The judge will then need to link it to legal sources that make its link to those sources clear, so that even if a decision is ideological, it is compatible with the ideology of the constitutional system. If the decision arises at a first instance level, superior courts can review the soundness of the justification. When the highest court is the one responsible, its justification is still subject to the indirect criticism of scholars, journalists and the citizenship in general.

In summary, against the first tenet of particularism, particular facts are indeed significant in adjudication, but only when they are subsumable under a general standard, whether it is a rule or principle. These standards can be found either in constitutional provisions enacted by framers, or norms ascribed by judges. Then particular facts do play a role in adjudication, but only when they are considered relevant from the perspective of a given legal system.

In this sense, Wright is right that coherence links both the particular and the general, but the coherence that matters is primarily that of a judgment with a set of ascribed norms issued by previous judges, not a coherence among the intuitions of an individual decision-maker. Decision-makers need to be prepared to justify their interpretation of the law before fellow judges and lawyers, and mere intuitions are not sufficient to show that a judgment is better than its alternatives. But in any case, the particular features that moral particularism stresses will be mediated by general legal sources.

This leads to the second, and most radical tenet of particularism, namely, the *irrelevance of precedents* as general standards. The particularist does not extract any kind of general standard from a particular case that will control future situations. Dancy states: '[w]hatever is a reason in one case may perfectly well be no reason at all in others, and so *there can be no sense in appealing to other cases in support of one's view* of how things are here.'[40] While it may by insightful to learn from past events, Dancy argues, such cases do not constrain moral agents.[41] It therefore seems that cases – understood as general standards like rules or principles – are insignificant for good decision-making, because new features in later cases, or a different combination of features, may prompt the revision of the apparent general standard. Thus the

[40] Dancy, *Ethics without Principles*, above n 2, 156 (emphasis added).
[41] Dancy, 'Moral Particularism', above n 2, section 8.

elements that are actually deployed in the task of justifying an action are the particulars, not the previous case.

In this way, along with the importance of narratives noted by Wright, legal scholars link particularism with the possibility of modifying the law when applying it in light of the features of the case. For example, George Pavlakos considers that general standards seek to 'freeze'[42] the features of the world, while the richness of new situations is always more complex and dynamic. Thus a judge may need to abrogate or add exceptions to standards to be able to cope with the dynamic nature of society.

Similarly, Cristina Redondo stresses the link between particularism and the *revision* of legal sources. She argues that universalism 'presupposes the stability of the norm-contents'[43] while particularism rejects it.[44]That is, the particularist argues that the norm is not independent of the context of application of the law; rather, interpreters change the meaning of sources while applying them.[45] Moreover, as previously noted, Redondo argues that both approaches are mutually exclusive: interpreters either treat standards as strict rules or as defeasible reasons.[46] In brief, Redondo argues that universalism is linked to formal principles as certainty, predictability and formal equality,[47]whereas particularism is linked to equity, flexibility and fairness.[48]

While Schauer holds that rule-sensitive particularism is indeed a middle path between pure particularism and a purely rule-based approach, he concurs with Redondo that there is a link between particularism and the revision of sources. The revision of legal rules is possible, Schauer argues, because legal systems are formed by both 'formal' and 'adaptive' elements.[49] They are formal when they accept 'some sub-optimal outcomes in deciding concrete cases as a price worth

[42] George Pavlakos, 'Two Conceptions of Universalism' in Zenon Bankowski and James Maclean (eds), *The Universal and the Particular in Legal Reasoning* (Aldershot, 2006) 159, 164.
[43] Redondo, above n 24, 57.
[44] Ibid.
[45] Ibid 59-68.
[46] Ibid, 47.
[47] Ibid 67-8.
[48] Ibid 68.
[49] Frederick Schauer, 'On The Supposed Defeasibility of Legal Rules' (1998) 51(1) *Current Legal Problems* 223, 223. While Schauer argues that revision or defeasibility of rules is a contingent feature of legal systems depending if revision is tolerated or permitted by law, Richard Tur argues that is a universal feature, and Jonathan Nash argues that, even if possible, revising the law while applying is rather infrequent. See, Richard H. S. Tur, 'Defeasibility and Adjudication' in Jordi Ferrer Beltrán and Giovanni Battista Ratti (eds), *The Logic of Legal Requirements: Essays on Defeasibility* (Oxford University Press, 2012) 362; Jonathan R. Nash, 'Legal Defeasibility in Context and the Emergence of Substantial Indefeasibility' in Jordi Ferrer Beltrán and Giovanni Battista Ratti (eds), *The Logic of Legal Requirements: Essays on Defeasibility* (Oxford University Press, 2012) 377.

paying for the virtues wrought by the *stability* of the law'[50]. They are adaptive when 'they reject formality in the service of trying to achieve *correct* results in *individual* cases, or at least results whose attempts at correctness are not burdened by an obeisance to the dictates of written materials pre-dating the situation the law now confronts.'[51] Yet he assures us that only in extreme circumstances of radical injustice or inefficiency can officials defeat rules.[52]Otherwise, the institutional process of decision-making would become pure particularism.[53] Hence, although he provides a gradual scale between extreme or purely rule-based decision-making and pure particularism, with a middle point occupied by 'rule-sensitive particularism'[54], he aligns himself more with the extreme rule-based approach.[55]

It is conceded to particularists that officials should be empowered to adapt the law to unanticipated circumstances. However, the questions for particularists are *who* are the officials that enjoy the power to revise the pre-existing law in light of particular facts and *under which circumstances* should they do it? The amending power is empowered to abrogate a constitutional provision only after a process of deliberation, and with prospective effects. In contrast, the revision of precedents is more problematic from the perspective of litigants, because constitutional judges can abrogate or modify a previous ascribed norm at the time they resolve a case. Moreover, if judges are empowered to revise the content of all legal rules every time they solve a case, the law would not only be unstable but also unintelligible. It would also be strange to review a legal source without admitting that other sources are relatively stable. In other words, decision-makers need at least a part of the law to be relatively stable to use it as basis to challenge a certain rule. It can therefore be justified for judges to revise a particular ascribed norm, but only when they show that the previous decision-maker did not anticipate a circumstance that is relevant in light of another constitutional source, whether it is a rule or principle.

Constitutional judges indeed have the power of revising the meaning of norms ascribes to constitutional provisions while applying them. This revision occurs when courts distinguish or overrule a constitutional precedent. When courts distinguish, they make partial revisions. They distinguish a precedent in light of relevant facts of the case at hand that warrant a different

[50] Schauer, 'On The Supposed Defeasibility of Legal Rules', above n 49, 223 (emphasis added).
[51] Ibid (emphasis added).
[52] Frederick Schauer, 'Is Defeasibility an Essential Property of Law?' in Jordi Ferrer Beltrán and Giovanni Battista Ratti (eds), *The Logic of Legal Requirements: Essays on Defeasibility* (Oxford University Press, 2012) 77, 80.
[53] Ibid 80;Schauer, 'Rules and the Rule of Law', above n 13, 650
[54] Schauer, 'Rules and the Rule of Law', above n 13, 649.
[55] See generally, Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford University Press, 1991.

treatment. In turn, when courts overrule a precedent, they make general revisions. When they overrule, they revisit the same legal question but now seen in a different way: they abrogate a hitherto valid ascribed norm and substitute it with a new norm that contradicts the prior one.

The revision of ascribed norms is possible and may be justifiable according to law. Particularists are right in stressing that concrete facts may trigger the revision of norms. However, that is not to say that judges can *always* do that. Certainly, some revisions may be justified according to law, but others can reflect mere ad hoc exceptions. Any judge on occasion may favour following the law for the sake of stability, but on other occasions may favour revising the law for the sake of correctness. Every constitutional system is dynamic, but there is a difference between a transparent and justified justification of legal change and an opaque or arbitrary modification of the law.

Against the second tenet of the particularists, cases *do* produce general ascribed norms. These norms usually have the structure of rules and thus indicate that a particular action is permitted, required or prohibited.[56] The effect of the particular norm reaches beyond the concrete controversy, to influence future decision-making.

The special status of these ascribed norms over other reasons is not grounded in experience, but on the principles of authority, formal equality and legal certainty. Legal participants do not cite ascribed norms merely to illustrate a point. Rather, legal participants cite precedent, to urge that prior interpretations of the constitution are binding law and thereby reduce judicial discretion.

Moreover, the possibility of revising ascribed norms is a contingent one rather than a necessity. There can be identical cases that require the identical conclusion. There can be similar cases that need a similar resolution, despite apparent differences. There can also be apparently similar cases that judges may treat differently in light of some unanticipated facts. These facts in themselves need to be relevant not only in the view of the judge but in light of constitutional rules or principles. In this way, legal sources not only enjoy preference over other reasons, but these latter reasons are relevant only insofar as they are mediated by sources. Although it is possible to revise ascribed norms in constitutional adjudication, particular facts are constitutionally relevant only when they can be subsumed under some constitutional rule or principle.

[56] See Chapters I and II.

Therefore, the possibility of granting preferential normative status to ascribed norms over other reasons casts doubt about the unrestricted holism of reasons defended by particularists. Judges do not decide cases as moral agents in a context in which all kinds of reasons bear the same status. Instead, ascribed norms enjoy preference over other reasons such as new incompatible interpretations of constitutional provisions, or new facts of cases. Section III expands upon these objections against the two basic tenets of particularism.

II.2. The Revision of Ascribed Norms in the Civil Law

The second question for this section relates to whether the possibility of revising the content of ascribed norms is peculiar to the common law or also extends to civil law.

Schauer suggests that the possibility of revising the law while applying it is not a universal feature of legal systems, although it is certainly linked with common law methodology.[57] He argues that the leeway for judges to adapt the law while applying it is characteristic of common law methodology.[58] While acknowledging that the picture of the civil law judge as a mechanical applier of law is a 'caricature'[59], he also suggest that in the civil law 'the central figure is not the judge deciding a controversy and making law in the process, but is the initial lawmaker making law at the outset and hoping that subsequent judicial involvement will be minimal'[60]. Thus Schauer implies that, at least on a superficial level, the only possibility of legal change in the civil law would be formal amendments rather than judicial interpretations, or, alternatively, that the judicial revision of law would only be legitimate when the previous interpretation contradicted the intention of the legislator.

On the one hand, civil lawyers are in fact being influenced by common law methodology. As argued in Chapter I, there has been a shift in their approach to precedents, bringing them closer to *stare decisis* in treating single judgments as binding legal sources. Mexican and Colombian

[57] Schauer, 'On The Supposed Defeasibility of Legal Rules', above n 49.
[58] Ibid 236-7; Schauer, 'Is Defeasibility an Essential Property of Law?', above n 52, 81-2, 88. However, Schauer has also noted that common law methodology is now a 'prominent feature' of civilian systems. See, Frederick Schauer, 'Is the Common Law Law?' (1989) 77(2) *California Law Review* 455, 458.
[59] Frederick Schauer, 'The Failure of the Common Law' (2004) 36(3) *Arizona State Law Journal* 765, 772.
[60] Ibid.

judges occasionally use the common law method of 'reasoning by example'[61] in revising the meaning of constitutional and legislative provisions, changing the relevant pre-existing law not as a consequence of formal amendments, but in light of the particular facts of the case.[62]

On occasion, civil law courts even use the English terminology of 'distinguishing'. For instance, the First Chamber of the Mexican Supreme Court in A.D.R. 5601-2014 held that lower courts can distinguish apparently binding precedents when there is a new and relevant 'factual element' in the case that was absent in the precedent.[63] The Chamber ruled that distinguishing necessarily narrows the scope of application of constitutional provisions.[64] The case related to the right of the accused to be assisted by a counsel in the Gessel dome. The Circuit Court sought to narrow the right previously interpreted by the Chamber, arguing that it applies only when the accused and the presumed victim are strangers, not when they are acquainted.[65] The Chamber admitted distinguishing as a valid argumentative technique, but reversed the Circuit Court judgment, arguing that the later case should not be distinguished, because the defendants were not acquainted with the victim: they had only seen each other once.[66] Thus the possibility of revising the meaning and scope of a constitutional norm in light of particular facts is a legal possibility in the civil law.

On the other hand, civil law scholars also use a different methodology, or at least terminology, to highlight the possibility of revising the meaning of legal rules while applying them. Bouvier, for example, questions universalism by appealing not only to U.S. legal realism but to the provision-norm distinction studied by Genovese realists, to highlight that legal texts lack any normative

[61] Edward Levi, 'An Introduction to Legal Reasoning' (1948) 15(3) *The University of Chicago Law Review* 501, 501, 541-72. The Colombian Court had referred to the work of Levi see, C-618-2004, Alfredo Beltrán Sierra, 29 June 2004, footnote 3; C-795-2004, Rodrigo Uprimny Yepes, 24 August 2004, footnote 5. Of course, the practice of distinguishing and giving normative status to judicial interpretations is frequent elsewhere in the civil law tradition. Even in a legal culture reluctant to only admit judgments as sources of the law such as the French. See, John Bell, 'Comparing Precedent (Book Review)' (1997) 82(5) *Cornell Law Review* 1243, 1249; Mitchel de S.-O.-l'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press, 2009) 53-61.

[62] See, e.g., SU-047-1999, Carlos Gaviria Díaz and Alejandro Martínez Caballero, 29 January 1999, sections 52, 54 and 55 (distinguishing C-222-1996 and C-245-1996).

[63] A.D. R. 5601-2014, Arturo Zaldívar Lelo De Larrea, 17 June 2015, recital V.

[64] Ibid.

[65] Sixth Circuit Court on Criminal Matters of the First Circuit, A.D. 344-2014, María Elena Leguizamo Ferrer, 17 October 2014. Distinguishing First Chamber, A.D.R. 1424-2012, Olga Sánchez Cordero de García Villegas, 6 February 2013. See *Constitución Política de los Estados Unidos Mexicanos de 5 de febrero de 1917* [Mexican Constitution of 5 February 1917], Art 20, A), IX (as amended 18 June 2008).

[66] A.D. R. 5601-2014, above n 63, recital V.

status prior to interpretation, and that interpretation is the task of judges or even scholars,[67] not of legislators. Both realists share a rule-scepticism and question legal formalism, with its conception of universal and static rules, though they use different techniques to show the possibility of revising the law while applying it. U.S. realists favour facts over rules to criticize legal formalism, arguing that sources, especially precedents, can always be interpreted in different, even incompatible ways.[68] In contrast, Genovese realists use the provision-norm distinction (where the provision is an uninterpreted text and a norm is the outcome of an interpretation) to show that the meaning of statutory and constitutional provisions is not discovered but ascribed, and influenced by the ideological preferences of judges, without focusing on precedents.[69] While admitting that precedents may develop stable meanings and hierarchies of general principles, Bouvier notes that it is always possible to review precedents.[70]

Moreover, civil law scholars have contributed to the debate on legal *defeasibility*. Defeasibility is the property of legal rules of being subject to implicit exceptions that become evident only when applying them.[71] Thus while particularism appears to be a decision-making approach that favours particular over general rules, defeasibility is the property of certain rules that they can to be revised. In this sense, Carlos Alchourrón has argued that most legal provisions are defeasible in light of unexpected circumstances relevant from an evaluative, rather than a descriptive, point of view; thus it is the role of judges to make implicit exceptions explicit in their judgments.[72] Alchourrón argues that rules can be defeated when underlying reasons ascribable to the will of the legislator authorise introducing exceptions to general rules.[73] In a similar way, Juan Carlos Bayón argues that once it is recognised that law is composed of principles in addition to rules, the former are a potential reason to defeat the

[67] Bouvier, above n 21, 21, 28, 271-3. Genovese realists are a group of legal theorists based on Genoa, Italy, who following the work of Giovanni Tarello in the interpretation of statutes, use analytical philosophy to stress the indeterminacy of legal provisions and the role of ideology in judicial interpretation. See Jordi Ferrer Beltrán and Giovanni Battista Ratti (eds), *El realismo jurídico genovés* (Marcial Pons, 2011).
[68] See e.g., Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown and Company, 1960) 22, 77-91.
[69] See Giovanni Tarello, *Diritto, enuciati, usi* (Il Mulino, 1974) 404-15.
[70] Bouvier, above n 21, 292, 331-4, 376-7.
[71] The term 'defeasibility' is owed to H.L.A Hart, see H L A Hart, 'The Ascription of Responsibility and Rights' [171] (1949) 49 *Proceedings of the Aristotelian Society* 171, 175. See also, G. P. Baker, 'Defeasibility and Meaning' in P.M.S Hacker and Joseph Raz (eds), *Law, Morality and Society: Essays in Honour of H. L. A Hart* (Oxford University Press, 1977) 26. John Dewey made a similar claim on the defeasibility of rules, without using such terminology. See John Dewey, 'Logical Method and Law' [560] (1924) 33(6) *The Philosophical Review* 560, especially at 571.
[72] Carlos E. Alchourrón, 'On Law and Logic' [331] (1996) 9(4) *Ratio Juris* 331, 342-6.
[73] Ibid, 343.

application of the latter.[74] More recently, Jordi Ferrer and Giovanni Battista Ratti have noticed that lawyers from both the common and the civil law acknowledge the phenomenon of defeasibility as favouring flexibility in rule-based decision-making.[75] In this way, civil law scholars recognise the possibility of revising the meaning of rules at the same time that they apply them.

Thus, given that civil lawyers recognise that particular facts may trigger the judicial revision of previous interpretations, the question is how to make such revisions transparent and acceptable from a legal point of view. It appears that the only universal postulate that the particularist defends is that it is *always* possible to review general rules or principles and that the justification for this arises from the concrete facts that constitute the particular situation rather than from general standards. While it is possible for judges to justify change, it would be difficult to maintain that it is always possible for them to do it.

Schauer may be correct in affirming that the possibility of revising the law while applying it is not a universal feature of the law but is important to stress that it is indeed a possibility even in the civil law tradition. Perhaps the power of judges to revise the content of sources is not a timeless and ubiquitous feature of legal systems, but it is at least present in the civil law. The equivocality of natural language in which framers enact provisions, the political preferences of judges, and the plural and dynamic nature of societies cast doubt on the static nature of legal rules. It appears that judges in a multi-member court can not only disagree about the linguistic meaning of provisions, but could also employ distinctive canons of interpretation to reach the result they prefer. Thus the possibility of revising the law while applying it is an all-pervasive feature of civil as well as common law.

However, another path, not sufficiently discussed by civil law realists and particularists alike, is the possibility of using the provision-norm distinction with a less sceptical approach to rules, hence as a tool to justify the revision of norms. Indeed, most civil law scholars are concerned with the equivocality of statutory and constitutional provisions, treating them as *sources* and

[74] Juan Carlos Bayón, '¿Por qué es derrotable el razonamiento jurídico?' in Paula Gaido, Rodrigo Sánchez Brigido and Hugo Omar Seleme (eds), *Relevancia normativa en la justificación de las decisiones judiciales* (Universidad Externado de Colombia, 2003) 263, 295.
[75] Jordi Ferrer Beltrán and Giovanni Battista Ratti, 'Introduction' in Jordi Ferrer Beltrán and Giovanni Battista Ratti (eds), *The Logic of Legal Requirements: Essays on Defeasibility* (Oxford University Press, 2012) 1, 6.

treating norms as the subjective product of interpretation.[76] Nonetheless, perhaps because of the inertia of the legislative theory of sources, civil law scholars have not fully considered judicial norms as sources in themselves. Thus, once it is granted that there is a first layer of vague and ambiguous legislative and constitutional provisions, followed by a less equivocal, albeit subjectively ascribed, layer of judicial norms, it is possible to use the provision-norm distinction not to stress the undeniable subjectivity of interpreting the constitution, but to reduce it by limiting the revision of the content of norms.

III. The Constrained Role of Particularism: The Particularist Moral Agent vs. Constitutional Judges

Particularists are right in stressing the importance of *context* in decision-making, but in law this context involves an institutional framework. Unlike the unconstrained moral agent, constitutional judges decide cases constrained by external elements independent of their individual beliefs. Judges work in the inter-subjective context of adjudication limited by sets of ascribed norms laid down by previous decision-makers, and by hierarchies of principles held by the legal community, and again by institutional standards for identifying relevant facts. Moreover, the formal powers of judges are limited by sources designed by framers or legislators. Judges need the concurrence, first, of the competences that empower them to decide a particular controversy, and second, the event of a litigant bringing a case to a court, before they are in the position to revise the law.

Before discussing how ascribed norms constrain judges, there are at least three relevant features to bear in mind, that distinguish the role of a moral agent from that of a constitutional judge.[77] First, judges resolve controversies about the legal sphere of *other* individuals or entities, not about their own interests. The judge is not a party in the case to be decided, but a third person whose main function is to adjudicate. While the judge may have some preference for a given

[76] See Riccardo Guastini, *Estudios sobre la interpretación jurídica* (Marina Gascón and Miguel Carbonell trans, UNAM, 1999) (analysing the equivocality of provisions without analysing precedent as a source.) See also Mauro Barberis, 'Contro il creazionismo giudirico. Il precedente giudiziale fra storia e teoria.' (2015) XLIV(1) *Quaderni fiorentini per la storia del pensiero giuridico moderno* 67, 71. (Questioning the general trend on Genovese realism in neglecting precedents as a source of law.) But see Pierluigi Chiassoni, 'The Philosophy of Precedent: Conceptual Analysis and Rational Reconstruction' in Thomas Bustamante and Carlos Bernal Pulido (eds), *On the Philosophy of Precedent* (Nomos, 2012) 13 (Treating precedents as a source of interpretation, but without using the provision-norm distinction). (Treating precedents as a source of interpretation, but without using the provision-norm distinction).

[77] See also Chapter IV.

principle or policy, the outcome of the case, unlike a decision made by a moral agent, does not alter his or her own legal situation.

Second, a fundamental difference between moral discourse and constitutional adjudication is the interpretation of constitutional provisions and norms. The starting point of the discussion is the interpretation of constitutional provisions relevant in light of the facts of the case. When there is a constitutional provision whose interpretation can only lead to one rule, e.g., the prohibition of the death penalty, the judge is constrained by such a rule, even if there are good reasons to question its soundness. Although constitutions abound in vague and ambiguous provisions,[78] when judges select one of the possible interpretations, such interpretation acquires the character of a rule and influences future scenarios.

Third, the decision of a judge will create a precedent as an institutional constraint for future legal participants. Unlike the decisions that moral agents make in deciding their own actions, which leave them free to disregard those decisions in future similar scenarios, the judgment becomes a source of law that is enforceable in future cases. As a norm, the precedent reduces the indeterminacy of the constitutional provision and the scope of judicial discretion in further exercises of interpretation.

Having spelled out these three differences, the rest of the section further explores how legal sources constrain judges.

III.1. Against the Strong Particularist: an Intersubjective Reconstruction of Ascribed Norms

As discussed in the introduction of this Chapter, a strong moral particularist such as Dancy decides cases in light of the holism of reasons without extracting any general standard for future cases. The particularist argues that a reason in favour of an action in a situation may not be a relevant reason for that action in the future, and may even be a reason against it.[79] Thus, apparently, every new case offers the possibility of revising past decisions in light of new facts.

[78] See Chapter II.
[79] Dancy, *Ethics without Principles*, above n 2, 156.

However, a strong particularist – whether a judge or a lawyer – would find it hard to reject the normative status of ascribed norms, or to consider them as equivalent to any other kind of reason. In fact, such norms are particularly relevant when a later individual disagrees with their content. Lawyers do not cite norms merely to guide a decision, but to constrain the judge.[80] Moreover, when lawyers cite ascribed norms to constrain judges, the general rule is to follow such norms; it is the exception to revise them by distinguishing or overruling. Lawyers cite norms from superior courts before low or intermediate courts to constrain judges, who bear the burden of argumentation in distinguishing cases in light of a legally relevant feature present in the case at hand. Similarly, lawyers before supreme courts cite norms to constrain the majority, or to prompt the justification of an overruling of a particular precedent. Then, even if the judge or the majority of the court decide to distinguish or overrule, this new norm will influence future decisions even if the authors of the norm are no longer in office.

Also, any constitutional judgment requires a justification in light of the *hierarchy* of constitutional principles. On occasion, the constitution of a community already identifies a hierarchy of principles that judges cannot review when solving a case. For instance, both the Colombian and Mexican Constitutions prohibit the death penalty.[81] In this way the framers have already settled the question, signalling a preference for the right to life over an interest in punishing defendants with the death penalty, however serious the crime.

However, often there will be no clear-cut hierarchy in constitutional provisions; thus, as Alexy notes, collisions among competitive principles are solved by balancing.[82] As is well known, Alexy holds that rules and principles are two distinct types of general norm. Judges apply rules by subsuming the facts of a case under one general rule following the structure of a legal syllogism.[83] In turn, principles are 'optimization requirements'[84] whose collisions are resolved by assigning an importance to each of the competing principles that can be 'light', 'moderate' and 'serious'.[85] Alexy does not provide an exhaustive hierarchy of principles, but instead proposes a

[80] See Frederick Schauer, 'Precedent' (1987) 39(3) *Standford Law Review* 571, 575.
[81] Mexican Constitution, above n 65, Art 20 [1]; *Constitución Política de Colombia de 4 de julio de 1991* [Colombian Constitution of 4 July 1991] (Colombia), Art 11.
[82] Alexy, *A Theory of Constitutional Rights*, above n 37, 90.
[83] 'On Balancing and Subsumption. A Structural Comparison' [433] (2003) 16(4) *Ratio Juris* 433.
[84] Alexy, *A Theory of Constitutional Rights*, above n 37, 88.
[85] Ibid 402.

formal law of balancing, which states the following: 'The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other'[86].

Juan Moreso argues that the model of balancing principles proposed by Alexy is particularism-oriented because new features of cases can trigger the revision of previous exercises of balancing.[87] Moreso links moral particularists' interest in context and their scepticism about general rules with Alexy's balancing as expanding judicial discretion.[88] He claims that Alexy's theory leads to an unrestricted ad hoc balancing in which the importance of principles is ascribed in each particular case.[89] In this way, Moreso implies that the generalist approach is in fact substituted by a particularist one because one feature of the particular case is sufficient to warrant a justification incompatible with prior exercises of balancing.[90] Similarly, Giorgio Maniaci suggests that Alexy is a 'soft particularist'[91]. According to Maniaci, even if balancing gives rise to rules, these are merely prima facie, as new features can always trigger their revision.[92] The core of Moreso's and Maniaci's objection is that if the hierarchy of principles can be revised every time there is a new feature in a case, then such principles are not general reasons but merely preferences in light of the concrete situation.

Although the method of balancing principles and the idea that these have an argumentative 'weight' have little to do with moral particularism, Moreso and Maniaci contend that its use in adjudication runs the risk of ad hoc, particularistic judgments. Particularists such as Dancy reject the significance of general standards, whether they are principles or rules. Moreover, Dancy questions the metaphor of 'weighing' reasons, as it seems to suggest that these are static physical elements whose measure will remain stable every time an agent weighs them.[93] The critics of balancing, link such approach to particularism because instead of subsuming the facts under a *general* rule, judges may use balancing to solve conflicts of reasons in light of the relevant features of a *particular* case. Thus, under the appearance of applying general principles, judges are in fact giving priority to the particular situation, as they describe it, over general rules issued

[86] Ibid 102.
[87] José Juan Moreso, 'Conflictos entre derechos constitucionales y maneras de resolverlos' (2010) 186(745) *Arbor* 821, 827.
[88] Ibid 823-825.
[89] Ibid 825.
[90] Ibid.
[91] Giorgio Maniaci, 'Algunas notas sobre coherencia y balance en la teoría de Robert Alexy' (2004) 20 *Isonomía* 137, 151.
[92] Ibid 157.
[93] Dancy, *Ethics without Principles*, above n 2, 9, 56, 190.

by other officials. However, this particularistic interpretation of balancing suggested by Moreso and Maniaci ignores the fact that the practice of ascribing weight to principles in adjudication produces precedents that serve to reduce judicial discretion in subsequent similar cases.

An example from Mexican constitutional law shows the risks of particularistic balancing. In A.I.R.599-2012, the Plenum analysed the confidentiality of assets declarations by representatives in light of the constitutional right to public information.[94] The Court balanced between the plaintiff's right to information and the public servants' right to privacy and held that the latter prevailed.[95] Given that privacy and the protection of personal data are valid restrictions on the right to information, the Court held that public servants needed to consent to publication, otherwise the information remained confidential.[96] The Plenum cited a First Chamber's precedent that asserted that the protection of privacy and personal data are valid restrictions on public information.[97] Nevertheless, there are several ascribed norms that cast doubt of such a preference. In fact, the First Chamber precedent actually disclosed an ongoing criminal investigation related to serious violations of human right of forced disappearance. Given the seriousness of the offense that qualifies as a crime against humanity, the investigation was of the public interest, and thus its diffusion prevailed over the secrecy of ordinary criminal investigations.[98] The Plenum also ruled in two precedents that freedom of expression and information usually prevails over other principles because of their connection with democracy and accountability.[99] The same Plenum even disclosed its draft opinions before a hearing because the topic was of public relevance.[100]

Thus it appears that the Court used particularistic balancing to rule in favour of the officials. Let us grant that the possible disclosure of personal information of officials was a reason to give prevalence to the right to privacy over freedom of expression and information. What is troubling is that the Court uses balancing to impose an ad hoc criterion on a relatively coherent set of norms that established a preference for the right to information over other rights, without justifying the apparent revision.

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[94] A.I.R. 599-2012, Jose Fernando Franco Salas, 12 August 2014. See, Mexican Constitution, above n 65, Art 6, especially section A, II. (as amended 7 February 2014).
[95] Ibid, recital V.
[96] Ibid.
[97] A.I.R 168-2011, Arturo Zaldívar Lelo de Larrea, 30 November 2011.
[98] Ibid recital IX, section 10.
[99] C.C. 61-2005, José de Jesus Gudiño Pelayo, 24 January 2008, recitals VI and VIII; C.T. 56-2011, Sergio A Valls Hernández, 30 May 2013, recital VI.
[100] A.I. 29-2006, Sergio Salvador Aguirre Anguiano, 7 June 2007. The case dealt with the '*ley televisa'*, a statute that concentrated the digital spectrum on the hands of two television networks, and thus at odds with antitrust law.

Despite Moreso's and Maniaci's objections, part of Alexy's work provides hints on how ascribed norms can limit judicial discretion when balancing. Alexy explicitly argues against non-universalist decision-making by questioning a strict distinction between the application and the justification of law.[101]Without abandoning balancing as a rational approach, Alexy argues that any application of the law in a particular case also requires the universalisability of the justification in a rule-based approach that will apply in all similar cases.[102] He also argues that while value judgments from individual judges are necessary in adjudication to set concrete preferences for one principle over another, such evaluations create 'preference relations'[103] or a 'network of relative concrete rules' in the long term.[104]

In this way Alexy seems to favour the rule-sensitive particularist approach noted by Schauer. At the extreme of universalism, ascribed norms would be strict rules safeguarded by legal certainty and exhaustive enough to settle any type of controversy. At the extreme of particularism, balancing exercises would produce only reasons to consider, equivalent to any other argument in favour of or against the prevalence of a certain principle. Alexy occupies the middle ground between the two extremes. Ascribed norms are not strict rules, but prima facie rules,[105] subject to revision in light of unanticipated circumstances. At the same time, these rules, even if prima facie, enjoy a preference over arguments not backed by precedents, because they are supported by formal principles linked to the stability of the legal system.[106]

Hence, the use of networks of ascribed norms as prima facie rules seems to suggest that a complete conception of precedent must include elements of universalism and particularism. On the one hand, universalism captures the binding effects of norms, and the constraint they exert on judges when fellow interpreters invoke them. If there is no clear and determinate rule, judges are empowered to create one, yet, simultaneously, they are committed to applying it in all similar cases. On the other hand, the element of particularism suggests that general rules of the past may be inadequate for deciding concrete cases. The inadequacy is understood as the application of a rule that is at odds with the principles of the legal system. But then, a conception of precedent

[101] Robert Alexy, 'Jurgen Habermas' Theory of Legal Discourse' (1996) 17(4) *Cardozo Law Review* 1027, 1032-3.
[102] Ibid 1033.
[103] Robert Alexy, 'Coherence and Argumentation or the Genuine Twin Criterialess Super Criterion' in Aulis Aarnio et al (eds), *On Coherence Theory of Law* (Juristförlaget i Lund 1998) 39, 47.
[104] Alexy, *A Theory of Constitutional Rights*, above n 37, 108.
[105] Ibid 376.
[106] Ibid 58.

needs coherence, this being a third element to constrain the revision of sources. There may be justified modifications of the law, but if ascribed norms are meant to work as rules, there must be a burden of argumentation that must be meet to modify them. With no constraints, rules become equivalent to unprotected reasons, and thus the conception of precedents becomes pure particularism. Then the modified rule must cohere with a sub-set of rules or principles. It is in this sense that the idea of a network of norms – that is, a set of prima facie rules progressively developed by judges and linked by common principles – becomes not only an ideal but a practical constraint on judicial decision-making when judges seek to modify the law.

Alexy does not elaborate on whom reconstructs this network of norms and with what purpose, but Laura Clérico interprets his theory in arguing against the objection that balancing is a particularistic method.[107] She notes that legal participants cite cases to reconstruct prima facie hierarchies of principles with the objective of reducing judicial discretion.[108] To defend Alexy's position, Clérico links his method of balancing with his previous work on legal argumentation and recent work on analogy in the application of cases.[109] Clérico claims that even if subsequent cases may present particular features that trigger a revision of ascribed norms, these are rebuttable only when such features are legally *relevant*.[110]

Clérico reconstructs Alexy's balancing as a rule-oriented procedure. First, she recalls that every exercise of balancing principles produces a precedential rule.[111] Then, she suggests that a set of consistent judgments may form a network of precedents that indicate that under certain circumstances one principle prevails over another, and thus make balancing unnecessary in later cases.[112] Finally, she reminds us that whoever dissents from such a network of rules bears the burden of argumentation in identifying a new unanticipated circumstance, or must produce other arguments aimed at questioning the weight previously ascribed to principles.[113]

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[107] Laura Clérico, 'Sobre "casos" y ponderación. Los modelos de Alexy y Moreso, ¿Más similitudes que diferencias?' (2012) 37 *Isonomía* 113.
[108] Ibid 131.
[109] Ibid 114. See Robert Alexy, *A Theory of Legal Argumentation* (Ruth Adler and Neil MacCormick trans, Oxford Clarendon Press 1989) [trans of: *Theorie der juriistichien Argumentation: Die Theorie des rationale Diskurses als Theorie der juristichen Begrundng* (first published 1978)] 274-9.; Robert Alexy, 'Two or Three?' in Martin Borowsky (ed), *On the Nature of Legal Principles* (Franz Steiner Verlag Stuttgart, 2010) 9.
[110] Clérico, above n 107, 132-5.
[111] Ibid 118.
[112] Ibid 116, 120.
[113] Ibid 121; Alexy, *A Theory of Legal Argumentation*, above n 109, 275.

While Clérico succeeds in showing that ascribed norms can limit judicial discretion, she presupposes coherence among them without any previous subjective exercise of reconstruction. The network of norms is not given, but instead requires legal participants to reconstruct them. If the application of code provisions found in a single and well-organised document presupposes a process of identification, interpretation and reconstruction, then, this previous exercise of reconstruction is more necessary when interpreting precedents that lack the order and clarity that codes enjoy. Given the plurality of judgements and interpretations of the constitutional text, it cannot be taken for granted that previous judges have consistently followed a single pattern of preference in which one principle always prevailed over others. There can be divided superior courts, conflicting lines of precedents and a diverse interaction of principles in which in some instances one principle prevails and in others a competing one trumps.

The argumentation between legal participants makes it possible that lawyers and judges may reconstruct not one but several lines of competitive norms. Judges would need to analyse and rank competitive lines of ascribed norms, and justify the selection, or propose an alternative line. Even if there is a relatively consistent line of ascribed norms, a recent one from a supreme court may be at odds with it. Is one norm enough to indicate that the preference relation has changed, or is it just one exception to the general preference?

A further consideration is that if Alexy and Clérico are still committed to opposing particularisist decision-making, then they need to justify the change of preference relations among principles. Analogy urges judges to treat similarly cases alike, yet on its own it does not provide guidance in justifying an overruling.[114] Judges would need to demonstrate that previous exercises of balancing were incorrect or have become out-dated in light of recent changes in the manner the legal community assigns preference to one principle over another.

Thus Clérico needs more than the idea of a network of norms in order to avoid a certain affinity towards particularism. She needs a criterion of relevance to justify when is possible to modify an ascribed norm, without falling into a kind of particularism that allows judges to revise the norm *every time* they decide a similar case.

[114] On overruling see Chapter VI.

III.2. One Qualification Against Weak Particularism: Reconstruction of a Set of Norms vs. Two Case Analogy

As discussed before, Clérico differentiates Alexy's balancing from particularistic approaches by pointing out that only legally *relevant* features may prompt and justify a revision of a precedent. The strong particularist argues that each situation may trigger the revision of a norm, given that it does not enjoy special normative status beyond the case in which it was issued. This is because features are relevant not in light of general principles but in light of other features that stand out in particular situations.[115] In contrast, Clérico and Alexy claim that only *some* features may be legally relevant to modifying the law. However, neither Alexy nor Clérico has properly clarified what features may be legally relevant.

In his recent work on analogy, Alexy takes a less strict approach to precedents, treating them as 'reasons for rules'[116] that legal participants apply through analogy or comparison of cases, rather than as universal rules that they apply through subsumption. Alexy claims that subsumption is the method for applying rules, while balancing is for deciding conflicts of principles, and analogy is the way of using cases.[117] Following depends on the number of *features* that the case at hand shares with the features considered to be relevant in a precedent: the more similarities between two cases, the more reason to follow it; the more differences, the more reasons to distinguish it.[118] Thus when there are enough similarities between the features of two cases, the 'reasons for the rule'[119] of the precedent apply to the following case. In Alexy's view, the principle of universalizability and the ideal of coherence require treating similar cases with shared features alike.[120]

Although the concern with features seems to suggest a more particularist approach, he observes that material features of precedential rules are limited, not infinite. [121] He justifies this assertion by saying that not every fact in the world is legally relevant, but that the relevance of features of cases is owed rather to the 'underlying reasons' that rules safeguard, which, according to him,

[115] Dancy, *Ethics without Principles*, above n 2, 85-90, 159, 192; Dancy, 'Moral Particularism', above n 2, section 3.
[116] Alexy, 'Two or Three?', above n 109, 17.
[117] Ibid 9, 14.
[118] Ibid 17.
[119] Ibid 14.
[120] Ibid 14, 18.
[121] Ibid 14.

usually have the structure of principles.[122] Thus, unlike the strong particularist, for Alexy features are not relevant in light of other features but in light of legal principles.

One qualification regarding Alexy's scheme of analogy is that judges do not simply compare the case at hand with a single precedent, but rather with an array of them. Alexy seems to borrow the standard approach to civil law analogy, namely, analogy *legis*, as opposed to analogy *juris*. Analogy *legis* is the extension of the underlying reason (*ratio legis*) for a single rule to an unanticipated case because the antecedent of the rule and the case to be decided share relevant facts in light of the underlying reason.[123] Analogy *juris* is the inference of a principle from a set of related rules when there is no single one that is sufficiently similar to the case at hand. [124]

In reality, legal participants do not simply discuss a single precedent but whole sets of them. While civil law scholars have widely discussed the use of analogy *juris* in statutory interpretation, they have not given adequate attention to its use in the interpretation of precedents. Yet there is a judicial practice of reading an ascribed norm in light of a set of others, either to clarify the ratio or to infer a principle. For instance, the Colombian Court ruled that when it is difficult to find a ratio from a single precedent, judges need to interpret it in the light of how later judges have interpreted it.[125] Then, as a descriptive issue, a holistic use of analogy, as chains of analogy not just extending a single rule to a case, but forming rules from sets of precedents and even inferring principles from sets of precedents, may be a more accurate analysis of judicial practice.

Moreover, a holistic use of analogy is preferable to a mere comparison of two cases, as it reduces judicial discretion. The comparison between two cases may favour the distinction of precedents as two cases are never identical. However, when legal participants invoke not one but a whole set

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[122] Ibid 15.

[123] On analogy legis, see e.g., Aleksander Peczenik, 'Jumps and Logic In The Law' (1996) 4(3) *Artificial Intelligence and Law* 297, 311-313.

[124] On analogy juris as a principle inferred of set of legislative rules, see e.g., Norberto Bobbio, *Teoria dell' ordinamento giuridico* (Giappichelli-editore, 1960) 176-84. Bobbio further distinguished between partial analogy juris and complete: the first is a principle inferred from a set of rules, while the second is a principle inferred from the whole legal order; Norberto Bobbio, *L'analogia nella logica del diritto* (Dott. A. Giuffrè Editore, first published 1938, 2006) 83, 93-6; Guastini, *Estudios sobre la interpretación jurídica*, above n 76, 61-2; Giovanni Damele, 'Analogia Legis and Analogia Iuris: an Overview from a Rhetorical Perspective' in Henrique Jales Ribeiro (ed), *Systematic Approaches to Argument by Analogy* (Springer, 2014) 243.

[125] SU-047-1999, above n 62, section 52; SU-1300-01, Marco Gerardo Monroy Cabra, 6 December 2001, recital II, section 2.2.
SU-058-2003, Eduardo Montealegre Lynett, 30 January 2003, recital II, sections 24-30; T-292-2006, Manuel José Cepeda Espinosa, 6 April 2006, recital II, section D) d).

of norms confirming or rebutting a claim, there is less scope for judicial discretion. This holistic approach is particularly relevant because, as Alexy suggests, analogy is required for coherence in the law.[126] Yet, the coherence that is relevant is not only the compatibility between a case at hand and a single isolated precedent, but instead consists in the mutual support between a set of norms that adds force to the particular judgment. This holism of ascribed norms does not have to cover the whole legal system, but only norms of a particular branch that regulate some of the facts of a particular case.

Then, if coherence is not an all-or-nothing quality of justification but a matter of the *degree* of interconnection between statements or propositions, as Alexy and Peczenik argue,[127] a judgment that finds support from more norms is *more* coherent than its alternatives. It is not only possible that legal participants may cite more ascribed norms, but it is also desirable that judges justify their decisions as flowing from a coherent set of interlinked norms.

To take full advantage of the constraining effect of ascribed norms to reduce judicial discretion, the gradual nature of coherence need to be linked to the argumentative nature of adjudication. Motivated by their own purposes, lawyers invoke not one but a series of ascribed norms to reduce judicial discretion. Even judges, whose direct interests are not at stake but who seek to advance a particular policy, invoke a greater and more rooted set of norms to reduce the discretion of fellow judges. The degree of exhaustiveness of the enquiry into precedents first favours the interests of the legal participants, but then also favours the rest of the community, as the judgement becomes part of a greater set of sources.

II.3. A Second Qualification to Weak Particularism: Backward- and Forward-Looking Relevance

Alexy and Clérico succeed in showing that good judicial practice may embrace elements of rule-based decision-making and balancing, but the notion of relevance needs to be examined in order to avoid a slide towards particularism. Alexy's notion of relevance as inferred from the underlying reasons of a single precedent in comparing just two cases seems to favour

[126] Alexy, 'Two or Three?', above n 109, 18.
[127] Robert Alexy and Aleksander Peczenik, 'The Concept of Coherence and Its Significance for Discursive Rationality' [130] (1990) 3(1 bis) *Ratio Juris* 130, 132, 144.

particularistic decision-making. For instance, in the Mexican case on the disclosure of information, the Court could have argued that the feature F^1—a serious crime – is not present in the case at hand, and that the feature F^2—protection of the personal data of officials – was absent in the precedent, thus that there are reasons to distinguish the case. While Clérico's reconstructive approach is better suited because it does not compare two cases but a whole network of precedents, it is unclear how she identifies relevant features that warrant distinguishing cases without coming very close to particularism.

In a similar vein, Clérico provides some clues about the criterion of relevance. She argues that cases that share relevant features must be treated alike.[128] However, she warns against 'unreflective continuity' and the 'petrification'[129] of ascribed norms, because cases can never anticipate all relevant circumstances, and previous judgments may be incorrect.[130]

The distinction advanced by Carlos Alchourrón and Eugenio Bulygin, between the *thesis* and the *hypothesis* of relevance is useful for reducing judicial discretion when distinguishing cases. The thesis of relevance refers to those features of cases that *are* relevant to safeguarding certain principles according to the original authority, which in the Alchourrón and Bulygin's account is primarily the legislator.[131] The hypothesis of relevance refers to those features of cases that *should* be relevant according to the interpreter, to protect a certain principle. While Alchourrón and Bulygin proposed the distinction in their descriptive work, mainly concerning codified legal systems, it is possible to borrow it and apply it so as to reduce the discretion of constitutional judges.

Legal participants can use a competitive constitutional principle as a thesis of relevance to challenge the application of an ascribed norm because it neglected a relevant feature, and to suggest or justify its distinctness. In this way, the participant can challenge the norm, whose antecedent is formed by particular features F^1, F^2, F^3, not only in light a new feature F^4 but one that is constitutionally relevant, according to a general principle. Thus, legal participants can appeal to a principle developed by the judiciary to challenge a particular norm in such a way that a set of norms enjoys a greater authority than a single, isolated decision.

[128] Clérico, above n 107, 129 footnote 43, 132.
[129] Ibid, 132
[130] Ibid, 133.
[131] Carlos E. Alchourron and Eugenio Bulygin, *Introducción a la metodologia de las ciencias jurídicas y sociales* (Editorial Astrea, 1987) 155.

This competitive principle can be either an explicit constitutional provision or an implicit principle developed by the judiciary. Legal participants can challenge a single ascribed norm by appealing to the constitutional provision. In such a scenario, participants ground their challenge on the superiority of the constitutional framers over judicial decision-makers. The competing principle is used to highlight that the previous decision-maker did not consider a relevant feature F^x, that warrants the issuing of a new norm. Legal participants can also invoke a principle as developed by a set of ascribed norms through analogy *juris*. In this scenario, legal participants challenge a single norm in light of a competing broader set of norms.

Once it is contended that a competing principle is necessary to prompt the revision of a norm, because it failed to consider relevant features, it is essential to consider *backward-looking* relevance. Backward looking relevance analyses whether a certain fact or feature has been considered constitutionally material in previous ascribed norms. These relevant features can be useful for reducing judicial discretion in subsequent exercises of balancing.

The case A.I.R. 599-2012 on the right of information and privacy illustrates backward-looking relevance. While it is true that facts related to freedom of information and privacy are constitutionally relevant, the distinction can be limited by a deeper reconstruction of norms. In one case, the First Chamber ascribed a norm to the constitutional text hat held that intimacy is a sub-genre of privacy, regarding a person's most personal details, such as their sexual preferences, and is thus more vigorously protected than generic privacy.[132] Moreover, in five cases the Chamber ruled that freedom of expression and information prevails over privacy, and that public servants enjoy a lesser degree of protection of the right to privacy than private citizens do.[133] It is also important to note that the First Chamber has ruled that the disclosure of public documents may be revealed *partial* or *total* according to the potential harm to state and private interests.[134] Likewise, the Second Chamber ruled that restrictions on information must be proportional to the reason that justifies its restriction.[135] Finally, the same Chamber held that public information

[132] A.D.R. 402-2007, Olga Sánchez Cordero de García Villegas, 23 May 2007, recital IV.
[133] See A.D.R. 2044-2008; A.D. 6-2009; A.D. 28-2010; A.D. 8-2012; A.D. 3-2011.
[134] A.I.R.168-2011, above n 97, recital IX, section 2.
[135] A.I.R. 50-2008, Genaro David Góngora Pimentel, 12 March 2008, recital IV at 36.

might be reserved or remain confidential when the authority obtained it as a private law agent, rather than as a state actor.[136]

Thus a reconstruction of ascribed norms suggests that (a) freedom of information usually prevails over state interests; (b) intimate details may be confidential; and (c) representatives handed in the information as state actors, not as private citizens. The Plenum had the burden of showing that it was constitutionally impossible to divulge at least some of the information.

The ascribed norm that the Plenum issued in A.I.R. 599-2012 may be represented as follows:

> **N[a:]** While the right to information usually prevails over other principles, when officials hand in their declaration of assets, they must consent to their disclosure, otherwise it is *prohibited* to reveal such information as it remains confidential.

Nevertheless, legal participants could have invoked the analysed set of ascribed norms to reduce the discretion of judges when balancing the principles of privacy and information. Unless the majority of the Plenum found a new relevant feature that justified the absolute secrecy of assets declared, the reconstructed ascribed norms suggest that the information may be disclosed while personal details of the security officials remained protected.

An alternative norm formed by a more comprehensive set of norms may have been more justified:

> **N[b:]** The right to information usually prevails over other principles, when officials hand in their declaration of assets they do it as public servants, in this case it is *compulsory* to disclose information about assets because it is of public interest when this is demanded by citizens, but it is *prohibited* to disclose the personal details of officials as these remain confidential.

Even if judges, from their particular point of view, consider that a disclosure is an error because privacy should be preferred – especially since they are also officials – ascribed norms limit their discretion to review the law while applying it. Ascribed norms are used to remind decision-makers that they are not deciding cases as moral agents, but are limited by constitutional sources

[136] C.T. 333-2009, Margarita Beatriz Luna Ramos, 11 August 2010, recital V, section I. The Chamber held that the information of the union from a state-run company is a social rather than public law matter.

that enjoy a preferential normative status over their individual reasons. Ascribed norms require decision-makers to act against their own assessment of the situation, unless and until they identify a feature that is not only relevant for them, but for the constitutional system.

However, it must be admitted that backward-looking relevance presupposes a number of ascribed norms in which two similar principles have competed. That is, it assumes the existence of a landmark precedent, and at least a couple of cases that followed and discussed the landmark precedent, or involved similar questions. In some scenarios there will be neither guidance nor constraint exercised by judicially ascribed norms, but only from constitutional provisions. Perhaps Alexy takes as a starting point a jurisdiction in which there are few precedents, and where there is therefore ample judicial discretion for distinguishing them. This occurred, for instance, when the Colombian Constitutional Court started functioning just after the Constitution of 1991 was promulgated. At that stage, there were few ascribed norms because constitutional courts had not decided many cases, it can be argued that there was broader discretion for constitutional makers to revise ascribed norms.

It is therefore important also to consider *forward-looking* relevance. Decision-making is cyclical. Judges are limited by the provisions enacted by framers and norms ascribed by previous decision-makers; nevertheless, today's ascribed norms will control future decision-makers, who, in turn, will be able to distinguish and overrule some of those ascribed norms. However, when a constitutional regime starts functioning, it may be argued that judges decide controversies relatively unrestrainedly, as superior courts have not yet issued many ascribed norms that ascribe precise meanings and prima facie hierarchies to constitutional principles.

In such infrequent scenarios where there are but few precedents, Alexy's particularistic approach to analogy seems appealing for distinguishing ascribed norms. A single precedent may not have exhausted the features that are constitutionally relevant. However, the entire universe of facts of the world is not constitutionally relevant, but only those that can be subsumed under the antecedent of a constitutional standard, whether it is a rule or a principle.[137] Later, legal participants subsume the facts or features under the antecedent of the relevant norm and then interpret it or balance the relevant principles. Where there is a lack of a great body of ascribed norms, a case at hand may only need to be distinguished from a single precedent.

[137] On the distinction between the universe of discourse and the universe of legal cases, See, Alchourrón and Bulygin, above n 131, 33, 118.

For instance, the ascribed norm that authorised the disclosure of an ongoing criminal investigation in cases regarding forced disappearance would be reasonably distinguishable from the later case on the declaration of assets. The fact: serious violations of human rights permits the disclosure of ongoing public investigation is distinct to the fact: the declaration of assets of representatives because its secrecy is not as detrimental to the right to information than the first.

Nonetheless, in the long run the ascribed norms will accumulate and apply to cases unforeseen by the original decision-makers. Progressively, decision-makers will be forced to justify the revision of ascribed norms, either through distinguishing or overruling, requiring that the new norms cohere with relevant ascribed norms. This constraint, of coherence with ascribed norms, is not only a self-imposed judicial constraint, but is a result of pressure from lawyers and public scrutiny. For instance, it would be harder for later decision-makers to distinguish the ascribed norm of disclosure of an ongoing criminal investigation when lawyers invoke it in a case regarding abuses of authority. The greater the network of ascribed norms reconstructed by lawyers, the less judicial discretion there is. The new relevant fact that warrants a different treatment would need to cohere with ascribed norms.

Thus it can be said against the strong particularist that in adjudication, unlike ordinary moral discourse any decision will influence future cases. This is true even in concrete constitutional review cases as *Amparo* or *Tutela.* In such cases, as opposed to abstract review cases, particular facts are decisive for resolving a concrete controversy. However, the particular facts of the case will become the antecedent of a general ascribed norm. In fact, this is the application of Alexy's Law of Competing Principles, which suggests that once a principle has prevailed under certain conditions, it will take 'precedence whenever the conditions are satisfied'[138]. The facts that are legally relevant for a case become the *protasis*, also known as the antecedent of a rule, and the conclusion of the case becomes the *apodosis*. The judgment becomes a rule that must be considered in future scenarios, even if new facts trigger the revision of the rule.

For instance, in T-1317-2001, a Chamber of the Colombian Court ruled that the facts of a *Tutela* become the antecedent of a rule that binds future cases.[139] The plaintiff was a student who was expelled from the university for low academic performance, who argued that this was a violation

[138] Alexy, *A Theory of Constitutional Rights*, above n 37, 101, see also at 52-6.
[139] T-1317-01, Rodrigo Uprimny Yepes, 7 December 2001, recital II, section 6.

of her right to education, while the university claimed that its decision was based on its autonomy. The Chamber first distinguished a precedent invoked by the plaintiff, because it dealt with the role of educators in eradicating discrimination, rather than with the autonomy of universities.[140] While the Court had protected the right to education over autonomy,[141] it did so only because the sanctions were not explicitly provided by regulations, or because the sanctions violated the relevant laws, not in cases of low academic performance. In this way, particular facts become the antecedent of a complex ascribed norm and acquire autonomous status as sources of law after a successful process of reconstruction.

Although it is possible that in addition to applying or following ascribed norms, decision-makers can revise them by distinguishing or overruling them, this revised norm would need to be supported by other ascribed norms, not only by the decision-maker's arguments. Ascribed norms need to cohere with other norms. When decision-makers distinguish norms, the exception must be based on a feature that supports prior rulings. When decision-makers overrule, they need to show that the general preference that the legal community has ascribed to one principle has been reversed. Although both kinds of revision amount to a break with universalisability understood as a logical constraint on rules,[142] the revision is limited by prior ascribed norms. Thus it is not constitutionally permissible to make revisions *always* but only when the ascribed norm reasonably coheres with a set of norms.

To conclude this section, there are three arguments that summarize the objection against legal particularism. First, against strong particularism, it was argued that features of situations and the holism of reasons are actually mediated by legal principles. Not all reasons or features are automatically legally relevant, but only those human actions that safeguard or threaten a constitutional principle. Legal participants can find these principles explicit in constitutional provisions or inferred from a set of ascribed norms through analogy *juris*. The role of ascribed norms is to reduce the scope if judicial discretion by considering not only facts that present judges find relevant today, but what previous decision-makers have considered relevant as well.

Second, the section raised a qualification against weak particularism grounded on the preference for reconstructing sets of ascribed norms rather than the comparison of two cases. Such norms

[140] Ibid, distinguishing T-337-1995, Eduardo Cifuentes Muñoz, 26 July 1995.
[141] T-647-1998, Antonio Barrera Carbonell, 10 November 1998; T-649-1998, Antonio Barrera Carbonell, 10 November 1998; T-974-1999, Álvaro Tafur Galvis, 2 December 1999, recital II, sections 3 to 5.
[142] See Chapter II.

would usually have the structure of rules; stating that a certain set of facts is prohibited, permitted or required. For the sake of reducing judicial discretion, a more holistic approach to precedent is preferable to the comparison of two cases concerned with features. Also, this more holistic approach considers how past decision-makers have treated certain facts as relevant or irrelevant, and the legal consequence that they attached to them. A holistic reconstruction of a complex norm formed by sets of precedents is superior to a mere comparison of two cases, and is a more accurate description of the judicial practice in the civil law.

Third, the qualification against weak particularism and its use of the comparison of cases leads us to a more norm-oriented approach. While Alexy is right in stressing that coherence requires analogy, the scope of normative coherence is broader than a mere comparison of two cases. Instead, what is needed are chains of analogies and sets of ascribed norms for proposing complex norms that cover the case. The more norms support a particular judgment, the more it coheres with relevant law. When there are conflicting sets of norms, judges will need to select one or propose an alternative and justify the selection.

This norm-oriented approach better explains and justifies the continuum between the extremes of applying and overruling precedent. On one extreme, when there is a single norm, or an overall coherent set of norms that exactly cover the facts of case, then judges simply *apply* norms to similar cases. Then, when some norms cover most facts but not all, and there are some conflicting norms, decision-makers *follow* such norms, adding some clarifications to the original norm. Later, when there are enough different facts, or some facts have been considered relevant enough to warrant a different treatment, decision-makers partially revise the norm by *distinguishing* it. Finally, on the other extreme, when most ascribed norms indicate that a preference for a principle has been transformed from one time to another so as to indicate that currently, a new principle prevails, superior judges are empowered to perform a general revision of the norm, abrogating it and substituting it with a new one by *overruling* it.

While it must be conceded to particularists that decision-making implies the possibility of revising norms while applying them, the provision-norm distinction is useful for making such revisions reasonably justified. Legal participants may point out the relevance of a fact that warrants a different treatment between the parties of the case and the parties in the precedent. However, such facts need to be relevant in light of a constitutional principle independent of the legal participants. Moreover, ascribed norms are useful for constraining the decision-maker. It is

not always justifiable to distinguish or overrule precedents. Ascribed norms state how a fact was considered relevant in precedents, thus if decision-makers today seek to distinguish a norm, they need to support the distinction with other norms. Similarly, when decision-makers seek to overrule a precedent, they need to show that a greater set of norms justifies its abrogation, and they must indicate that the new rule should be ascribed.

IV. Reasonable Coherence Among Ascribed Norms: Between Universalism and Particularism

This chapter has cast doubt on strong particularism. But the picture of universalism in law as a closed, static system comprised of strict rules is inaccurate. Decision-makers do more than subsume facts under rules by deduction. There is no perfect rule that anticipates all scenarios. Decision-makers can revise norms by distinguishing relevant facts that warrant a different treatment. Moreover, it is at least possible that the preference assigned to one principle over another fluctuates over time and decision-makers may be able to overrule the norm. However, the opposite position – namely, particularism – is also questionable. It is doubtful that decision-makers modify norms every time they decide a case. When decision-makers fail to come up with a new fact that is constitutionally relevant, they simply apply or follow a norm without modifying it, even if it does not reflect their personal beliefs. It is even less plausible to say that decision-makers can always modify any norm at any time. On the contrary, at least some norms need to be stable and serve to challenge others. Therefore some norms do operate as general standards and constrain the judgment the decision-makers when pointing out relevant features that make certain actions right.

The following table provides a taxonomy of the different decision-making approaches analysed in this chapter.

Table II: From Universalism to Coherentism

Decision-making approach	Normative status of ascribed norms	Method for applying ascribed norms	Burden of argumentation for revising norms
Universalism	Strict and static rules	Subsumption after a process of interpretation	The new rule must be universalisable for future scenarios.
Pure/strong particularism	The same status as any other reason	Holism of reasons	No burden of argumentation.
Weak/rule-sensitive particularism	Prima facie/defeasible rules	Two-case analogy	Legally relevant differences between cases.
Coherentism	Prima facie/revisable rules	Subsumption after a process of reconstruction of a set of norms	A legally relevant difference in light of another rule or principle *and* the mutual support between the new rule and a set of pre-existing sources.

The essential objection against universalism is that it does not pay sufficient attention to the temporal or dynamic nature of rules. A strictly universalist approach would suggest that once a judge issued a rule, later judges should *always* limit their task to applying the rule to similar cases. However, universalibility in law is relative to a certain jurisdiction and a given time in its history. If the universalisability of judgments depends on their compatibility with the values, principles, rules or conventions of a given community, then, by the same token, their universalisability is also relative to a certain time. The adequacy of rules depends on how the

legal community understands a certain rule or principle and how it ranks them at a particular time in history. Thus, if the occurrence of new facts or a new understanding of them prompts the revision of a rule, the revision needs to be constrained in order to avoid arbitrary decision-making.

Against the strong particularist, the chapter has argued that ascribed norms reduce the scope of judicial discretion with respect to interpreting constitutional provisions. Norms minimise and rationalise discretion by ascribing concrete meaning to vague and ambiguous constitutional provisions and developing prima facie hierarchies of principles. The particularist is forced to acknowledge that such norms enjoy a privileged normative status over reasons and features of cases.

Thus coherence between a new judgment and a set of ascribed norms is a useful constraint for reducing judicial discretion in light of unanticipated circumstances. Judges may modify or abrogate an ascribed norm at the same time that they apply it, but they need to provide reasons to justify the modification other than the features of the particular case. Such features must be relevant in light of a pre-existing rule or principle. Also, the new norm must form part of a relatively coherent sub-set of pre-existing sources dealing with a related question of law.

Still, the weak particularist and the sceptic alike may argue against the coherentist that the indeterminacy of law is not eliminated but relocated, and so particularistic reasoning reappears. The particularist may argue that instead of vagueness and ambiguity being a source of indeterminacy in constitutional provisions, now it is the conflict or the lack of coherence between sets of ascribed norms that results in indeterminacy of a new kind. The weak particularist may concede that there are norms, while holding that these are so conflicting and contradictory that it is preferable for decision-makers to make judgements according to their particular conception of justice as derived from the features of the situation. The next chapter tackles the challenge of conflicting ascribed norms.

Chapter IV The Framework of Constitutional Reciprocity

This chapter proposes Constitutional Reciprocity as a method for dealing with precedents in constitutional adjudication in the civil law. This method is an adaptation of John Rawls' coherentist process of reflective equilibrium (RE) to the institutional and intersubjective context of constitutional adjudication in the civil law. The subject matter of RE is considered judgments and its goal is to systematise and revise them to develop coherent theories of morality. In contrast, the subject matter of Constitutional Reciprocity is judicially ascribed norms, and its goal is to issue judgments that cohere with them. The institutional feature stresses that ascribed norms are supported by the formal principles of authority, equality and legal certainty. Constitutional Reciprocity is also useful for revising norms, but the possibility of revision is qualified by formal principles that safeguard sources regardless of their content. The intersubjective feature stresses that legal participants invoke competing sets of norms and judges need to select one set or propose another and justify their selection. In this way, a modest foundationalist interpretation of RE is proposed; ascribed norms enjoy a preferential normative status over other types of reasons. Rather than a complete theory of legal reasoning or adjudication, Constitutional Reciprocity is a framework that is valuable for achieving coherence between a potential judgment and a set of constitutional precedents.

I. Coherentism and Foundationalism in Justification

The last chapter critically assessed the role of particularism in constitutional adjudication. Particularists claim that unanticipated situations can always trigger the revision of law when it is being applied. While particularists are correct in stressing the possibility of the revision of legal sources, they do not give sufficient attention the institutional context in which this revision takes place. Facts need to be relevant in light of another constitutional source to justify the revision of a judicially ascribed norm. Even when judges revise a norm, the new ascribed norm will constrain judges in future similar scenarios.

This chapter proposes the modest foundationalist framework of Constitutional Reciprocity for dealing with constitutional precedents in the civil law. Constitutional Reciprocity is an adaptation of Rawls' RE – arguably the best-known coherentist method of moral reasoning.[1] According to Rawls, as will be further discussed below, RE is both a method for revising theories to minimise internal contradictions, and the state of affairs of having reached a position of internal coherence.[2] In this context, coherence accounts for the mutual support between general principles and concrete judgments.[3] RE is a coherentist method because all principles and judgments enjoy the same status; they can be revised or eliminated until coherence is reached.

Coherentist methodologies of morality need to be framed within the debate between fondationalists and coherentists in epistemology, where the latter emerged as a reaction to the former. At the one extreme, foundationalists claim that justification derives from certain basic and unrevisable beliefs usually linked to experience.[4] Because basic beliefs enjoy a privileged status over derived beliefs, the structure of foundationalist justification is like a pyramid.[5]At the other extreme, the coherentist claims that no belief enjoys a privileged status. Rather, justification depends on how broad, mutually supported, and free of contradiction a set of beliefs is.[6] The structure of coherentist justification is like a raft: it takes the inquiry wherever it needs to go and its components can be removed and replaced to improve it when the need arises.[7]

However, there can be intermediate positions between foundationalism and coherentism. Modest foundationalists give a prima facie preferential status to descriptions of states of affairs based on experience that link beliefs with the external world. They concede to coherentists that such descriptions are revisable in light of other beliefs that are better justified because of the way they 'concur' with other beliefs, and this concurrence adds weight to the epistemic status of those

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[1] Norman Daniels, Reflective Equilibrium (2013) *The Stanford Encyclopedia of Philosophy (Winter 2013 Edition)* <<http://plato.stanford.edu/archives/win2013/entries/reflective-equilibrium/>>; But see, Roger P. Ebertz, 'Is Reflective Equilibrium a Coherentist Model?' (1993) 23(2) *Canadian Journal of Philosophy* 193, 198-207.
[2] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 18-21.
[3] According to Norman Daniels, RE is a method for good moral decision-making. Norman Daniels, 'Wide Reflective Equilibrium and Theory Acceptance in Ethics' (1979) 76(5) *The Journal of Philosophy* 256. In contrast, according to John Mikhail, RE is not a method, but the description of a state of affairs when persons reach a state of coherence between intuitions. See John Mikhail, 'Rawls' Concept of Reflective Equilibrium and Its Original Function in A Theory of Justice' (2011) 3(1) *Washington University Jurisprudence Review* 1, 14-19.
[4] Ernest Sosa, 'The Raft and the Pyramid: Coherence versus Foundations in the Theory of Knowledge' (1980) 5(1) *Midwest Studies in Philosophy* 3, 5.
[5] Ibid 3-4.
[6] See, Nicholas Rescher, *The Coherence Theory of Truth* (University Press of America, 1982).
[7] Otto Neurath, 'Foundations of the Social Sciences' in Otto Neurath, Rudolf Carnap and Charles Morris (eds), *International Encyclopedia of Unified Sciences* (University of Chicago Press, 1966) vol 2, 47.

other beliefs.[8] For instance, someone's belief in what appears to be a cat, because she sees what appears to be a cat through her eyesight, is prima facie preferable to denying the presence of a cat. Yet, this belief can be rebutted by another set of beliefs that suggest that what appeared to be a cat was actually a dog because of its appearance, behaviour and anatomy. There can also be hybrid theories such as Susan Haack's Foundherentism, that combines the foundational element of empirical evidence linked to the external world with the coherentist elements of comprehensiveness and interconnection of beliefs, without granting special status to either.[9] Modest foundationalists still assign a preferential status to empirical evidence, while foundherentists give equal rank to evidence and the requirement of mutual support.

Legal theorists have also appealed to the role of coherence and mutual support in legal justification. They suggest that legal justification is more than applying rules through deduction. Legal reasoning also requires than interpretations should 'fit'[10] or 'hang together'[11] with a set relevant sources understood as a rational whole. In this way, coherence in the law, as discussed in the introductory chapter, works both as an ideal and as a constraint on judicial discretion. In addition, coherence implies that judgments can trigger the revision of precedents to render law coherent. The previous court may have failed to notice a fact that is legally relevant and thus may distinguish the precedent. Similarly, the previous court may have issued a precedential rule that has become incoherent in light of subsequent precedents and thus it may be justified to overrule it.

In this sense, RE can serve as the core of a normative conception of constitutional precedent. Equilibrium serves to systematise components to show that a particular judgement is justified because it coheres with previously held beliefs, just as judges reconstruct precedents to justify a particular decision. At the same time, this process of systematization can serve to identify tensions that need to be revised to re-establish coherence, just as judges distinguish or overrule precedents to re-establish coherence among a set of precedents.

[8] See Roderick M. Chisholm, *Theory of Knowledge* (Prentice Hall, 3rd ed, 1989) especially at 1, 18-25, 69-71.
[9] Susan Haack, *Evidence and Inquiry: Towards Reconstruction in Epistemology* (Blackwell Publishers, 1993) especially at 73, 83, 90. But see, Peter Tramel, 'Haack's Foundherentism is a Foundationalism' (2008) 160(2) *Synthese* 215.
[10] Ronald Dworkin, 'Hard Cases' (1975) 88(6) *Harvard Law Review* 1057, 1069.
[11] Neil MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005) 190.

This Chapter focuses primarily on how a judgment should cohere with a set of ascribed norms, while chapters V and VI tackle the question of distinguishing and overruling precedents, respectively. Section II of this chapter analyses the method of RE in moral philosophy. This section also identifies the institutional and intersubjective features of adjudication that prompt an adaptation of the method into the context of constitutional law. Then, sections III and IV analyse the coherentist theories of Ronald Dworkin and Amalia Amaya. Section V proposes the framework of Constitutional Reciprocity as a method of achieving coherence between a potential judgment and a set of previously ascribed norms. Section VI applies Constitutional Reciprocity to the case study of gay adoption in Mexico and Colombia. Finally, Section VII concludes with some preliminary remarks on the usefulness and challenges facing Constitutional Reciprocity.

II. The Coherentist Method of Reflective Equilibrium

II.1. The Method of Reflective Equilibrium in Moral Discourse

Without using the term, the method of RE was first introduced in the field of inductive and deductive logic by Nelson Goodman.[12] According to Goodman, a process of reciprocal adjustment between particular inferences and general principles is the appropriate method for justifying deduction and induction. If a general principle leads to inferences that are implausible, the principle should be abandoned.[13] Likewise, if a concrete inference violates a general principle proved to be adequate, the inference should be rejected. In this bidirectional process of revising general principles and particular inferences, enquirers achieve a state of coherence.

Rawls introduced this method into the field of moral philosophy and coined the term of Reflective Equilibrium.[14] As developed in *A Theory of Justice,* the agent starts with some 'considered judgments'[15] about the right thing to do in light of a particular case and tries to reconstruct them to form a coherent set. However, these considered judgments are subject to review. When agents find conflicting judgments they have two options: either they modify the

[12] Nelson Goodman, *Fact, Fiction, and Forecast* (Harvester Press, 3rd ed, 1979) 61-4.
[13] Ibid, 63-4.
[14] Rawls, above n 2, 18-21, 48-50, 119-20. Before his *Theory of Justice*, Rawls proposed a similar procedure without using the term 'RE', where he also gave a more intersubjetive account of the procedure discussing how 'competent judges' should solve conflicts of interests. See, John Rawls, 'Outline of a Decision Procedure for Ethics' in Samuel Freeman (ed), *John Rawls: Collected Papers* (1999) 1-19(first pubished 1951)], especially at 1, 3-4, 13.
[15] Rawls, *A Theory of Justice*, above n 2, 48.

particular judgment or revise the general principle, until both support each other.[16] In this process of going back and forth modifying the judgment in light of principles or vice versa, what Rawls calls the 'sense of justice'[17] of the person may change once a state of equilibrium is reached.

Thus RE fulfils two basic functions. First, it *systematises* the considered judgments of a person, enabling them to make inferences to general principles that explain and justify a potential judgment. This may identify tensions between the judgment and the general principles. As a result of this conflict, the agent may *modify* the judgment to cohere with the principles. However – and this is the second function of RE – it may be the case that the agent *revises* the principles in light of the potential judgment.

In a later paper, perhaps in reply to criticism, Rawls explicitly distinguished between *Narrow* (NRE) and *Wide Reflective Equilibrium* (WRE). Richard Hare has questioned Rawls' method as an intuitionist approach that merely confirms the prejudices that the agent had under the appearance of a rational procedure.[18] Thus, Rawls noted that in NRE, agents develop a coherent scheme between concrete considered judgments and general principles.[19]Considered judgments are *prima facie* fixed points in this process that support a conclusion, but any judgement is subject to revision and can even be rejected in favour of judgments and principles that are free of conflict.

For instance, in NRE, an agent inquiring about the correctness of euthanasia may start with the principle of the protection of life and conclude that persons do not own their lives and therefore that euthanasia should not be allowed. Then, however, the agent may question this conclusion, arguing that persons do own their lives and that euthanasia is valid when a person is no longer able to live a dignified life. This stage of revision triggers the rejection of the previous conclusion about the ownership of life and modifies the general principle of the protection of life. Now, euthanasia is no longer a violation of the protection of life but an instantiation of it. In contrast, according to Rawls, in WRE, the agent not only develops a coherent scheme between principles

[16] Ibid 20.
[17] Ibid 49.
[18] R. M. Hare, 'Rawls' Theory of Justice' (1973) 23(91) *The Philosophical Quarterly* 144, 146, 147-9, 155. For a reply to the objection of intuitionism, see Daniels, 'Wide Reflective Equilibrium and Theory Acceptance in Ethics', above n 3, 264-271. See also Peter Singer, 'Sidgwick and Reflective Equilibrium' (1974) 58(3) *The Monist* 490, 515-7; Peter Singer, 'Ethics and Intuitions' [331] (2005) 9(3) *The Journal of Ethics* 331, 344-347.
[19] John Rawls, 'The Independence of Moral Theory' (1975) 48 *Proceedings and Addresses of the American Philosophical Association* 5, 8-9.

and judgements but also considers competing background theories.[20] Thus, for instance, the agent may have developed a theory about euthanasia based on the autonomy of individuals, but after reading a rival treatise on the sacredness of life, the agent may revise and reject his or her previous views.

The main difference between NRE and WRE is that the latter presupposes a comparison between competiting theories. As Normal Daniels notes, in NRE, agents develop a coherence between (i) moral judgments and (ii) moral principles, but in WRE agents add a third element: rival background theories.[21] In WRE it is not sufficient to develop a coherent scheme of principles and judgments; it is also necessary to consider alternative theories and select the most internally coherent position. As Rawls, states it:

> [justification] presumes a clash of views *between persons* or within one person, and seeks to convince others, or ourselves of the reasonableness of the principles upon which our claims and judgments are founded[22].

This statement emphasises the importance of distinguishing between individual and *intersubjective* WRE. In individual WRE, the agent opens her mind to competing claims as in a monologue. The scope of the enquiry is broader than in NRE. However, the comparison between schemes is limited to the systematisations of the same agent. Just as agents can develop principles to confirm their own biases, they can also reconstruct competing theories to ratify their own preconceived theories.

In contrast, in intersubjective WRE, the agent interacts with fellow speakers and they try to change each other's 'sense of justice'. This exchange of sets of beliefs cannot take place when agents engage in individual RE. In this later scenario, the alternative theory or the hypothetical adversary may be used to confirm an intuition rather than to justify a decision before other agents.

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[20] Ibid.
[21] Daniels, 'Wide Reflective Equilibrium and Theory Acceptance in Ethics', above n 3, 259.
[22] Rawls, *A Theory of Justice*, above n 2, 580 (emphasis added). Elsewhere, Rawls also stated: 'the problem of justice arises whenever it is reasonably foreseeable consequence of the satisfaction of two or more claims of two or more persons that those claims, if given title, will interfere and conflict with one another', Rawls, 'Outline of a Decision Procedure for Ethics', above n 14, 13.

RE may be summarized in three accumulative tiers. In NRE agents (a) systematise their beliefs to form coherent principles that justify a concrete judgment. In case of conflict between a concrete judgment and a general principle, they either (b) modify the original judgment in light of other beliefs or (c) review the other beliefs in light of the concrete judgment. Then, in WRE, agents also consider competing theories at all levels of generality that seem to clash with their own. Finally, in intersubjective WRE agents interact, making claims, objections and qualifications to such claims, seeking to select the most coherent theory and to change each others' sense of justice.

II.2. Preliminary Remarks on the use RE in Constitutional Adjudication

The kind of RE valuable for adjudication is not only intersubjective but also *adversarial.* In other kinds of social practice, the interaction between participants may be predominantly cooperative. In contrast, while there can be cooperation among legal participants – e.g., clerks assisting judges or lawyers – one important element of adjudication is that it is adversarial. Lawyers raise competing claims and seek to persuade judges of incompatible conclusions. In multi-member courts, judges also invoke precedents to question the interpretations suggested by fellow judges. By definition, there are always two competing claims.

Once it is observed that the equilibrium that matters for constitutional adjudication is intersubjective, it is also pivotal to consider the *institutional* context of adjudication. As noted by Robert Alexy, adjudication is an argumentative institutional practice constrained by particular legal restrictions unfamiliar to moral discourse. This is what Alexy calls 'the special case thesis'[23] of legal discourse. The law is neither supplementary of nor subordinated to general practical discourse, but is a particular instantiation of the latter. In adjudication not everything is

[23] Robert Alexy, *A Theory of Legal Argumentation* (Ruth Adler and Neil MacCormick trans, Oxford Clarendon Press 1989) [trans of: *Theorie der juriistichien Argumentation: Die Theorie des rationale Diskurses als Theorie der juristichen Begrundng* (first published 1978)The thesis that adjudication is a special case of general discourse is based on the Habermasian concept of the "ideal speech scenario" in which free and informed speakers discuss until they reach a rational consensus. However, Habermas himself rejects the special case thesis because adjudication is not a free and egalitarian enquiry, but an asymmetrical and strategic discussion. See Jürgen Habermas, *Between Facts and Norms* (William Rehg trans, MIT Press, 1998) [trans of: *Faktizitiit und Geltung. Beitriige zur Diskurstheorie des Rechts und des demokratischen Rechtsstaat* (first published 1992)], 231-7. For Alexy's reply, see Robert Alexy, 'The Special Case Thesis' (1999) 12(4) *Ratio Juris* 374, 376-84.

debatable; cases have deadlines and decisions must be based, at least partially, on positive law.[24] These constraints are alien to general discourse, in which controversies are wholly indeterminate, discussions may never be settled, and conclusions are exclusively based on arguments rather than on legal sources.

The most relevant institutional constraint in constitutional adjudication is that of *legal sources*. Legal sources – constitutional provisions, or judicially ascribed norms – constrain legal participants in the process of argumentation. Legal authorities may constrain interpreters by issuing constitutional provisions or ascribing judicial norms to them. Firstly, constitutional framers may limit or empower legal participants through the enactment of constitutional *provisions*. For instance, a constitutional rule prohibiting capital punishment precludes any argument in its support, regardless of the economic or political implications.

Secondly, as discussed in previous chapters, when judges interpret a provision in a certain way, they ascribe a *norm* that is prima facie binding for later cases. Such ascribed norms in adjudication are prima facie fixed points. In this sense, they play a similar but not identical role to that which considered judgments play in moral discourse. In adjudication, these norms are safeguarded by what Alexy calls the *formal* principles of authority, equality and certainty.[25] Formal principles indicate that the force of law supports particular decisions issued by competent authorities, regardless of their content. As such, ascribed norms enjoy a prima facie preference over new incompatible interpretations of constitutional provisions.

In the institutional context of adjudication, there is an analogy but not an identity with the method of RE as applied in moral discourse. The scope of judicial decision-making is first limited by formal competences established in constitutions or legislations. Moreover, any legal decision needs to be the product of a process established by law, guided by parties, and limited by burdens of proof and argumentation. The main difference is that the subject matter of RE as applied to adjudication is decisions issued by competent authorities, rather than beliefs of moral agents.

This institutional feature influences how the two functions of RE operate in adjudication. First, legal participants use it to *systematise* ascribed relevant norms in relation to the facts of the

[24] Alexy, *A Theory of Legal Argumentation*, above n 23, 19-20, 212-4.
[25] On the role of formal principles in precedent see Chapter II.

case.[26] This systematisation results in a set of ascribed norms that justify a potential judgment. As a result, judges may *modify* or abandon the potential judgment in light of the ascribed norms. That is, a lawyer may succeed in changing judges' 'sense of justice' once the initial intuition is rendered implausible, when it is seen in the light of a broader set of reasons that contradict it. Second, when judges are unwilling to modify the original judgment they *revise* one or several of the previously ascribed norms. Instead of abandoning the potential judgment, they modify or abrogate a legal source and issue a new one.

These two functions require further explanation. First, the function of systematisation can be subdivided into two tasks. One sub-function is to ascribe *meaning* to constitutional provisions. The other sub-function is to ascribe concrete weight to constitutional principles. Ascribed norms indicate under which circumstances a certain principle prevails over another.[27] When judges rule that a certain set of facts is commanded, they suggest the prima facie preference of one principle over the other. Conversely, when a court rules that a certain set of facts is prohibited, the opposite happens. If the process of systematisation occurred in an isolated context, judges could decide the case according to their intuition and then give the appearance of justifying it in a post-hoc fashion.[28] However, this is not how judges decide cases. Instead, legal participants respond to each other's arguments. When one participant invokes norms, judges need to justify transparently that such norm is irrelevant, must be distinguished, or overruled. In short, in this function of RE, legal participants raise competing set of norms to change or confirm judges' sense of constitutional justice.

The second function of RE is the *revision* of previously ascribed norms. Thus, rather than modifying the conclusion of the case at hand, legal participants prompt the court to review a norm or a set of norms. What triggers the revision may be that the facts of the case at hand were not anticipated by the previous norm but are constitutionally relevant. Alternatively, other constitutional provisions and norms may be in tension with a given norm in such a way that it is preferable to abrogate the norm rather than leave the relevant area of law in a state of incoherence. The revision is *partial* when courts distinguish a norm and *general* when they

[26] The terms 'systematisation' or 'rational reconstruction' (coined by Neil MacCormick) used in Chapter I and subsequent chapters are used interchangeably. Both terms refer to a process of re-arranging apparent unconnected sources to form coherent wholes that justify a particular interpretation of the law.
[27] Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans, Oxford University Press, 2002) [trans of: *Theorie der Grundrechte* (first published 1985)] 52.
[28] See Joseph C. Jr. Hutcheson, 'Judgment Intuitive: The Function of the Hunch in Judicial Decision' (1929) 14(3) *Cornell Law Review* 274. But see, Schauer, *Thinking Like a Lawyer*, above n 128.

overrule. When judges distinguish an ascribed norm they modify its scope, as it has proved inadequate for handling the facts of the case.[29] When judges distinguish a norm, it remains a valid source for further cases. In contrast, when competent judges overrule a norm, they abrogate it.[30]

These preliminary remarks suggest that the migration of RE from moral discourse to constitutional adjudication should imply a reconfiguration of the method, as it is permeated by the institutional and intersubjective features of adjudication. The next two sections critically assess the work of Ronald Dworkin and Amalia Amaya on normative coherence. The analysis of both approaches, more than an exegesis, is a critical reconstruction in light of the previous discussion on RE and of this chapter's main question, namely: Is RE, with its corresponding adaptations, the best method to apply constitutional precedents in the civil law?

III. Ronald Dworkin's Interpretation of Reflective Equilibrium

Two reasons justify analysing Dworkin's work. First, Dworkin was perhaps the first scholar to borrow RE and apply it to dealing with precedents in the common law.[31] In later years, he reaffirmed his intellectual debt to Rawls.[32] Second, Dworkin influenced the development of a theory of precedent in the civil law. For instance, Diego López borrowed the Dworkinian distinction, discussed below, between the enactment and the gravitational force of precedents.[33] Similarly, Ana Magaloni seemed to invite Mexican justices to conceive precedents as pieces of a Dworkinian collective chain novel in which each judgment is a akin to a chapter which must cohere with precedents.[34] Also, the civil law may have indirectly influenced Dworkin. Dworkinian principles seem vaguely inspired by the civil law conception of 'general principles of the law' – i.e., standards that are not formally established in legislation but fill gaps when solving a case.[35] Thus, just as Rawls influenced Dworkin, the latter also influenced civil law scholars, and

[29] See Chapter III and V.
[30] See Chapter VI.
[31] See Ronald Dworkin, 'The Original Position' (1973) 40(3) *The University of Chicago Law Review* 500, 505-519 , 1391-2, 1405.
[32] Ronald Dworkin, 'Rawls and The Law' (2004) 72(5) *Fordham Law Review* 1387, 1391-2, 1405.
[33] Diego López Medina, *El derecho de los jueces* (Legis, 2nd ed, 2006) 61.
[34] Ana Laura Magaloni Kerpel, '¿Por qué la Suprema Corte no ha sido un instrumento para la defensa de los derechos fundamentales?' in Eduardo Ferrrer Mac-Gregor and Aturo Zaldívar Lelo de Larrea (eds), *La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho.* (UNAM, 2008) vol II Tribunales constitucionales y democracia., 271, 280.
[35] See Dworkin, *Law's Empire* above n 19. Cf, *Riggs v. Palmer* (1889) 115 N.Y. 506. (Robert Earl J.) at 513 (citing the Code Napoleon and the work of Jean Domat). See also Geoffrey Samuel, *A Short Introduction to the Common Law* (Edward Elgar Publishing, 2013) (Noting that Dworkin's interest in coherence and principles resembles the

the dialogue between common and civil law scholars will continue. Throughout his career, equilibrium played an essential role in Dworkin' theory of law, which includes a theory of common law adjudication, which in turn includes a theory of precedent. The early Dworkin argued that equilibrium was 'analogous to one model of common law adjudication'[36] and the late Dworkin insisted that it was the traditional common law method'.[37] It is therefore important to analyse Dworkin's contributions to the quest for coherence between judgments and precedents, so that his approach can later be complemented and improved for the civil law.

III.1. Dworkin's Constructive Interpretation

Before borrowing RE, Dworkin made a famous distinction between rules and principles. He claimed that rules have a clear factual predicate and are applicable in an 'all-or-nothing fashion'[38]. In contrast, principles are not applied in an all-or-nothing fashion because they have a 'dimension of weight'[39]. For example, the principle 'No man may profit from his own wrong'[40] neither has a clear factual predicate nor attaches a legal consequence. Nevertheless, the principle enjoys argumentative weight. Thus Dworkin maintained that good judges do not use their discretion to legislate but find implicit principles developed by law as an interpretative practice.[41]

Less discussed is Dworkin's distinction between *substantiv*e and *conservative* principles. Dworkin noted that high courts must overrule precedents. However, if courts can always overrule precedents, then these would not be binding law and thus judges would always exert discretion.[42] Dworkin claimed that judges should consider a substantive principle, such as any constitutional right, and 'standards that argue against departures from established doctrine'.[43] Conservative principles include the principle of legislative supremacy or the doctrine of precedent.[44]

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historical concern of the civil law in making out of law a rational order.).On general principles of the law see e.g.,, Norberto Bobbio, *Teoria dell' ordinamento giuridico* (Giappichelli-editore, 1960) 167-83.
[36] Dworkin, 'The Original Position', above n 31, 511.
[37] Dworkin, 'Rawls and The Law', above n 32, 1396. See also Dworkin, *Law's Empire* above n 35.
[38] Ronald Dworkin, 'The Model of Rules' (1967) 35(1) *The University of Chicago Law Review* 14, 25.
[39] Ibid 27.
[40] Ibid 26.
[41] Ibid 42-5.
[42] Ibid 37-8.
[43] Ibid 38.
[44] Ibid 39.

To some degree, Dworkin's conservative principles parallel Alexy's *formal* principles discussed in Chapter II.[45] Both conceptions refer to standards that safeguard a certain decision issued by a competent authority following a legitimate procedure, regardless of its content, and count against departing from the pre-existing law. However, unlike Alexy, Dworkin stressed that conservative principles seem to favour the status quo.[46] Moreover, while Dworkin's explicit interest in conservative principles decreased over the years, the interest of Alexy or his followers in formal principles increased, with the purpose of delimiting the competences between the judiciary and the legislator based on the formal principles of the separation of powers or democracy.[47] However, there is still more work to be done on how conservative principles for Dworkinians, or formal principles for Alexians, reduce the discretion of subsequent judges by requiring attention to the previous interpretation of constitutional or legislative provisions as precedents, i.e. as authoritative decisions backed by formal principles.[48]

Without engaging in the debate over the distinction between rules and principles,[49] it is important to bear in mind the role that formal or conservative principles play in a coherentist approach to precedent. One function that a coherentist theory fulfils is to show how a judgment coheres with the relevant law. Another function is to revise pre-existing law to render it coherent. Yet the revision should not be automatic. Formal principles count against revising the law while applying it, and thus make the revision of legal components more conservative than the modification of moral beliefs.

After making the distinction between rules and principles, Dworkin borrowed Rawls' RE to argue in favour of *constructive interpretation*.[50] He distinguished between a natural and a constructive model of Equilibrium.[51] The first *describes* a kind of objective morality that persons discover in intuitions, while the second refers to the responsibility for persons or officials to

[45] See Martin Borowski, 'The Structure of Formal Principles- Robert Alexy's 'Law of Combination'' in Martin Borowski (ed), *On the Nature of Legal Principles* (Franz Steiner Verlag 2010) 19, 26. (Arguing that Dworkin started the discussion on formal principles).
[46] Dworkin, 'The Model of Rules', above n 38, 38.
[47] See e.g., Robert Alexy, 'Formal principles: Some replies to critics' (2014) 14(3) *International Journal of Constitutional law* 511; 515-6. Matthias Klatt, 'Balancing Competences: How Institutional Cosmopolitanism Can Manage Jurisdictional Conflicts' (2015) 4(2) *Global Constitutionalism* 195, 211-213.
[48] See Borowski, above n 45, 25 footnote 37.
[49] For a positivist critique of Dworkin's account of principles see Joseph Raz, 'Principles and the Limits of the Law' (1972) 81(5) *Yale Law Journal* 823.
[50] Dworkin, 'The Original Position', above n 31, 510.
[51] Ibid

construct 'a coherent program of action'[52]. Dworkin preferred the constructive model because moral theories are not discovered in the way scientific theories are but constructed by individuals. Dworkin argued that this process of Equilibrium, far from being exotic, was part of the everyday practice of common law adjudication.[53] Dworkin claimed that 'precedents are analogous to intuitions'[54], thus judges engage in arranging precedents and principles in a justified scheme that supports a particular judgment.[55]

Dworkin used Equilibrium to identify two dimensions of interpretation, namely *fit* and *justification.* Interpreters adjust general theories and concrete judgments until they achieve the best degree of 'fit'[56]. Judges are also engaged in a process of justification.[57] They are not only re-arranging their convictions and theories, but also trying to propose an appealing normative theory.

Later, Dworkin argued that the dimension of fit assists judges when interpreting precedents to decide hard cases. Dworkin distinguished between the 'enactment' force and the 'gravitational' force of precedents.[58] The enactment force is the mere wording of a precedent working as a rule. On the other hand, the gravitational force relates to the underlying reasons for a rule. Thus the gravitational force urges judges to expand the scope of precedents beyond their wording by analogy or extensive interpretation, honouring the fairness requirement of treating like cases alike.[59]

For this process of interpretation, Dworkin created Hercules J, an imaginary judge with infinite time and wisdom, who can reconstruct the law as a whole and issue a judgment that coheres with it.[60] In the process of the reconstruction of precedents, Hercules may identify some 'mistakes' in the institutional record, but it is his task to treat law as coherent as possible.[61]

[52] Ibid 511.
[53] Ibid.
[54] Ibid 512.
[55] Ibid.
[56] Ibid 514.
[57] Ibid 507.
[58] Dworkin, 'Hard Cases', above n 10, 1089-1091.
[59] Ibid 1090.
[60] Ibid 1083
[61] Ibid 1098.

This holistic process of interpretation, which I will henceforth refer to as Equilibrium, is Dworkin's interpretation of RE, though it is unclear whether it is Narrow or Wide Reflective Equilibrium that is at issue here. Dworkin may be referring to WRE, because he includes not only rules and principles but also general legal theories – e.g., theories about constitutional rights. [62] On another interpretation, in some cases, NRE suffices for inferring principles from materials, but in harder cases, he needs to expand the scope of enquiry and thus he uses WRE to propose the best legal theory.[63]

In *Law's Empire*, the mature Dworkin expanded the scope of constructive interpretation from deciding hard cases to interpretation in general. Dworkin defended the theory of 'law as integrity' that holds that 'propositions of law are true if they figure in or follow from the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community's legal practice'.[64] According to Dworkin, there are three stages in the interpretation of the law.[65] First, in the pre-interpretive stage, the judge identifies the relevant data, including rules and principles, that constitute the practice. Then, in the interpretive stage, the interpreter develops an interpretation of the law that fits with such data. Finally, in the post-interpretative stage, the *best* interpretation is selected.

The best constructive interpretation is the one that fits with relevant law but is also justified. Fit refers to what coheres with practice to distinguish interpretation from invention of the law. In turn, justification puts 'the practice into the best light'.[66] At times, Dworkin argues that both dimensions are independent because formal constraints are necessary for constraining substantive interpretations.[67] But in other passages he argues that the judge 'must also meld these dimensions into an overall opinion'[68].

The dimension of fit is partially limited by what Dworkin calls the principle of 'local priority'[69]. This is an instantiation of the more general principle of due process that suggests that a given

[62] Barbara B. Levenbook, 'The Role of Coherence in Legal Reasoning' (1984) 3(3) *Law and Philosophy* 355, 365-6.
[63] Jeremy Waldron, 'Did Dworkin Ever Answer the Crits?' in Scott Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford University Press, 2006) 155, 161.
[64] Dworkin, *Law's Empire* above n 35, 225.
[65] Ibid 66-7.
[66] Ibid 67.
[67] Ibid 67-8.
[68] Ibid 411. See also, Ronald Dworkin, 'Ronald Dworkin Replies' in Justine Burley (ed), *Dworkin and His Critics* (Blackwell Publishing, 2004) 339, 381-2.
[69] Dworkin, *Law's Empire* above n 35, 250.

interpretation should be rejected if it does not fit with the most immediate area of law, even if it fits with other more distant areas. For instance, an interpretation regarding a tort may not fit such an area, but may fit with a more distant one such as contractual law. However, local priority is only a prima facie constraint that may yield to the global coherence of the legal system as a whole. It is possible that a given interpretation may fit two or more areas of law. It is even possible for Hercules to eliminate boundaries between particular branches of law, and develop new ones.[70]

In *Law's Empire*, the constraints of changing the law while applying it no longer appear as conservative principles, but as part of the broader fundamental principles of *fairness* and *due process*. Fairness relates to the structure of the political system, such as legislative supremacy.[71] Legislative supremacy may urge a judge to enforce an unjust statute because of the democratic legitimacy of the legislator. In turn, due process relates to adequate procedures for enforcing existing rules, such as following precedent, respecting legislative history and local priority.[72]

To clarify the constraints that 'law as integrity' imposes on interpreters, Dworkin distinguishes between pure and inclusive integrity. Inclusive integrity refers to the construction of coherent theories of law that combine substantive justice 'so far as possible' and 'in the right direction'[73] with the constraints of fairness and due process.[74] In contrast, pure integrity refers to coherent theories of substantive justice abstracted from the constraints of due process and fairness.[75]

However, despite the apparent constraints of fairness and due process, Dworkin also claims that judges may revise the existing law based on *fidelity* to higher principles. Dworkin represents judges as author-critics of a collective novel. Every judgment is like a chapter that must fit with precedents while making the novel as a whole the best it can be.[76] However, he also affirms that, on occasion, it is justified 'to depart from a narrow line of past decisions in search of fidelity to principles conceived as more fundamental to the scheme as a whole'[77]. Thus fairness and due process may constrain judges, but judges can also appeal to substantive constitutional principles

[70] Ibid 250-4, 402, 405, 407.
[71] Ibid 404,405.
[72] Ibid 404-5.
[73] Ibid 405.
[74] Ibid 407.
[75] Ibid 405-6.
[76] Ibid 229-230.
[77] Ibid 219.

to outweigh them. Nevertheless, it is unclear what the threshold is that must be met to justify revising the law.

Later, in *Freedom's Law*, the mature Dworkin applied 'law as integrity' to the field of constitutional law. He proposed a 'moral reading of the constitution' because abstract constitutional provisions, such as the Equal Protection Clause of U.S Constitution, invokes moral principles.[78] The 'moral reading' is limited by two constraints. First, judges should not enforce their individual interpretation of the text, but one that is compatible with provisions understood as abstract principles of political morality.[79] Judges are constrained by the *semantic* intention of constitutional framers, not with their actual expectations.[80] For example, the expectation of framers when ratifying the Equal Protection Clause in 1868 was to abolish slavery, not to end racial segregation.[81] In fact, they intended to establish the doctrine of 'separate but equal' among black and white. In contrast, the semantic intention allowed judges to reinterpret the text in 1954 when *Brown v. Board of Education* was decided on the principle that guarantees equal status to citizens, even if that was not the expectation of the framers.[82]

The semantic approach appears to be the equivalent of the civil law canon of statutory interpretation of the rational legislator. This canon suggests that an interpretation of the provision that is compatible with what a reasonable or ideal drafter would mean according to current linguistic and social usages is preferable to its alternatives.[83] In contrast, the 'expectation' approach seems to be the equivalent of the canon of the historical legislator.[84] This canon suggests that an interpretation of the provision that is compatible with what the framers had in

[78] Ronald Dworkin, *Freedom's Law: The Moral Reading of the Constitution* (Oxford University Press, 1996) 2, 9-10. See *United States Constitution* amend XI § 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*" (Emphasis added).

[79] See Jeffrey Goldsworthy, 'Dworkin as an Originalist' (2000) 17(1) *Constitutional Commentary* 49 (arguing that Dworkin rejected originalism in Law's Empire, but in Freedom's Law embraced semantic originalism while rejecting expectation originalism).

[80] Dworkin, *Freedom's Law: The Moral Reading of the Constitution*, above n 78, 10. See also, Ronald Dworkin, 'Comment' in Amy Gutmann (ed), *A Matter of Interpretation* (Princeton University Press, 1997) 115, 119-124; Ronald Dworkin, 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve' (1997) 65(4) *Fordham Law Review* 1249, 1255.

[81] Dworkin, *Freedom's Law: The Moral Reading of the Constitution*, above n 78, 13.

[82] Ibid, 13; *Brown v Board of Education of Topeka* (1954) 347 U.S. 483.

[83] For a current analysis of the idea of the rational legislator see Luc. J. Wintgens, 'The Rational Legislator Revisited. Bounded Rationality and Legisprudence' in Luc. J. Wintgens and Daniel Oliver-Lalana (eds), *The Rationality and Justification of Legislation: Essays in Legisprudence* (2013) 1, especially at 16-19, 27-30.

[84] On the interpretive canon of the historical legislator see Riccardo Guastini, *Estudios sobre la interpretación jurídica* (Marina Gascón and Miguel Carbonell trans, UNAM, 1999) 50.

mind at the time of the enactment according to legislative records or historical evidence should be preferred to its alternatives. The semantic approach allows Dworkin to revisit the meaning ascribed to a provision without renouncing the text as a partial constraint.

As expected, the second constraint to the 'moral reading' is 'law as integrity'. Constitutional judgments must fit not only with the semantic intention of framers, but also with constitutional practice.[85] For instance, Dworkin assures that interpreting the Equal Protection Clause as requiring *socio-economic* equality –as opposed to political equality- does not fit with the liberal institutional record of the U.S.[86] Dworkin insists that constitutional law is like a seriatim novel: constitutional judgment must fit with prior decisions.[87]

However, this interaction between the constraints of constitutional provisions and precedents reveals a tension between them. In 1868, only a judgment that supported racial segregation would cohere with most of the institutional record. But at some point in history, a judgment urging racial equality did not fit with precedents that interpreted equality as allowing racial segregation. Perhaps in the early 1900's some judgements started to question the doctrine of separate but equal treatment. Later, more judgments increased the tension until a new egalitarian conception replaced the prior conception.

Dworkin claims that despite the apparent novelty of an egalitarian conception of race in 1954, and its seeming contradiction with the practice of that time, it nevertheless fits with the principle of equality.[88] Dworkin seems to be suggesting that the dimension of fit has two levels. The first is that a judgment must cohere with a set of *precedents*. Nevertheless, this level of fit may be defeated if a new potential interpretation coheres with a constitutional *provision* whose interpretation gives rise to a norm with the structure of a principle. However, in this scenario, the first level of fit is not performing a justificatory role. Rather, following precedent yields to a substantive interpretation of constitutional provisions. Coherence between a judgment and a set of precedents is outweighed by coherence between a judgment and a better interpretation of the constitutional provision.

[85] Dworkin, *Freedom's Law: The Moral Reading of the Constitution*, above n 78, 10.
[86] Ibid 11, 36.
[87] Ibid 10.
[88] Dworkin, 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve', above n 80, 1254.

A different strategy would be to show that a set of precedents started to question the conception of separate but equal. Progressively, such precedents prompted a new understanding of equality that does not tolerate race as criterion for differentiation. This new conception could have justified an explicit overruling of the doctrine of separate by equal.[89]

By mixing the dimensions of fit between provisions and precedents, Dworkin neglects the distinction between two dimensions of coherence. On the one hand, the process of systematisation is used to show that a potential judgment will cohere with past decisions. On the other hand, the process of systematisation of precedents may reveal tensions in the law. Instead of making the judgment fit the doctrine of separate of equal, the doctrine is re-arranged to re-establish coherence. What was once settled law later started to be questioned by a competing set. In such a case it would be preferable to abrogate the doctrine of separate but equal, even if that is also detrimental to the conservative principle of legal certainty.

The distinction between conservative and substantive principles may have served to illustrate and resolve this tension between constitutional provisions and precedents. Nonetheless, in *Freedom's Law*, the role of conservative principles is considerably blurred. Certainly, the dimension of fit is still a conservative constraint; as a general rule, judgments must cohere with precedents. Yet, in other scenarios judgments actually trigger the revision of precedents. That is, coherence does not play a conservative role but a dynamic one.

While the mature Dworkin seemed concerned with coherence between a judgment and the relevant precedents as a constraint to reduce judicial discretion when interpreting the law in the context of plural societies,[90] the later Dworkin, in *Justice in Robes* and *Justice for Hedgehogs*, appealed to coherence as a means of showing that conflicts of principles may be more apparent than real. Any conflict of principles can be resolved once these are properly interpreted and defined.[91]

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[89] On precedents that may have prompted the overruling of the doctrine of 'separate but equal', see, Andrew Kull, 'Post-Plessy, Pre-Brown: "Logical Exactness" in Enforcing Equal Rights' in Clare Cushman and Melvin I. Urofsky (eds), *Black, White, and Brown* (Supreme Court Historical Society, 2004) 47, 50-53, 59-63. See, Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); *Mendez, et al v. Westminster* [sic] School District of Orange County, et al, 64 F.Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947) (en banc); *Henderson v. United States*, 339 U.S. 816 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950).

[90] See his discussion on how Law as Integrity fosters substantive conflict between principles of justice, fairness and due process, Dworkin, *Law's Empire* above n 35, 404-7, 410-11.

[91] See Ronald Dworkin, *Justice in Robes* (The Belknap Press of Harvard University Press, 2006) 105-116; Ronald Dworkin, *Justice for Hedgehogs* (The Belknap Press of Harvard University Press, 2011) 1-19, 113-22, 163. For a

The later Dworkin insisted on the role of RE for developing coherent moral and legal decisions, but one that integrates law as a branch of political morality forming a unique rather than two normative systems, even if the law deals with local decisions.[92] However, he also admitted that real judges are not Hercules, because their skills, information, and available time for deciding a case are constrained by the legal context.[93] Nevertheless, despite his apparent rejection of the metaphor of Hercules as applied to real-life adjudication, Dworkin was still convinced that positivists were mistaken. Positivists need a pedigree criterion based on social facts to determine what the law is; by contrast, Dworkin argued that the law is an interpretative practice based on arguments, not on pedigree criteria.[94]

The later Dworkin also seemed to defend the functional equivalence between legal sources and moral convictions. Otherwise, there will be the need for one criterion for the law and another for morality.[95] Thus it appears that according to the late Dworkin, Equilibrium works in the same way in morality and adjudication.

III. 2. A Critical Analysis on The Institutional and Inter-Subjective Features of Dworkin's Theory

First of all, Dworkin's contribution to understanding normative coherence – i.e., integrity as an autonomous value to reduce judicial discretion – must be acknowledged. As previously discussed, Dworkin notes that integrity is a political value autonomous from, but also limited by, the principles of due process and fairness.[96] Interpreting Dworkin's work, Jeremy Waldron has observed that officials, rather that imposing their own conception of justice, should find shared grounds in the institutional record, thus integrity limits judges when they are developing their theories of justice according to law.[97]

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critique of Dworkin's moral monism as applied to adjudication, see Martha Minow and William Singer, 'In Favor of Foxes: Pluralism as Fact and Aid to The Pursuit Of Justice' (2010) 90(2) *Boston University Law Review* 903.

[92] Dworkin, *Justice for Hedgehogs*, above n 91, 171.

[93] Dworkin, *Justice in Robes*, above n 91, 54.

[94] Dworkin, *Justice for Hedgehogs*, above n 91, 402.

[95] Ibid, 403, 407.

[96] Dworkin, *Law's Empire* above n 35, 404.

[97] Jeremy Waldron, 'The Circumstances of Integrity' (1997) 3(1) *Legal Theory* 1, 16-22; See also, Gerald J. Postema, 'Integrity: Justice in Workclothes' (1997) 82 *Iowa Law Review* 821, 825-8, 833-5.

Although Dworkin did not put it in this way, the provision-norm distinction is useful for illustrating the practical relevance of integrity for constitutional adjudication. Firstly, legal participants disagree about the right interpretation of a constitutional provision – e.g., the Equal Protection Clause of the U.S. Constitution. Secondly, participants disagree about the right interpretative method – e.g., the 'expectation' of the framers, or their 'semantic' intention. Thirdly, participants disagree about the normative theory that justifies having a constitution. According to some, the purpose of having a written constitution is to fix the constitution's meaning in time and constrain judges when they interpret it.[98] According to others, the role of the constitutional text is secondary and constitutional law is actually developed and updated by judicial doctrine.[99] For still others, like Dworkin, the constitutional text matters, but it can be updated when its provisions are understood as abstract principles.[100] Then, all participants, irrespective of their ideology, consult precedents to show that their interpretation coheres with previous interpretations of the same text.

Nevertheless, it must also be noted that the role of normative coherence as a constraint progressively faded, for Dworkin, as he put less attention on conservative principles. Against Dworkin, it must be stressed that the best interpretation of the law is limited by the degree to which it coheres with precedential rules backed by principles of authority, formal equality and certainty. Respecting such principles part of the practice of law. Thus when there is a coherent set of precedents that support a conservative interpretation of a constitutional provision, the more liberal interpretation would be harder to justify given the meaning that previous courts ascribed to the constitutional text.

Any complete conception of precedent must give a proper role to conservative principles. The early Dworkin noted the tension between conservative principles and correctness. However, as his works evolved, conservative principles became vague when included among the broader principles of fairness and due process. Moreover, deeper attention to conservative principles could have served to clarify the normative status of precedents. The 'analogy' that Dworkin drew between intuitions in the context of moral discourse and precedents when he borrowed the method of RE, becomes debatable. The similarity is that Equilibrium serves to systematise considered judgments and precedents to form coherent sets. The difference is that precedents

[98] Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws' in Amy Gutmann (ed), *A Matter of Interpretation* (Princeton University Press, 1997) 3, 38-41.
[99] David A. Strauss, 'Common Law Constitutional Interpretation' (1996) 63(3) *University of Chicago Law Review* 877, 883.
[100] Dworkin, 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve', above n 80, 1255.

enjoy a *privileged* normative status over other reasons, such as new incompatible interpretations of constitutional provisions.

Precedents develop prima facie rules rather than absolute rules, but their revision is still limited by conservative principles. There can be tensions within the principle of authority. It can be that there are two conflicting lines of precedents, but one line can be more internally coherent than the other. There can also be tensions within the principle of formal equality: e.g., a party arguing that the case at hand is similar to previous decisions and another party indicating that there are relevant distinct facts that warrant a different treatment between cases. Finally, there can be tension between legal certainty and correctness. In this scenario, a party can identify a set of precedents of last-resort courts that have started a new interpretation of a provision that de-stabilises once settled law. Thus, she suggests that it is preferable to overrule a precedent or a set of them and re-establish coherence than to follow questioned precedents. Conservative principles serve to clarify the tension between following the law and revising it.

Furthermore, as conservative principles became part of broader structural principles of fairness and due process, the constraint on coherence with precedents yielded to substantive interpretations of constitutional provisions. While fairness and due process count in favour of following a morally unattractive set of precedents, Dworkin also noted that departing from precedents may be justified for the sake of fidelity to higher constitutional principles. Similarly, the principle of local priority counts in favour of preferring small-scale revisions in particular legal areas over the re-arrangement of the legal system as a whole. Nonetheless, the force of local priority is weakened at the constitutional level. Ultimately, the constitution is the supreme law of the land. Thus, in the case of a conflict between constitutional and non-constitutional doctrine – e.g., civil liability for exercising the right to freedom of speech – the first prevails over the second and may trigger its revision.

Because the later Dworkin proposed that law and morality are part of a single normative system, his interpretative methodology became blurred. While he is right that both lawyers and moral or political philosophers can use Equilibrium as a method, it works differently depending on the context. One of the aspects that differentiates law from political morality is the existence of conservative principles in law. In fact, as the mature Dworkin himself noted, the existence of fairness and due process is what distinguishes inclusive integrity (highest possible degree of normative coherence as limited by institutional constraints) from pure integrity (perfect normative coherence). Pure integrity is the perspective of political or moral philosophers,

whereas inclusive integrity relates to the view of lawyers and judges as limited by principles of authority, equality, and legal certainty. Thus Equilibrium works differently in the institutional context of adjudication, where reasons from authority enjoy special weight over non-authoritative reasons, and this special weight is protected by formal principles of the law.

In addition to the objective constraints of conservative principles, at times Dworkin minimised the *intersubjective* constraints of adjudication. His use of Hercules as a perfectly wise judge unconstrained by time, in single-member court, with no interaction with fellow legal participants, supports this interpretation. At times, in *Law's Empire*, Dworkin argues that interpretation is not 'conversational but *constructive*'[101] or that it is a 'conversation with oneself'[102]. In this context, Frank Michelman notes that Hercules meets no one in his process of interpretation; he is a 'loner'[103]. Similarly, Jürgen Habermas claims that Dworkin's 'solipstic'[104] approach suggest the need of a more intersubjective theory of legal justification.

Perhaps, no one has better identified the individualistic nature of Dworkinian interpretation than Waldron, when he states that, frequently,

> Dworkin's formulations neglect the forensic adversarial context of legal argument: it is not enough to show that a lawyer can come up with a legal argument; what he comes up with must be capable of refuting and displacing the legal argument that his opponent is likely to come up with as well.[105]

Without recognising the importance of intersubjective constraints in adjudication, Dworkin runs the risk of using Equilibrium simply to confirm a preconceived intuition. Dworkin may reply that a particular interpretation is not justified by a single precedent but by a set of decisions that were issued by *other* judges. However, once it is recalled that coherence between a potential judgment and precedents is a matter of *degree* rather than an all-or-nothing matter, other legal participants can challenge a particular interpretation by appealing to other precedents.

Once the intersubjective constraints are acknowledged, it becomes clear that legal participants will raise claims backed by *competing* principles. The failure to acknowledge a plurality of antagonistic principles is the criticism that sceptics raise against Dworkin, and coherentist

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[101] Dworkin, *Law's Empire* above n 35, 52, (emphasis in original).
[102] Ibid 58.
[103] Frank I. Michelman, 'The Supreme Court 1985 Term- Foreword: Traces of Self-Government' (1986) 100 *Harvard Law Review* 4, 76.
[104] Habermas, above n 23, 197.
[105] Waldron, 'Did Dworkin Ever Answer the Crits?', above n 63, 171.

theories of adjudication in general.[106] Dworkin's reply is that sceptics confuse competition and contradiction among principles.[107] Dworkin suggests that while there can be tension between principles, this does not mean an irremediable contradiction. For instance, Dworkin notes that in torts law there is a tension between, on the one hand, the principle of solidarity that urges that in the case of an accident damages should be redressed even if the accident was caused by the victim, and on the other, the principle of liability that requires the party at fault to redress damages. However, this is not an unavoidable contradiction, but rather a conflict that can be resolved by interpreting principles in the correct way.[108] While Dworkin is right in asserting that coherence in the law is not a matter of logical consistency but a question of better or worse value judgments, he disregards the fact that in some cases one principle yields to another. The Court will need either to award damages in favour of plaintiff A or declare the respondent B free of liability. The legal sphere of one individual is increased while that of the other is decreased. Judges need to consider that, in particular situations, competing principles cannot be obeyed at the same time.[109]

Dworkin borrowed from Rawls the method of RE but did not stress that judges need to strike a balance between competing principles. In adjudication, a particular interpretation competes with others, and a clear winning argument must be selected. In this respect, Dworkin overlooked that the method of Equilibrium is not only available to Hercules. All legal participants can reconstruct legal sources and propose rival sets of norms stressing competing principles using the method of Equilibrium. Once it is accepted that there is not a single equilibrium but a set of competing equilibria suggested by legal participants, it becomes manifest that it is insufficient to show that one reconstruction of the law simply 'fits'; the point is to show that it fits better than others. In order to select the *best* interpretation of the law, legal participants first need to show that their interpretation is *better* than others.

When using the method of Equilibrium in the intersubjective context of adjudication, the question that arises is this: Can coherence between judgements and sources be assessed? And if so, is

[106] See e.g, Roberto Mangabeira Unger, 'The Critical Legal Studies Movement' (1983) 96(3) *Harvard Law Review* 561, 616-46; Mark Tushnet, 'Following The Rules Laid Down: A Critique Of Interpretivism And Neutral Principles' (1983) 96(4) *Harvard Law Review* 781, 814-21. For a reply to critics and a defence of coherence as a process of reconstruction of rules linked by principles, see Neil Maccormick, 'Reconstruction after Deconstruction: A Response to CLS (Book Review)' [539] (1990) 10(4) *Oxford Journal of Legal Studies* 539, especially at 546-51.
[107] Dworkin, *Law's Empire* above n 35, 274-75.
[108] Ibid 269-70.
[109] See Iris Van Domselaar, 'Tragic Choice as a Legal Concept' in Martin Borowski (ed), *On the Nature of Legal Principles* (Franz Steiner Verlag, 2010) 105, 109.

coherence subject to a *metric* control, so that legal participants can use a specific unit of measurement for measuring coherence?[110] A metric judgment is based on a single scale to evaluate disparate objects, e.g., money for quantifying the price of all objects and services. It seems unlikely that the degree of coherence between sources and a claim can be reduced to such terms. Competing principles cannot be assessed in abstract and a priori ways, but only in light of competing principles and the facts of the case at hand. Thus, following Alexy, it can be argued that the degree of coherence between competing claims and pre-existing law cannot be objectively measured, but can be reasonably *compared* in adjudication.[111]

The key question is whether A's claim *coheres better* with relevant pre-existing law than B's? The judgment may not be perfect, as principles may be sacrificed, but balancing principles is a useful method to transparently recognise both the tension between claims and principles, and the role of value judgments in coherence. Moreover, balancing can be used to stress that one principle may prevail in one situation, but it is possible that in a different situation a different principle may prevail. In short, by using balancing to contrast sets of norms or reasons, judges recognise the tension between principles and their place in a relatively open-ended hierarchy.

To summarise, there are two objections against Dworkin's interpretation of RE. First, as his work evolved, the role of conservative principles became blurred. Closer attention to conservative principles may have been useful for clarifying the normative status of precedents. As legal sources backed by the principle of authority, formal equality and legal certainty, precedents enjoy a preferential status over new incompatible interpretations of constitutional provisions. Moreover, conservative principles are also useful for distinguishing between the conservative and dynamic facets of coherence. Conservative principles require that a potential judgment coheres with pre-existing law; thus they play a conservative role. Yet the tension between formal equality and legal certainty on the one hand, and differences between apparently similar cases and arguments form substantive correctness raised against following pre-existing law in cases to be decided, on the other, reveals the dynamic nature of coherence. On occasion, the judgment triggers the revision of certain components of pre-existing law when judges distinguish or overrule cases, and thus coherence plays a dynamic function.

[110] On the classification of value judgments as classificatory, comparative or metric. See Alexy, *A Theory of Constitutional Rights*, above n 27, 89
[111] Ibid.

The incomplete understanding of conservative principles provided by Dworkin can be complemented by the growing interest of Alexy and his followers in formal principles. The conception of formal principles defended so far will be further developed in Section V with the 'combination model', i.e., the idea that formal principles add weight to a particular decision only when they are linked to substantive principles after following a legitimate procedure, rather than having weight on their own.[112] However, formal principles are used in this thesis to illustrate not the tension between democracy and constitutional review, but the tension between previous judges – as creators of precedent – and subsequent judges as limited by precedents. Moreover, formal principles impose a burden of argumentation on later judges when they seek to modify or abrogate an ascribed norm

The second objection relates to intersubjective constraints on adjudication being overlooked. The intersubjective feature of adjudication serves to represent the tension between conservative and substantive principles. A legal participant argues in favour of following a precedent while the another argues against it. To recall, coherence among norms is a matter of degree; thus judges are expected to select the set that is more coherent than its alternatives. While there is a value judgment in this selection, it is nevertheless reduced by the way fellow participants invoke sources to reduce judicial discretion.

IV. Amalia Amaya's Coherentist Theory of Legal Justification

In *The Tapestry of Reason*, Amaya offers the most comprehensive and sophisticated study on the role of coherence in legal reasoning to date.[113] While she does not offer a theory of precedent, she addresses the topic of normative coherence in legal justification. Although Amaya analyses coherence in the context of evidential reasoning,[114] and the use of RE in moral discourse,[115] this section focuses primarily on her proposal for selecting the most coherent interpretative hypothesis about legal sources. Her work is relevant to this investigation because her theory includes a method for solving cases when there is not a clear controlling rule or when there are several plausible interpretation of the relevant law. The conflict of precedents is a common

[112] Ibid 423; Borowski, above n 45, 33-5. However, Alexy rejects the combination model at least when dealing with the formal principle of democracy. See Alexy, 'Formal principles: Some replies to critics', above n 47, 518-22.
[113] Amalia Amaya, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument* (Hart Publishing, 2015).
[114] Ibid Ch. 2.
[115] Ibid Ch. 8.

problem when interpreting ascribed norms, even if, in Amaya's case, she did not focus explicitly on precedent.

IV.1. Amaya's Method for Achieving Normative Coherence

Amaya anchors her coherentist approach in four elements.[116] The first is an understanding of coherence as *constraint satisfaction*. Amaya follows Paul Thagard's theory of explanatory coherence but modifies and expands it for the context of legal justification.[117]According to this theory, the justification of a belief 'depends on the way in which it fits into the best explanation of some puzzling facts.'[118] If an element E (a proposition, belief, hypothesis) meets positive constraints it must be accepted, if not, it must be rejected.[119] With the goal of maximizing coherence, elements of a set are separated into two different subsets, one formed by accepted elements A and another by rejected elements B.[120]

Following Thagard, Amaya observes that there are four kinds of coherence: deductive, explanatory, deliberative and analogical.[121]Deductive coherence refers to how principles, rules and judgments fit with each other. The main positive constraint is entailment and the most important negative constraint is contradiction.[122] This kind of deductive coherence is different from classical deduction because it is not a linear process, since incoherence may trigger the revision of premises.[123] Analogical coherence refers to the fit of similarity between a potential judgment and previous judgments. Positive constraints are semantic, purposive, structural or axiological similarities, and negative constraints are incompatibilities.[124] Explanatory coherence refers to the fit of rules, principles and judgments with empirical hypotheses.[125] Finally, deliberative coherence refers to the fit of principles, rules and judgments with the goals, values and preferences of the legal system.[126]

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[116] Ibid 552.
[117]Ibid 487. See Paul Thagard, *Coherence in Thought and Action* (MIT Press, 2000) , especially chapter 2; Paul Thagard, 'Ethical Coherence' (1998) 11(4) *Philosophical Psychology* 405.
[118] Amaya, above n 113, 195.
[119] Ibid, 488.
[120] Ibid.
[121] Ibid, 495-6.
[122] Ibid.
[123] Thagard, 'Ethical Coherence', above n 117, 408.Amaya, above n 113, 220-1.
[124] Amaya, above n 113, 385-393, 496.
[125] Ibid, 195-7, 213-4, 497.
[126] Ibid 351-2, 394-8, 497-8.

Amaya adds a fifth kind of coherence that distinguishes legal from moral coherence, namely, *interpretative coherence*.[127] This refers to the fit of interpretative hypothesis with normative elements i.e., legal principles, rules and judgments.[128] The normative elements for questions of law are equivalent to empirical evidence in questions of fact: the more the elements meet positive and negative constraints, the more coherent the interpretative hypothesis is.[129]

Amaya proposes seven principles for achieving interpretative coherence.[130]First, interpretative coherence is a symmetrical relation among elements, unlike deductive entailment, in which certain premises enjoy a privileged status.[131] Second, the principle of explanation suggests that the more hypotheses are needed to explain a set, the less coherent the set is.[132] Third, the principle of analogy suggests that similar interpretative hypothesis explain similar normative rules or principles, and dissimilarities justify different judgments.[133] Fourth, and very important for the law, the principle of *data priority* suggests that propositions that describe reasons from legal authority have a degree of acceptability on their own.[134] Fifth, the principle of contradiction suggests that contradictory propositions are incoherent with each other.[135] In law, contradiction is not logical but an axiological tension between values or principles. Sixth, the principle of competition suggests that if two hypotheses explain the same evidence but are not explanatorily connected, then they compete and are incoherent with each other.[136] Seventh, and finally, the principle of acceptance suggests that the acceptance of a proposition in a set of propositions depends on its coherence with the rest of the set as a whole, rather than as isolated propositions.[137]

Amaya also identifies three stages and three strategies to develop coherence among a given set of elements. First, there is a stage of developing plausible interpretations, then there is a process of revision and enhancement of the interpretative evidence, and finally, there is a stage in which the best candidate is selected.[138] In turn, the inquirer can use three strategies to enhance the

[127] Ibid 496.
[128] Ibid 496, 498.
[129] Ibid 498.
[130] Ibid 498-9.
[131] Ibid 220, 498, 501.
[132] Ibid 215, 498-9, 501.
[133] Ibid 221-222, 499, 501.
[134] Ibid 216, 499, 501.
[135] Ibid 216, 499, 501.
[136] Ibid 217, 499, 502.
[137] Ibid 217, 499, 502.
[138] Ibid 506.

coherence of elements: subtraction, addition and reinterpretation.[139] Following the terminology of belief revision literature, Amaya notes that inquirers can 'subtract'[140] a belief from an incoherent set, or can 'add'[141] a belief or beliefs to render it coherent. Finally, following the linguist Maria E. Conte, Amaya adds the third strategy of 'reinterpretation'. Instead of removing or adding a belief, the reinterpretation of beliefs is similar to the case where a literary text has already been interpreted but whose interpretation is modified in light of other parts of the text.[142] It is in the middle of this bidirectional process of finding, adding, subtracting and reinterpreting evidence and generating hypothesis that the interpreter infers the best interpretative conclusion.

The second element of Amaya's theory is inference to the best legal explanation. This is a process of abduction, or as it is also called, non-deductive reasoning based on explanatory coherence.[143] This process generates and tests hypotheses to select the most coherent explanation.[144]

To simplify this procedure, Amalia offers a five-step procedure for 'coherence-driven legal inference'[145] for selecting the most coherent interpretative hypothesis. First, 'the base of coherence', which includes interpretative hypothesis and normative elements (rules, principles, precedents), should be specified. The elements of this base are transitory; they can be eliminated or reinterpreted, or new elements may be added.[146] Second, a 'contrast set' containing alternative theories should be constructed. Third comes 'the pursuit' of alternative theories about what the law requires. Fourth comes the 'evaluation' of the coherence of alternative theories against the criteria of normative coherence. Fifth, the most coherent theory according to the criteria of normative coherence must be selected and justified. Amaya notes that this linear representation is a heuristic device to simplify the actual process of decision-making, in reality judges move back and forth between stages.[147]

[139] Ibid 509.
[140] Ibid 265, 509.
[141] Ibid, 267, 509.
[142] Ibid, 434-5, 509.
[143] Ibid 196.
[144] Ibid 198, 504. See also Peter Lipton, 'Alien Abduction: Inference to the Best Explanation and the Management of Testimony' (2007) 4(3) *Episteme: A Journal of Social Epistemology* 238.
[145] Amaya, above n 113, 512.
[146] Ibid.
[147] Ibid 513.

Amaya exemplifies this procedure with the English criminal case of *Sweet v Parsley*.[148] The defendant was a landlady of a house that she sublet to tenants. The police found cannabis at the house. She was convicted under §5 of the Dangerous Drugs Act 1965 of 'being concerned in the management of premises used for the purposes of smoking of cannabis'. She claimed that she had no knowledge that the premises were used for such a purpose. The conviction was confirmed on second instance, where courts held that such an offense did not require knowledge (*mens rea*) but was a strict liability offense. However, the House of Lords reversed the decision and ruled that the offense did require knowledge on the part of the defendant.

Amaya justifies the decision of the House of Lords using her method. She starts with two possible hypotheses: either ($H^{1)}$ the offense required knowledge or ($H^{2)}$ it did not require knowledge. The normative elements include the legislation on drug use, the principle that in case of doubt statutes should be interpreted so as to favour the defendant, and the *Warner* case, that held that possession of illicit drugs was not sufficient to prove an offense, but required the intention to possess it.[149] Amaya shows how her principles of interpretative coherence justify the House of Lords' judgment.[150] The principle of symmetry suggests that H^1 coheres with *Warner* and the principle in favour of defendant. The principle of explanation suggests that H^1 coheres with the legislative purpose of such an offense is to punish intentional behaviour rather than impose strict liability. The principle of analogy urges that normative elements must cohere with each other: prior legislation and cases did not establish that strict liability applies in the case of drug offenses. The principle of data priority suggests that H^1 coheres with the propositions held in *Warner*, and with that of §5 of the Act. The principles of contradiction, competition and acceptance suggest that H^1 is more coherent with the rest of the set than H^2.

The third element of her theory is the notion of *optimal coherence*.[151] Amaya notes that judges may defend a hypothesis that is coherent with a body of evidence but is the result of what she calls the 'coherence bias'.[152] That is, the judges exaggerate the coherence of the set to justify a claim and disregard evidence that contradicts it. Thus, for a claim to be 'optimally coherent' it must be also be the result of 'epistemically responsible coherence based-reasoning.'[153] Judges

[148]Ibid 499-502; *Sweet v Parsley* (1970) 132 AC.
[149] Amaya, above n 113, 500; *Warner v Metropolitan Police Commissioner* [1969] 2 Ac 256.
[150] Ibid, 500-2.
[151] Ibid, 520.
[152] Ibid, 126, 516-20.
[153] Ibid, 521. See also, Amalia Amaya, 'Legal Justification by Optimal Coherence' [304] (2011) 24(3) *Ratio Juris* 304, 306.

need to exercise epistemic virtues such as open-mindedness and diligence, and to follow the enquiry even if it contradicts their original hypothesis.[154] Thus it is not enough for them to arrive at a judgment that coheres with rules and principles, but rather, they must arrive at the conclusion by following an epistemically responsible procedure that minimises the coherence bias.

The fourth and final element in Amaya's theory is the specification of the *context* to identify how demanding the standards of justification of coherence must be to qualify as optimal.[155] The strength of the justification varies according to (a) the threshold that must be satisfied for coherence, (b) the number of alternative explanations that must be considered and (c) the comprehensiveness of the set to justify an hypothesis.[156] How demanding the justification should be depends on an array of factors that include the stakes (e.g., criminal standards are more demanding than civil because personal liberty is a stake) and the role of the interpreter (e.g., a constitutional court ought to be more exhaustive regarding interpretative hypotheses than a first trial court).[157] Another factor that Amaya notes but does not develop are the dialectical features of justification – e.g., the standard of justification for a piece of expert testimony rises as the credibility of the expert is questioned.[158]

With these four elements, Amaya offers us an alternative to legal foundationalism.[159] Instead of representing legal reasoning as a pyramid in which rules are deduced from basic rules, she proposes a bidirectional approach in which premises can be removed or added as the enquiry progresses. While the principle of data priority grants special status to legal sources, this principle is also a matter of coherence. She notes that data priority is not a foundational element because it coheres with second-order beliefs that distinguish law and political morality.[160]While both branches are interlinked, granting special weight to reasons of authority is what distinguishes the former from the latter.

Amaya also suggests that her approach is an alternative to the *pure* coherentism of Dworkin.[161] Dworkin seems to grant equal status to all the components that form the soundest theory of law.

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[154] Amaya, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument*, above n 113, 521.
[155] Ibid 525-31.
[156] Ibid, 526.
[157] Ibid 527.
[158] Ibid 528.
[159] Ibid 11, 545-7.
[160] Ibid 62-3, 546.
[161] Ibid 216, 546. See also, Thagard, *Coherence in Thought and Action*, above n 117, 72.

In contrast, Amaya gives priority to reasons from authority, but these can be rejected when they do not meet positive or negative constraints. Thus, her approach discriminates in favour of *'[p]ropositions that describe reasons from authority*', but their acceptance is not a priori because they can be rejected when they do not cohere with other elements.

IV.2. A Critical Analysis of the Institutional and Intersubjective Features of Amaya's Theory

The central contribution of Amaya's work is the clarification of normative coherence as a constraint on interpretation. Amaya overcomes the problem of the vagueness of coherence in the law as linked to metaphors such as 'fit' or 'hanging together'. Amaya correctly points out that legal coherence has several dimensions – deductive, deliberative, explanatory, analogical, and interpretative – that distinguish legal reasoning from coherence in moral deliberation. Her principle of data priority also identifies how reasons from authority occupy a preferential status in interpretation, without falling into foundationalism, because some of these elements can be rejected when they do not cohere.

Although it was not Amaya's intention to develop a conception of precedent, the role of judicial decisions impacts on her principle of data priority and its normative status in relation to other kinds of non-authoritative reason. Statutory or constitutional provisions may be mere descriptions of reasons from authority, but in most jurisdictions these sources do not operate autonomously but in *coordination* with judicial interpretation. As argued in previous chapters, a provision is merely an un-interpreted text of the past. On occasion, provisions may lead to an unequivocal interpretation when a single rule can be inferred. However, when these provisions are indeterminate, judges ascribe meaning and weight to them. The provision ceases to be an uninterpreted proposition, and the judicial interpretation becomes attached to the text. As MacCormick observes, in the case of statutes or constitutions, precedents become 'glosses'[162]of the text. In short, ascribed norms become an authoritative interpretation of the text that mediates between its pure description and new interpretations of it.

[162] MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning*, above n 11, 145. See also at 128-9.

Amaya seems to grant to precedents a merely auxiliary role rather than a primary one. She rightly notes that a precedent that supports a given interpretative claim enhances the coherence of the set.[163] However, she also suggests that a given precedent may be excluded as mistaken when it does not cohere with other principles.[164] While judges may confine or overrule a particular precedent, they need to appeal to other precedential rules, i.e., sources of the same rank, or sources of higher rank, to dismiss it as a mistake. Without this justification, litigants in similar cases would be treated differently, and the status of the precedent would be similar to a hypothetical case, not a legal source.

Amaya's account of normative elements may be improved.[165] She notes that normative elements include not only rules and principles but also judgments, and concurs with Michal Araszkiewicz on the need for a more nuanced account of 'legal norms'[166] for improving coherentist approaches to law.

One way of nuancing coherentists' approaches is by acknowledging that interpretative coherence, unlike explanatory, is developed in coordination between distinct institutions. In explanatory coherence, empirical evidence enjoys a preferential status over other components, but the development of empirical knowledge is not shared by two institutions. In contrast, in countries with separation of powers, distinct institutions share the task of developing the law. Framers develop the law in coordination with judges, in the case of constitutional law, and legislators do likewise in statutory law. Framers and legislators enact provisions and the judiciary interprets them within their semantic boundaries.

The acknowledgement of this coordination in the task of developing the law would add a foundationalist element to the coherence constraint approach, because an interpretation of the text is more authoritative when backed by precedents. However, perhaps this is the only way in which a theory of justification can give an account of precedents as legal rules rather than mere past experiences. A precedent ascribed to a given text enjoys preferential status over a new

[163] Amaya, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument*, above n 113, 510.
[164] Ibid 509-10.
[165] Ibid, 498.
[166] Ibid 498, footnote 64. See also, Michal Araszkiewicz, 'Limits of Constraint Satisfaction Theory of Coherence as a Theory of (Legal) Reasoning' in Michal Araszkiewicz and Jaromir Savelka (eds), *Coherence: Insights from Philosophy, Jurisprudence and Artificial Intelligence* (Springer, 2013) 217, 239.

incompatible interpretation of the same provision, unless there are sources of the same or higher rank that contradict it.

Deeper attention to precedents may also serve to clarify how deliberative coherence is developed in the law. Amaya rightly notes that deliberative coherence in law must not only include actions and goals, but also rules, principle, values, preferences and practical reasons and precedents.[167] As will be discussed later in this chapter, precedents serve to develop prima facie hierarchies of principles. They serve to monitor the weight that judges assign to provisions with the structure of principles. Thus they develop prima facie hierarchies of principles that guide and illustrate in what circumstances a principle usually prevails.

Deeper attention to precedents rules and the formal principles that support them can also serve to develop a constrained approach to legal change. Amaya's analysis of the techniques of adding and removing beliefs may be useful for formalising how legal change occurs. New information may trigger the reinterpretation of constitutional provisions. However, an individual person's change of beliefs seems more fluid than the relatively fixed context of a legal system. A single event may be enough for an individual to change his or her beliefs. In contrast, a single new piece of information on its own is insufficient to prompt the overruling of a precedent supporting a particular interpretation of a provision. Legal change tends to be progressive rather than radical. A restricted approach to change is also better justified from a normative perspective; otherwise law would be very unstable and any court could overrule decisions with no further constraint than the requirement of arguing that new information justifies the revision.

Regarding the intersubjective aspect of adjudication, Amaya is aware that dialectical factors may influence the standards of justification, but rather than matters being left to contingent factors, dialogue is the standard context of adjudication. The interaction between legal participants invariably influences the way a set of normative elements is developed. In fact, Amaya's concern about the *coherence bias* can be reduced, if not eliminated, by stressing the intersubjective constraints of adjudication. A judge may start with an apparently coherent set of normative elements that confirms a biased judgment. But judges do not form sets of normative elements in a vacuum, but in the context of intersubjective deliberation. The relevance of coherence in the law, understood as a constraint, is that fellow participants invoke normative elements to put pressure

[167] Amaya, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument*, above n 113, 497-498.

on judges. When a participant invokes a source and judges simply disregard it, they fail to honour their commitment to transparency and impartiality.

Thagard's and Amaya's principles of competition are also a general factor in adjudication. By definition, lawyers defend competitive claims that are in opposition with each other. Consistent with their interests and those of their clients, they search for sources that support their claims and qualify or rebut the claims of their counterparts.

Likewise, judges try to persuade fellow members of the court, in order to gain a majority that approves the conclusion they are defending. In civil law courts, an individual judge (the judge-rapporteur) is even assigned the task of drafting's judgments before the actual case is decided, seeking to convince a majority that the judgment is as well supported by legal sources as possible.[168] Judges may modify and enrich the draft, or even renounce their part in drafting it, leaving the task to other judges better able to persuade the majority. Thus, first there is a process of interaction with lawyers defend their own interests and invoke sources to reduce judicial discretion. Then there is a process of interaction with fellow judges who are supposed to decide cases impartially and according to law. In this way, the intersubjective feature of adjudication is one constraint that reduces the subjectivity of the individual judge.

The principle of contradiction is also a default factor in adjudication. Judges need to hear both sides. The interpretative hypothesis raised by lawyer A, backed by a given set of sources, is in opposition with the claim raised by lawyer B, also backed by sources. This tension is particularly acute when there are conflicting lines of precedents. On occasion, there can be a relatively consistent set of previous decisions that clearly support one claim over the other. But on other occasions, the solution may not be as straightforward. But even if there is more precedential support for a particular claim, the judge will need to resolve the tension by balancing competing principles.

Thus another constraint that may complement Amaya's requirement of epistemic virtue are intersubjective restrictions. Lawyers need not be morally virtuous, but a good lawyer must be

[168] For a comparative analysis on the process of writing judgments in superior courts between the common and the civil law, see Mathilde Cohen, 'Ex Ante Versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort' (2014) 62(4) *American Journal of Comparative Law* 951. See, *Reglamento Interno de la Corte Constitucional* [Internal rules of Constitutional Court] 21 October 1992 DO (Colombia). Arts 31-35 A (as amended 30 April 2015); *Reglamento Interno de la Suprema Corte* [Internal rules of Supreme Court] 1 April 2008 DOF (México). Arts 14-19, 47-48.

epistemically virtuous. Even if her search for normative elements is triggered by her self-interest, her enquiry aims to reduce judicial discretion. When an individual judge fails to follow an epistemically responsible procedure, fellow participants may oblige her to expand and refine her enquiry in search of more normative elements. The potential of coherence as constraint is only fully realised when legal participants take as much advantage as possible of legal material to reduce the biases of a judge or a majority of the court.

In summary, there is one central and one secondary observation to be made about Amaya's coherentist theory. The central observation is the need to rethink the principle of data priority. This principle suggests a parallelism between the preference in interpretative coherence for reasons of authority over other types of reasons, and the corresponding preference in the field of explanatory coherence for empirical evidence over other types of reasons. However, the development of the law, unlike the interpretation of empirical evidence, is shared by two institutions: framers or legislator who enact constitutional or legislative provisions, and judges who interpret them. Statutory or constitutional provisions may be mere propositions that describe reasons from authority, but these propositions are applied according to how judges have interpreted them. Judges do not merely reproduce a unique meaning embedded in the text, but rather, ascribe meaning to it. In this way, precedents become an authoritative interpretation of a given provision. Thus precedents possess a *prima* facie priority over new incompatible interpretations.

The secondary observation is that the relevance of intersubjective constraints should be expanded to reduce the risk of the coherence bias. Coherence between an interpretative hypothesis and a set of normative elements is indeed a useful constraint for reducing judicial discretion. Nevertheless, it is not a self-imposed restraint but a product of the interaction of legal participants. The intersubjective feature of adjudication stresses that the sets of normative elements are indeed transitory, but their capacity to prevail or not, and the scope of the enquiry depends on the interaction of legal participants. In this context, judges should issue transparent judgments in which they indicate that a set of sources is more coherent than its alternative.

Following this analysis of Dworkin's and Amaya's general work on coherence, the next section proposes a framework of Constitutional Reciprocity for dealing with constitutional precedents in the civil law.

V. The Framework of Constitutional Reciprocity

The contributions of Dworkin and Amaya should not be underappreciated. Constitutional Reciprocity takes from Dworkin, firstly, the idea of Integrity or normative coherence as an autonomous value. However, it uses the ideal in light of the provision-norm distinction. Judges are constrained by the semantic boundaries of the provision, but they are also constrained by layers of ascribed norms. Norms identify how the legal community understands a particular text at a given time. Thus, Integrity serves to reduce the scope of judicial discretion when interpreting indeterminate provisions. Secondly, it takes his idea of conservative principles as a useful starting point for limiting judges in their task of modifying the law while applying it. However, given that Dworkin's conservative principles became unclear as his work evolved, Alexy and his followers complemented his idea with the concept of formal principles. Nonetheless, their proposal is limited to ascertaining the limits of competences between courts and legislators, as discussed in Section III.

In the same way, Constitutional Reciprocity (CR) takes from Amaya her clarification of the vague concept of coherence, which is in reality constituted by five kinds of coherence, among which interpretative coherence stands out for its ability to help decision-makers to distinguish among plausible interpretative hypothesis that cohere with rules, principles and judgments, as analysed in Section IV. However, Amaya is not concerned with how precedents reduce interpretative discretion – a fundamental issue when dealing with indeterminate provisions such as constitutional clauses. The ascription of norms significantly reduces this discretion by delimiting the range of plausible interpretations.

However, as proposed here, CR differs from Dworkin's and Amaya's positions in five ways. First, it is directed at a more practical level of adjudication. While Dworkin used RE to develop a general theory of law, and Amaya advances a general theory of justification, Constitutional Reciprocity is only a method for adjudicating constitutional cases with precedents in the civil law. This approach makes it possible to be more specific, and less metaphorical, than Dworkin, and more accessible to legal practitioners than Amaya.

Second, Constitutional Reciprocity stresses that precedents produce prima facie rules to safeguard the right to equality. Given his criticism of rule-centred positivism, Dworkin privileged principles over rules when interpreting precedents. While Amaya does focus on principles and rules, on occasion the rule only exists after one judge has ascribed it to a constitutional or legislative provision after using a canon of interpretation. Thus, understanding precedents as legislative rules, at least as they are understood in the civil law – i.e., as standards formed by an antecedent, a consequent and a *ratio legis* (an underlying reason for a rule) – has the benefit of identifying categories of individuals who engage in a particular kind of behaviour. The emphasis on rules makes it possible to enhance the protection of the right to equality by noting that judges expand, reduce or eliminate categories when they interpret precedents. Judges expand categories of individuals when they amplify the scope of a *ratio* through the analogical extension of rules,[169] reduce the scope of categories when they distinguish cases, or they may even eliminate categories when they overrule prior decisions. Neither Dworkin nor Amaya explicitly developed these topics, given their more abstract interests.

Third, CR is explicitly situated in the civil law tradition. Dworkin used common law methodology, or proposed new ideas, to increase our understanding of common law adjudication. While Amaya is familiar with both legal traditions, her case studies and methodology are closer to the common law. By contrast, the framework defended here uses civil law concepts and techniques to help illuminate the way in which constitutional judges should adjudicate cases. For instance, the provision-norm distinction, unfamiliar to common lawyers, stresses that judges are limited by the semantic boundaries of the constitutional text. The more specific the provision is, the less discretion there is; any interpretation outside its linguistic boundaries is an illegitimate exercise of power. However, the understanding of a text is dynamic and plural, and precedents serves to monitor how its meaning evolves over time. Moreover, the conception of civil law analogy *legis* (analogy of rules) focuses not only on the similarity of facts, between cases, but also on the connection between underlying reasons to extend rationes. In addition, the use of analogy *juris* (analogy of principles) permits judges to infer principles from a set of rules that favours coherence in a sequence of cases.

Fourth, this proposal takes an intersubjective rather than an individualistic approach to adjudication. Although the intersubjetive element is implicit in any theory of legal reasoning, as it

[169] Bobbio, *Teoria dell' ordinamento giuridico*, above n 35, 175.

tends to justify a given claim before some other real or ideal speaker, most approaches assume that the judge decides a case in isolation. Dworkin's recourse to Hercules as a superhuman judge abstracted from time and in isolation from fellow legal participants distracts our attention from the intersubjetive context of adjudication. Amaya does consider dialectical features as a possible factor in the context of legal justification. However, more than a mere factor, this is the common context of adjudication. Lawyers question their rivals, a minority of judges dissent from the majority, parties try to refute each other's claims. The interaction between participants also produces alternative sets of reasons that justify a particular interpretation of the law, and it is in this context that judges, or a majority of the court, decide cases.

Fifth, and finally, CR specifies the role that formal principles have in constitutional decision-making that distinguishes coherence in justification in general from coherence in precedents. While a constraint on the revision of past decisions, i.e., via judicial interpretation, was present in the early Dworkin's work, this became blurred as the conservative principle of the doctrine of precedent later became part of the broader principles of due process and fairness, until, finally, law and political morality became, in Dworkin's view, part of a single normative system. Amaya is also aware that the special weight carried by past decisions from authority is one of the elements that distinguishes law from political morality, but she does not elaborate on this abstract distinction in the practical field of precedents. In contrast, CR highlights the role that the principles of authority, equality and legal certainty play in limiting judicial power to revise sources. Formal principles work by restricting the power of judges – e.g., lower judges cannot overrule a particular superior precedent despite any incoherence with other precedents – and imposing a burden of argumentation on subsequent judges when distinguishing precedents or overruling.

Bearing in mind these five differences, this section proposes the framework of Constitutional Reciprocity as an adaption of RE for the context of constitutional adjudication in the civil law. Rather than a complete theory of legal reasoning, it is a framework useful for achieving coherence between a potential judgment and a set of constitutional precedents.

Constitutional Reciprocity is anchored in three basic elements. First, it is concerned with the constraints that intersubjective deliberation imposes on the individual discretion of judges.

Secondly, in accordance with my proposal based on the work of Dworkin and Alexy, it is concerned with the role that formal principles play in limiting the dynamic aspect of coherence that allows the revision of precedents. Thirdly, it is concerned with civil law concepts and challenges. The main civil law concept is the distinction between a provision as an uninterpreted text and an ascribed norm as the product of judicial interpretation.[170] The main challenge facing a reasonable application of precedent is the overproduction of precedents by constitutional courts in the civil law.[171] The fact that superior courts decide thousands of cases encourages a holistic approach to precedent, systematising not just a few precedents but a broader set of them.

V.1. An Intersubjective Test of Constitutional Reciprocity

Theories of adjudication usually neglect the fact that coherence between a claim and a set of reasons is achieved intersubjectively, rather than by judges as individuals, Coherence is not only achieved intersubjectively in the sense that a judge at T^2 links the judgment with a previous decision laid down at T^1. Coherence is also developed in the present because of the pressure that legal participants put on each other. In multimember courts, there is also disagreement among judges who may use the same methodology, consult the same materials, but reach different conclusions because they stress competing values or principles implicit in precedential rules.

In this sense, this adaptation of RE is influenced by intersubjective theories of justification. In moral philosophy, Thomas Scanlon has stressed that justification imposes a burden of argument in a way that informed persons cannot reasonably reject.[172] Scanlon argues that respecting others 'requires us to treat rational creatures only in ways that would be allowed by principles that they could not reasonably reject'.[173] At the core of Scanlon's proposal is the idea that claims need to be compared and tested to select the most reasonable.[174]

[170] See Chapter I.
[171] See Introduction.
[172] T.M. Scanlon, *What We Owe to Each Other* (The Belknap Press of Harvard University Press, 1998) especially at 4, 153, 195.
[173] Ibid 106.
[174] Ibid 195, 210.

Similarly, Rawls argues that 'Reciprocity' requires individuals to justify their actions on grounds that could be accepted by other reasonable persons.[175] Unfortunately, Rawls is inconsistent on the requirement of Reciprocity. At times he argues that persons must be able 'to justify our actions in a way that others similarly motivated could not reasonably reject'.[176] On other occasions Rawls refers to a lighter burden of justification, noting that our reasons 'may reasonably be accepted by other citizens as justification of those actions'[177].

In this sense, David A. Reidy notes that there are two readings of Rawls' conception of Reciprocity in adjudication.[178] The strong reading is highly burdensome as it requires moral agents not only to consider how a decision will impact on others, but to justify a claim that no reasonable person could reasonably reject.[179] Moreover, Reidy interprets the strong reading of Reciprocity not only as the ideal of reaching a decision that no reasonable person could reject now, but also that no reasonable person could reject in the future.[180] In contrast, the weak reading is not demanding at all as it just requires that other people can accept a framework of general principles.[181]

An intermediate approach to Reciprocity in justification can be useful in constitutional adjudication. As Rawls notes, disagreement in plural societies is not only unavoidable but an exercise of rationality between persons who may cherish distinct values and principles.[182] However, despite the existence of disagreement, judges need to solve controversies in which parties raise competing reasonable claims. Thus an intermediate approach between weak and strong Reciprocity conceives of constitutional adjudication as a reasonable framework for resolving disagreements. Lawyers and judges may consider particular precedents or constitutional provisions as unjust, but in general they accept the framework of constitutional adjudication as a reasonable mechanism for resolving controversies.

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[175] A similar suggestion is found on the idea of a universal auditorium of Chaïm Perelman. See Chaïm Perelman and Lucie Olbrecths-Tyteca, *Tratado de la argumentación* (Julia Sevilla Muñoz trans, Editorial Gredos, 1989) [trans of: *Traité de l'argumentation, la nouvelle rhétorique* (first published 1958)] 71-78.
[176] John Rawls, *Political Liberalism: Expanded Edition* (Columbia University Press, first published 1993, 2005) 49.
[177] Ibid, XLIV.
[178] David A. Reidy, 'Reciprocity and Reasonable Disagreement: From Liberal to Democratic Legitimacy' (2007) 132 *Philosophical Studies* 243, 244.
[179] Ibid, 268.
[180] Ibid 269.
[181] Ibid
[182] Rawls, *Political Liberalism: Expanded Edition* above n 176, 54-8.

Following Scanlon and Rawls, but applying the ideal of Reciprocity to the institutional context of adjudication, we might consider Constitutional Reciprocity to be the ideal in which legal participants try to defend a claim that is sufficiently coherent with relevant sources to ensure that the other informed legal participants should not reasonably reject it.

Constitutional Reciprocity acknowledges that the most coherent legal answer may not be considered the correct moral answer that satisfies all members of the community, but it also acknowledges that the search for constitutional correctness is open-ended. It is possible that in later cases a different decision may be reached. Legal participants raise new interpretations of sources that were not considered before, or invoke sources that were neglected, or identify a trend in precedents that was neglected in a judgment.

The intermediate approach to Reciprocity also acknowledges that the legal community is not identical with, although it may overlap with, the moral community. Legal participants, i.e., mainly superior court judges, and in a lesser extent, in certain cases, lawyers, take an internal point of view of the law rather than an external observer approach.[183] As legal participants they recognise the validity of the general constitutional framework, which includes the validity of texts, and the conventions for interpreting such a text, including the doctrine of precedent. Although they may question a given rule or principle, they need to appeal to some legal source to challenge it.

The intermediate approach to Reciprocity requires reasonable and achievable but still not perfect coherence between a claim and the set of relevant sources. Reciprocity is a criterion of justification that requires a reasonable, even if not perfect, degree of mutual support between constitutional provisions and precedents and a potential judgment. Subsets of sources may encompass certain inconsistencies, and yet be relatively coherent as a whole. Thus, it is 'reasonable' coherence because, usually, while there may be tensions in legal sources, judges can be expected to resolve the case even if one principle is sacrificed.

The term Reciprocity is used in two senses. In the first sense, Reciprocity refers to the requirement of mutual support between a claim and *past* decisions. The goal of Constitutional Reciprocity is to urge judges to adjust their constitutional judgments so as to cohere with previous interpretations of the same text. In the second sense, the test of Constitutional

[183]H L A Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) 88-92.

Reciprocity is linked to how legal participants argue in the *present*. It is not only about considering alternative theories or discussing matters with hypothetical rivals. As previously discussed, any coherentist theory that neglects the intersubjective element of adjudication runs the risk of participants searching for elements that merely confirm a preconceived judgment. Instead, Constitutional Reciprocity is about comparing sets of reasons raised by distinct participants.

In this second sense, Constitutional Reciprocity admits the role that history plays in normative coherence,[184] but also recognises that individuals may develop alternative reconstructions of the institutional record. Legal participants have access to the same material, but they may find precedents that were neglected by another party, or they may stress elements that passed unnoticed in justifying a claim.

In this sense, Constitutional Reciprocity acknowledges the gradual – the 'matter of degree' – nature of coherence, but also profits from the *adversarial* logic of adjudication to simplify the process of selection among competing claims.[185] While the coherence of a particular set of norms is a matter of degree rather than an all-or-nothing phenomenon, judges are obliged to solve the case in a 'yes or no' fashion. In some cases there can be decisions in which the ideal moral answer is identical to the most coherent legal answer, and thus no principle is sacrificed. However, hard cases are controversies in which two or more claims are reasonable, and here the judge must select one of the potential judgments or propose an alternative. Judges are forced to resolve competing claims, but they are expected to do that in a transparent and reasonable way by balancing the interests of party A and party B.

The adversarial context of adjudication also serves to simplify the tension between the conservative and dynamic elements of doctrines of precedent. On the one hand, the conservative elements suggest that precedents must be followed in similar factual scenarios. On the other hand, the dynamic elements suggest that precedents must be distinguished because a previous court did not consider relevant facts that are present in the case being decided, or that precedential rules must be overruled because of their incorrectness. Then, parties invoke

[184] See Postema, above n 97, 827.
[185] On the binary code legal-illegal as a mechanism to simplify complex questions of justification that are actually a matter of degree see Niklas Luhman, *Law as a Social System* (Klaus A. Ziegert trans, Oxford University Press, 2004) 314; John Finnis, *Natural Law and Natural Rights* (2nd ed, 2011) 279-80.

competing sets of precedents and raise incompatible claims: A may suggest that a precedent must be followed while B argues that it must be distinguished or overruled.

The tension between the conservative and dynamic elements of precedent also parallels the conflict between formal and substantive principles. Both parties invoke precedents as authoritative interpretations of the constitution, yet judges must select the claim that is better supported. Likewise, one party may suggest that a particular precedent must be followed because of a similarity, while their counterpart suggests that the case at hand is distinct from the precedent and thus should be treated differently. Finally, one party may claim that following a precedent is required by legal certainty, while the other party may claim that other precedents actually support her claim and authorise overruling, even if that unsettles the law in a way detriment to legal certainty.

Therefore, in the adversarial context of adjudication, the key question for Constitutional Reciprocity is whether the claim proposed by A is *more* coherent with the relevant law as it currently-stands than the one proposed by B. While the idea that coherence in the interpretation of the law is a matter of degree is usually conceded,[186] its gradual nature is rarely linked to the intersubjectivity of adjudication. It is therefore necessary to go deeper into the types of reasons that justify a particular interpretation of the constitution, so that the criteria for selecting among competing sets can later be suggested.

V.2. Five Types of Reasons Used in Reaching Constitutional Reciprocity

The provision-norm distinction serves as a basis for proposing a catalogue of reasons that form the set that justifies a particular interpretation of the constitution.

(I) *Constitutional norms with the structure of a rule*. When the interpretation of provision leads to a single norm with the structure of a rule, i.e., a clear antecedent and a legal consequence attached to it, then such reason enjoys the highest normative status.

[186] See, e.g., Robert Alexy and Aleksander Peczenik, 'The Concept of Coherence and Its Significance for Discursive Rationality' [130] (1990) 3(1 bis) *Ratio Juris* 130, 132; Luc. J. Wintgens, 'Some Critical Comments On Coherence In Law' in Bob Brouwer et al (eds), *Coherence and Conflict in Law: Proceedings of the 3rd Benelux-Scandinavian Symposium in Legal Theory, Amsterdam, 1992* (Kluwer Law and Taxation Publishers 1992) 109, 115.

Such a norm does not need justification and is not revisable via judicial interpretation. It could become revisable if framers enacted another constitutional provision that regulates similar behaviour in a quite different way. For instance, Article 22 [1] of Mexican Constitution states that the death penalty is prohibited.[187] The prohibition of the death penalty can only be restored by formal amendment. E.g., framers may enact a provision that authorizes the death penalty in cases of terrorism.

(II) *Constitutional norms with the structure of principles*. When the interpretation of provisions leads to norms that lack the structure of a rule, they are, as Robert Alexy notes, 'optimization requirements'[188]. That is, they indicate that a certain state of affairs is valuable and must be realized as legally and factually as possible, but they do not attach a clear consequence that delimits its scope of application.[189] Given that principles collide with each other, such tensions, as Alexy notes, are solved by balancing competing principles and selecting one that prevails in light of the circumstances of the case. If the method of balancing is not applied, any other canon of interpretation will ascribe a norm to the provision.

(III) *Judicially ascribed norms*. Judges do not interpret constitutional norms with the structure of principles in isolation but in light of previously ascribed norms. Because judgments conclude that a given set of facts is permitted, prohibited or commanded, such norms will usually have the structure of rules.

Norms ascribed to principles, unlike constitutional norms with structure of rules, are revisable via judicial interpretation. All courts can distinguish a norm in light of facts that are constitutionally relevant and warrant different treatment between cases. Usually, only supreme courts are empowered to overrule a particular norm and the burden of argumentation lies in showing that a norm has become incoherent in light of a recent interpretive pattern.

[187] *Constitución Política de los Estados Unidos Mexicanos de 5 de febrero de 1917* [Mexican Constitution of 5 February 1917],Art. 22 [1], (as amended 9 December 2005).
[188] Alexy, *A Theory of Constitutional Rights*, above n 27, 88.
[189] Ibid 388-425.

It may be argued that the revision of a norm is not an amendment of the provision in itself but a revision of its interpretation. Nevertheless, this would deprive constitutional precedents of their status as sources. Judges do not only ascribe an interpretation in the abstract, but rather, they modify the legal sphere of the parties. Judges lay down a presumption that similar cases will be treated in such a way as to cohere with such an interpretation. While revisable, ascribed norms have a prima facie superior status to incompatible interpretations.

While vagueness and ambiguity are the principal sources of indeterminacy in constitutional provisions, the principal source of indeterminacy among judicially ascribed norms is conflict among them. For instance, the norm ascribed in A.I. 599-2012 ruled by the Plenum of the Mexican Court suggests that officials' right to privacy prevails over citizens' right to information.[190] The Court ruled that when officials hand in their declaration of assets, they must consent to their disclosure, otherwise it is prohibited to reveal such information as it remains confidential. In contrast, the norm issued in C.C. 61-2005 holds that freedom of expression and information usually prevails over officials' right to privacy.[191] The Court held that the right to information must be specially protected because of its connection with democracy and the accountability of officials, implying that the general rule is to make information public and the exception is to keep it confidential. Thus, there is a tension between two ascribed norms: one favours secrecy and the right to privacy over the right to information, while the other privileges the right to information to empower citizens.

The conflict is apparent when ascribed norms regulate different factual scenarios. The conflict between norms is real when they regulate similar scenarios, in which case the burden of argumentation lies in persuading judges that a claim is supported by a greater number of precedents that the claim raised by the other party.

(IV) *Arguments from authority, equality and legal certainty*. As indicated in the previous section, precedents are applied in connection with the tension between formal and substantive principles. The first tension is between distinct authoritative

[190] A.I. R 599-2012, Jose Fernando Franco Salas, 12 August 2014.
[191] CC 61-2005, José de Jesús Gudiño Pelayo, 24 January 2008, recital VI.

interpretations of the same provisions. This tension is resolved by providing arguments that show that a given set of precedents is more authoritative than its negation. The second tension is between equality in its expression in treating members of the same category alike, and treating members of different categories differently. The tension is resolved by determining that the facts of the case are different to those in previous precedents. The third tension is between legal certainty and constitutional correctness. This tension occurs when a court revisits a question previously settled, but where there are good arguments to abrogate the ascribed norms and issue an opposing one. The tension may be minimised when precedents issued after the case was decided offer further support for the correctness of the claim.

(V) *A candidate for an ascribed norm*. In light of constitutional provisions and previously ascribed norms, legal participants may argue that a new norm should be ascribed to the constitutional text.

This set of reasons requires a process of systematisation to show that a particular candidate for a norm is more coherent than its negation. The process of systematisation may also lead to a process of revision of previous law. Yet this process of revision, unlike the revision of moral judgments, is limited by formal principles.[192] The next section makes a proposal about the steps that are necessary to systematize the set of reasons and to select the most coherent claim.

V.3. The Five Steps of Constitutional Reciprocity

Constitutional Reciprocity is a five-step process that guides the selection of the most coherent systematisation of reasons to solve a case. Given that adjudication implies that a participant raises a claim while another proposes its negation, it is not sufficient to reconstruct law coherently to justify a particular decision. Instead, it is necessary to show that the decision coheres better with the law than its negation.

There are three steps regarding past decisions of authorities, in which participants reconstruct legal sources to justify the ascription of a new norm:

[192] See Chapter V on distinguishing and confining norms and Chapter VI on overruling.

1. *Identify the relevant sources in light of the facts of the case.* Participants identify the relevant facts and subsume them under the antecedent of constitutional rules or principles, but only according to their own description of the case. For instance, when dealing with a case on abortion a liberal participant may prioritise sources that protect a woman's autonomy while a conservative judge may prioritise sources that protect the right to life or the sovereignty of federal entities to regulate health issues.

2. *Systematise the sources according to their degree of semantic indeterminacy and the record of conditional preferences.*

   A single ascribed norm may be insufficient to clarify the meaning and scope of a constitutional provision. Thus legal participants arrange a set of relevant norms that address similar facts but with different levels of generality. Just as the provisions of a code have several degrees of indeterminacy, ranging from very abstract to very concrete, likewise, judgments may have addressed relevant issues with different levels of generality. The degree of indeterminacy can be catalogued as high, moderate or low. Participants not only look for norms with low indeterminacy that clarify meaning, but also make connections between ascribed norms and constitutional principles.[193]

   For instance, Colombian lawyers who seek to defend the constitutionality of a sanction against whipping applied by an indigenous community to one of its members may start by invoking constitutional provisions that are highly indeterminate. These provisions protect abstract notions such as indigenous autonomy and axiological and cultural diversity.[194] The lawyer also invokes the moderately indeterminate principle developed by courts that states that indigenous autonomy must be maximised and state intervention minimised.[195] In addition, he or she may link highly indeterminate norms that defend axiological pluralism[196] with determinate norms that rule that self-determination cannot be invoked to justify the death penalty or torture, even if whipping is not torture but an expiation procedure when applied by indigenous courts.[197]

[193] On the importance of justificatory cross-connections for the coherentist structure. See Alexy and Peczenik, above n 186, 144-9; Kenn Kress, 'Coherence' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing, 2nd ed, 2010) 521, 532 Aleksander Peczenik, *On Law and Reason* (2nd ed, 2009) [trans of: *Rätten och Förnuftet* (first published 1989)] 132-42.
[194] Colombian Constitution, Arts 1, 7, 70, 246 and 330.
[195] T-349-1996, Carlos Gaviria Díaz, 8 November 1996.
[196] C-139-1996, Carlos Gaviria Díaz, 9 April 1996;SU-510-98, Eduardo Cifuentes Muñoz, 18 September 1998.
[197] T-523-1997, Carlos Gaviria Díaz, 15 October 1997.

Legal participants can reconstruct precedents to develop a record of the constitutional preferences of the legal community. In jurisdictions with thousands of cases such as Mexico or Colombia, participants can prioritise the precedents from the Plenum over those of inferior courts and the landmark precedents, e.g., cases in which the Plenum interpreted a right for the first time, or consolidated a doctrine, or overruled an ancient precedent.

This record of constitutional preferences fulfils two functions. The first is to systematise how past judges have framed *facts* in ascribed norms. For example, legal acts regarding marital status may be framed as private law matters that must be regulated by legislatures in respect of the principle of democracy, or they can be framed as an instantiation of the constitutional right to autonomy. In this first function, the institutional record serves to form factual elements that will form the antecedent of a norm.

The second function of the institutional record is to develop prima facie hierarchies of *principles*. Alexy has suggested, though not developed, the use of precedents as a network of prima facie preferences of a legal community.[198] In this function, the concern is no longer with how certain facts are translated into legal discourse. Instead, the function is to stabilize the tension between competing principles; it is related to the consequent of an ascribed norm.

These hierarchies of principles are neither absolute nor static. They are not absolute because in some circumstances a principle may prevail, while it may be that in other cases unanticipated circumstances create an exception to the general prevalence of the principle.[199]A static hierarchy is, for instance, a constitutional provision with the structure of rule that prohibits the death penalty. It commands that when the principle of punishing criminals clashes with the principle of protection of life, the latter will always prevail. In contrast, dynamic hierarchies may evolve over time through progressive litigation. At a given point in time the general preference for privacy may be replaced in favour of freedom of information over privacy. But, perhaps due to technological changes that facilitate intrusions into privacy, the privacy principle may become more vigorously protected.

[198] Alexy, *A Theory of Constitutional Rights*, above n 27, 98.
[199] Ibid, 103, 108, 408.

The example of the right to indigenous autonomy is useful for illustrating how the institutional record develops prima facie hierarchies. The lawyer seeking to defend the right of indigenous autonomy over other competing principles may confirm the general preference. The lawyer may show that over more than twenty years indigenous autonomy has usually prevailed even over specially protected principles like freedom of religion,[200] or the best interests of the child,[201] with the only exception being when national security is threatened.[202]

3. *Propose a candidate for a norm to solve the particular case.* Participants argue as if the law were coherent, but only according to their individual reconstruction. In this way, they propose that a certain set of facts is permitted, commanded or prohibited or that a certain authority has a given power.

Then, in the present context of adjudication, there are two steps where rival schemes are contrasted:

4. *Expand and modify the set of reasons in reply to objections and qualifications, reformulating the claim in a way that should not be rejected by the other legal participants.* Each participant expands upon and modify the set of reasons according to the counter-claims of other participants.[203] Participants add sources that were originally disregarded, and remove sources that are not really applicable to the case at hand. This step may urge participants to formulate claims in a more tentative way given the objections and qualifications raised by other participants.

   For instance, a lawyer may cease to invoke an ascribed norm once the another party argues that there is no binding ratio but merely a persuasive obiter. Thus the lawyer may expand the scope of enquiry by appealing to other sources that do justify her claim and that rebut the arguments may by the other participant.

[200] SU-510-98, above n 196.
[201] T-617-2010, *Luis Ernesto Vargas Silva*, 5 August 2010, at section 12.3, note 54.
[202] T-405-93, *Hernando Herrera Vergara, 23 September 1993.*
[203] On the epistemic process in which personal acceptance can be transformed into external justification once it passes a process of scrutiny, see Keith Lehrer, *Theory of Knowledge* (Westview Press, 2nd ed, 2000) Ch. 7.

5. *Select the most coherent set of reasons according to the criterion of the soundness of justificatory interconnections, the postulate of analogy and the law of balancing.* The process of selection can be reconstructed to include three sub-steps. First, judges are required to prefer the claim that is supported by the greater number of and the sounder interconnections (ranging across high, moderate and low indeterminacy).[204] Exceptions can be invoked to enhance the soundness of an interconnection: while some exceptions can justify the general rule, an excessive number of exceptions show that the general rule has disappeared in practice.

   The second step appeals to analogy as a tool for enhancing coherence in the law. Analogy suggests that the scope of an ascribed norm may be extended to cover unanticipated circumstances when the case at hand shares factual similarities with the precedent. This process of analogy may be extended not only to link a norm to the case at hand but to create chains of analogies and infer a principle from a set of ascribed norms. According to the postulate of analogy, the "greater the number of factual similarities between the case at hand and judicial norms the more reason to impose an obligation coherent with the set". According to analogy *legis,* "the greater the number of ascribed norms supporting the candidate for a norm is, the more reasons to select it". According to analogy *juris*, the more comprehensive a single principle encompasses the sources and the candidate for a norm, the more coherent the deontic claim will be with the relevant law.[205] Conversely, the less a principle explains and justifies precedents that match the described behaviour, the less coherent the norm is. When one participant is able to suggest a principle that covers the facts of the case and also a set of ascribed norms that the other party left unexplained, the more coherent the claim is. Analogy can be complemented with the use of the a *fortiori* argument:[206] If the law protects a certain action grounded on a given principle, then there is all the more reason for it to protect a more important action.

[204] On the epistemic requirement to choose the better justified set even it there is a possibility of mistake, Chisholm, above n 8, 59-60.
[205] On comprehensiveness as an element of coherence, see Rescher, above n 6, 168-71; Robert Alexy, 'Coherence and Argumentation or the Genuine Twin Criterialess Super Criterion' in Aulis Aarnio et al (eds), *On Coherence Theory of Law* (Juristförlaget i Lund 1998) 39, 42.
[206] Lars Lindahl, 'Conflict in systems of legal norms: a logical point of view' in Bob Brouwer, Ton Hol and Arend Soeteman (eds), *Coherence and Conflict in Law:Proceedings of the 3rd Benelux-Scandinavian Symposium in Legal Theory, Amsterdam, 1992* (Kluwer Law and Taxation Publishers 1992) 39, 60.

The third step urges judges to balance between the competing principles while also giving due attention to the record of preferences.[207]The record of preferences can be challenged, suggesting that the circumstances in question were not resolved by any precedent. Alternatively, the record of preferences may be challenged by appealing to a recent trend of precedents that suggests that the hierarchy of principles has reversed in favour of a different principle.

After spelling out the five steps of Constitutional Reciprocity, the next section applies this framework to a case study.

VI. Applying Constitutional Reciprocity: The Case study of Gay Rights in Mexico and Colombia

This section applies the framework of Constitutional Reciprocity to two case studies from Mexican and Colombian constitutional law. The question at issue is whether it is constitutionally permissible for de facto gay couples to adopt children. The enquiry is limited in scope to constitutional precedents issued up to 18 February 2015, in which the Constitutional Court of Colombia ruled that gay couples can adopt children but only when one of them is the biological parent. [208] More recently, the Colombian court has abandoned the distinction between heterosexual and homosexual couples, granting then equal rights.[209] However, the scope of the case study is limited to February 2015 and before, to stress how the then existing framework would have constrained intermediate courts.

The case study places the context of deliberation at the level of an intermediate court bound by the precedent of superior courts (vertical precedent), rather than at the level of a Supreme or Constitutional Court, the latter being less constrained by their own precedents (horizontal or self-precedent). Because of the principle of authority, only last-resort courts are normally empowered to overrule decisions.[210]

The case study has two purposes. The first is to exemplify how Constitutional Reciprocity works in the intersubjective context of adjudication. The second is to highlight the role of ascribed

[207] Alexy, *A Theory of Constitutional Rights*, above n 27, 98-109, 376, 388-425.
[208] C-071-2015, Jorge Iván Palacio Palacio, 18 February 2015.
[209] SU-214-2016, Alberto Rojas Ríos, 28 April 2016.
[210] See Chapter VI.

norms as *objective* constraints. While constitutional provisions may be similar in several jurisdictions, the norms that judges have ascribed to them constrain subsequent interpretations. A lawyer arguing a similar case with similar provisions would face different constraints, depending on how superior courts have interpreted the Constitution. In this way, RE in moral discourse and Constitutional Reciprocity work differently, because of the special weight granted to ascribed norms over new interpretations in the case of the latter.

VI.1. The Case of Mexico

There are at least three constitutional provisions relevant to the case study. Article 1 [5] prohibits discrimination on the basis, among others, of sexual preference. Article 4 [1] commands authorities to treat men and women equally and promotes the development of families. Article 30 B) II permits a foreign man or woman who has married a Mexican woman or man to obtain Mexican nationality. The first provision suggests that discrimination against gay couples is prohibited. However, the second provision is ambiguous regarding what kind of family is recognised by the constitution. The third provision presupposes that the couples in question are heterosexual, although it seems to limit the scope of application to the naturalisation of foreigners when marrying a Mexican citizen.

By interpreting such constitutional provisions without reference to ascribed norms, we are left with at least three candidates for ascribed norms. (A**)** De facto gay couples are constitutionally *permitted* to adopt children. Alternatively, ($B^{1)}$**:** The constitution is *silent*, thus the democratic legislator is empowered to legislate on the matter according to their views of citizenship, or ($B^{2)}$: The constitution *prohibits* de facto gay couples to adopt. Only A and B^1 interact in the Mexican case.

The following analysis represents the interaction between legal participants once provisions are read in light of ascribed norms.

> Participant A: The constitution prohibits discrimination on the basis of sexual preference (Art 1 [5]). Also, in the gay marriage case the Plenum has recognised an *implicit right to sexual autonomy*, derived from human dignity, that permits individuals to choose their sexual preferences, couple or marital status, and whether

to adopt, without state interference.[211] If heterosexual couples can adopt, by analogy *legis*, the same should apply to same sex couples, otherwise there will be an unjustified exclusion based on sexual preference.

Participant B: Such right only applies to individuals, not to couples. Moreover, the conception of family protected by the constitution is limited to the heterosexual family (Art.30). In addition, the principle of Federalism (Arts. 40 and 124) empowers the states, rather than courts, to legislate on civil law matters. Perhaps some federal entities such as Mexico City can recognise gay marriage and adoption, but that is a legislative issue. Indeed, one Chamber has insisted that federalism entails not subordination but distribution of competences between powers.[212] In addition, the best interest of the child (Art. 4[11]) must prevail over the possibility of gay couples adopting.

Then, in light of B's counter-claims, A expands and strengthens the set of reasons that support her claim.

A: In the gay marriage case, the Plenum insisted that the right to sexual autonomy *permits* individuals to start a family, which includes marrying and deciding the number of children.[213] The Plenum also ruled that in case of conflict between the right to sexual autonomy and non-discrimination and federalism, the power of states to legislate need to be reconciled with the right of citizens against discrimination. The same precedent also ruled that there is not a 'single' conception of family.[214]

B: Such precedents do not apply regarding de facto couples. The Constitution suggests that marriage is a more formal family than a de facto couple. In addition, the Plenum has not ruled explicitly in the matter of de facto couples.

A: While the Plenum has not ruled on the issue of de facto families, the First Chamber has indeed developed the right of sexual minorities to be protected 'against

[211] A.D. 06-2008, Full Court, Sergio A. Valls Hernández, 6 January 2009. The case dealt with a person who was considered a male in the birth certificate but developed female organs thus she sued the registrar for a new birth certificate consistent with her physical characteristics.
[212] See Third Chamber, A.I.R. 1838-89, 3776-89, 252-90, 2118-89 and 2010-90.
[213] A.I. 2-2010, Sergio A. Valls Hernández, 16 August 2010. Quoting the right to autonomy at 100.
[214] Ibid, at 123 and 128-33.

> sexual stigmatisation'. The Chamber held that that the mere wording of civil codes that define marriage as heterosexual is unconstitutional on its face because they send a discriminatory message to citizenship on general.[215] Even if gay couples do not intend to marry, they have enough standing to challenge such statutes because of the negative expressive function of law. In at least four other cases, the Chamber has insisted that statutes that define marriage as a heterosexual union, or create alternative unions, but ones which are not termed as 'marriage', have created unconstitutional distinctions.[216] Thus, by analogy, the mere prohibition of adoption in virtue of sexual preference is unconstitutional.

Once it is contrasted with other judicial norms, A's claim coheres better with the relevant pre-existing law than B's. Several analogous precedents have protected the right to sexual autonomy and the right against sexual stigmatisation. If the mere wording of civil codes that define marriage as heterosexual violates the right of same-sex couples to non-discrimination, even if they do not plan to marry, there is all the more reason for saying that similar legislation or acts that impede couples intending to adopt children violate such a right. Moreover, the Plenum has stressed the prevalence of sexual autonomy over other issues such as federalism. The First Chamber and the Plenum have insisted on the right to sexual autonomy in a generally consistent manner.

However, there are some tensions between such precedents and the principle of federalism, which is one of Mexico's fundamental features. It appears that more conservative states should emulate more progressive ones. This tension is reduced, although not eliminated, by the suggestion that, in case of conflict, the right against sexual stigmatisation prevails over the power of state legislatures to regulate on issues of marriage and adoption. A's claim is thus *more* coherent than B's.

[215] A.I.R. 152-2013, Alfredo Gutierrez Ortíz Mena, 26 April 2014. In turn, the judgment follows a precedent which considered that homophobic speech between journalists was not constitutionally protected as it reproduces discriminatory prejudices. See A.D.R.2806-2012, Arturo Zaldívar Lelo de Larrea, 6 March 2013.
[216] See First Chamber, A.I.R. 122-2014, A.I.R.263-2014, A.I.R.591-2014, A.I.R.704-2014. Reiterating the precedent 152-2013, above n 215.

VI.2. The Case of Colombia

There are at least four provisions in the Colombian constitution that may lead to two incompatible judgments. Article 13 recognises that all persons are equal before the law and prohibits discrimination on the basis of sex, religion and any political or philosophical preferences. Article 16 recognises an explicit right to personal autonomy. Article 42 recognises the family as a basic institution. It also recognizes that the family is constituted by the free will of a man and a woman linked by marriage, or by the free will of individuals seeking to create a family. Finally, Article 44 [3] recognises children's rights and affirms that the best interests of the child usually prevail over the rights of others.

A reading of such provisions, in abstraction from ascribed norms, can lead to the same incompatible interpretations that we have seen in the case of Mexico. However, given that the meaning ascribed to such of provisions is contingent upon the judicial interpretation of prior judges, the legal implications may be different.

The interaction between legal participants may be as follows:

> Participant A: The adoption of children by gay couples should be *permitted.* Article 42 should be read in light of Articles 13 and 16. A family can be constituted by de facto gay couples willing to adopt a child. Otherwise there would be unjustified discrimination and a curtailment of the right to personal autonomy. Indeed, a Chamber has argued that the right to autonomy covers the sexual orientation of individuals.[217]

> Participant B: Article 42 should be interpreted in the sense that families are only constituted as a union between a man and a woman. In the case regarding the regulation of de facto couples, the Plenum interpreted the provision in the sense that

[217] T-097-1994, Eduardo Cifuentes Muñoz, 07 March 1994. At 16. The case deal with the possibility of punishing sexual acts in the police. The court ruled that heterosexual or homosexual acts must be punished when thy affect third-party rights. However, homosexuality in itself must not be punished.

only those in heterosexual unions can start a family, and highlighted that it is not the role of the court to legislate on such matters.[218]

A: But the Plenum has ruled that the exclusion of legal institutions based on sexual preference is unconstitutional, since homosexuality is not a sexual deviation but an expression of human diversity.[219]

B: Indeed, the law does not condemn homosexuality or gay unions, but it does promote heterosexual unions over other associations. The Plenum has interpreted 'family' as a heterosexual and monogamous union in two precedents.[220] In fact, in light of article 42, and in the best interests of the child, only heterosexual couples can adopt children.[221] In another two cases the Plenum has found a '*principle of protection deficit'* regarding the distinct treatment of gay couples.[222] This is a principle developed by courts that suggests that treating gay and heterosexual couples differently does not amount to discrimination. Instead, it is a valid differentiation because the protection of family is a legitimate constitutional goal, although this deficit of protection can be redressed by the democratic legislator rather than unrepresentative courts.

A: This criterion establishes families of a second-category. In two recent cases the Plenum has extended the rights of heterosexual couples to gay couples. First, the Plenum expanded the rights in matters of social security, and then commanded that legislation regulating de facto couples must be read to include gay unions.[223] By analogy *legis,* this ratio must be extended to include the right to adopt children, whether biological or not.

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[218] C-098-1996, Eduardo Cifuentes Muñoz, 07 March 1996. But see (Eduardo Cifuentes Muñoz and Vladimiro Naranjo Mesa, Clarifying Vote) (Arguing that legislators should regulate legal regimes for gay couples, regardless of their name.)

[219] C-481-1998, Alejandro Martínez Caballero, 9 September 1998. Considering homosexuality a 'suspect category' and thus subject to strict scrutiny on constitutional review.

[220] SU-623-2001, Rodrigo Escobar Gil, 14 June 2001; C-814-2001, Marco Gerardo Monroy Cabrera, 2 August 2001.

[221] C-814-2001. But see (Manuel Jose Cepeda Espinosa, Jaime Cordova Treviño and Eduardo Montealegre Lynett, dissenting)

[222] C-075-2007, Rodrigo Escobar Gil, 7 February 2007; C-811-2007, Marco Gerardo Monroy Cabra, 3 October 2007.

[223] C-1035-2008, Jaime Córdova Treviño, 22 October 2008; C-029-2009, Rodrigo Escobar Gil, 28 January 2009.

B: The distinction between heterosexual and gay couples is based on Article 42. Dissimilar treatment may be compensated by the legislator rather than courts. This is the ratio of the latest ruling on gay unions, which gives the legislator a period of almost two years to regulate such issues.[224] In light of the best interests of the child, the Plenum ruled that gay couples can adopt children, but only when one of the partners is the biological parent, although it clarified the point by saying that gay couples do not enjoy identical rights to those of heterosexual ones.[225] The Plenum reiterated this criterion in another precedent from the perspective of the would-be parents, but insisted that they can adopt if and only if one of the partners is the biological parent of the child.[226]

Thus, as of February 2015, Colombian constitutional precedents regarding gay rights were less favourable than those of Mexican law. The Colombian court developed the *principle of protection deficit* regarding sexual minorities, a deficit that must not be remedied by unrepresentative courts, but by democratic legislators at their own discretion.

VI.3. Constitutional Reciprocity at Intermediate Courts

The method of Constitutional Reciprocity follows the same structure as that of Equilibrium, but it works differently in the institutional context of adjudication that grants a preferential status to ascribed norms over new interpretations of the constitutional courts.

In Mexico, the Plenum has developed a relatively consistent set of norms that started with the establishment of an implicit right to sexual autonomy. Moreover, the First Chamber has developed the principle against sexual stigmatisation. Both principles encompass the vast majority of precedents but are odds with the principle of federalism, as this forces states to recognise acts not recognised by the legislature. Nevertheless, a general account of the judicial norms supports A's claim**:** De facto gay couples are constitutionally *permitted* to adopt children.

In contrast, the Colombian Constitutional Court has developed a more conservative jurisprudence regarding gay rights, one that is more deferential to the legislator. Most of the precedents were

[224] C-577-2011, Gabriel Eduardo Mendoza Martelo, 26 July 2011.
[225] SU-617-2014, Luis Guillermo Guerrero Pérez, 28 August 2014.
[226] C-071-2015, above n 208.

based on the principle of deficit of protection. The Court recognised inequality among gay and heterosexual couples but ruled that the power to redress such damage lies at the hands of legislators rather than judges. Thus a Colombian lawyer defending the right of gay couples to adopt would face a less favourable state of affairs than in Mexico.

VII. Conclusion: Conservatism and Dynamism in Constitutional Reciprocity

This chapter has proposed Constitutional Reciprocity as an adaptation of Rawls' method of RE into the institutional context of constitutional adjudication in the civil law. Both methods serve to systematise apparently unrelated elements to form coherent wholes. However, while the main subject matter of Equilibrium is considered to be the judgments of moral agents, the main concern of Constitutional Reciprocity is with norms that judges ascribe to constitutional provisions when deciding a case. As sources, ascribed norms enjoy a prima facie preference over new incompatible interpretations of such provisions. In this sense, Constitutional Reciprocity adds a modestly foundationalist element to the originally coherentist nature of Equilibrium, in which all components enjoy the same status.

Constitutional Reciprocity takes advantage of the intersubjective context of adjudication. While moral enquiry may be individual or intersubjective, adjudication is by definition intersubjective, and predominantly adversarial rather than cooperative. Constitutional Reciprocity uses the adversarial structure of adjudication to simplify the procedure in which legal participants raise competitive claims and judges are expected to select the one that coheres better with provisions and ascribed norms. The intersubjetive feature stresses that coherence between a potential judgment and a set of relevant sources is first and foremost promoted by the interaction of legal participants seeking to reduce the discretion of an individual judge or a majority of the court.

Constitutional Reciprocity takes up the Dworkinian idea of conservative principles – later developed by Alexy as formal principles – to identify the conservative and dynamic dimensions of a coherentist theory of precedent. The conservative dimension urges judges to issue ascribed norms that cohere with pre-existing law. Prior authoritative decisions must be followed rather than revised. In contrast, the dynamic feature identifies tensions between the potential judgment and pre-existing law, and thus may prompt its revision. Constitutional Reciprocity clarifies the

process of the systematisation of ascribed norms to make it useful in the context of constitutional adjudication in the civil law.

Constitutional Reciprocity is also indebted to Amaya's clarification of the several dimensions of coherence in legal reasoning, but tries to expand the analysis of precedent. However, the process of clarifying the role of precedent leads to a more foundationalist approach than the one suggested by Amaya. Provisions do enjoy a certain degree of acceptability on their own, but in addition, the norms that judges ascribe to such provisions enjoy a prima facie preference over incompatible interpretations.

As a framework that embraces coherentist elements, as in Dworkin's and Amaya's theories, Constitutional Reciprocity faces the objection that it is conservative. Given that coherence requires that judgments cohere with pre-existing law, coherentist theories appear to be inherently conservative, and an obstacle to normative change. In fact, by combining the coherentist element of mutual support and the modest foundationalist element of granting legal sources a privileged status, Constitutional Reciprocity faces the objection that it comes close to offering a predominantly conservative doctrine of precedent.

The challenge for the next two chapters is to reduce, if not eliminate, the tension between conservative and dynamic elements of a theory of precedent. The conservative elements suggest that the main rationale for precedent is that judgements are constrained by past decisions. These elements suggest that precedents are followed when there are more similarities than differences between the precedents and the case at hand. On the other hand, the dynamic elements calls for law to adapt over time. The practice of distinguishing allows all judges to deviate from precedents issued by superior courts when the previous court did not consider legally relevant circumstances present in the case at hand. The practice of overruling allows judges, usually from Supreme Courts, to overrule previous decisions because of their incorrectness. It is still to be determined what role distinguishing and overruling should play in a conception of constitutional precedent. The challenge is to allow for a change in the approach to precedent, but one that still constrains judges.

Chapter V The First Dynamic feature of Constitutional Reciprocity: Distinguishing and Confining Ascribed Norms

This chapter analyses two common law techniques available to all judges for making partial revisions on precedents as exceptions to the principle that similar cases be treated alike. Partial revisions reduce the scope of norms rather than eliminating them altogether. First, the technique of distinguishing precedents allows subsequent judges to resolve apparently similar cases differently in light of relevant facts that were not considered by the previous judge. What civil lawyers call the dissociative argument in statutory interpretation serves to ground the distinction of precedents on coherence grounds: the later judge divides a general rule into more specific rules based on pre-existing principles. The second technique is confining. Rather than making a comparison between two cases, confining is a more holistic technique useful for reducing the scope of a given precedent once it is seen as part of a broader set of norms. These techniques may either reveal coherence or tensions between precedents. In the latter case, tensions may pave the way for overruling, and thereby reestablishing coherence in the law.

I. Conservative elements in precedent and the need for Partial Revision

The last chapter introduced the framework of Constitutional Reciprocity as a method for adjudicating constitutional cases with precedents. The chapter gave particular attention to the tension between conflicting lines of precedent, both backed by the formal principle of authority. The primary rationale of the method, in line with coherentist theories, is that judges must explain and justify how a judgment is compatible with a set of relevant sources rather than being a whimsical or unconstrained act of political power.

Given that judges are, at least partially, constrained by past decisions, it is argued that theories that embrace coherentist elements are inherently conservative. In this sense, Joseph Raz has argued that ‘the coherence test requires further injustices to be perpetuated in "hard cases" in the

name of coherence'[1]. Likewise, Raymond Wacks argues that faced with a racist institutional record such as that of apartheid South Africa, judges would be condemned to making coherent but immoral decisions.[2] In this manner, critics argue, coherence is an obstacle to legal evolution and an excuse for repeating incorrect decisions.

This chapter tackles the tension between the conservative practice of following past decisions and the dynamic practice of making partial revisions of precedents. A partial revision is the modification of a precedential rule by introducing exceptions. Left to the next chapter is the question of overruling, that allows for making complete revisions of precedents, i.e., abrogating and issuing a new norm that contradicts the overruled norm, rather than just reducing its scope. In both scenarios, the interpretation and application of precedents involves a dynamic rather than a conservative role.

Perhaps the critics of coherentist approaches neglect the fact that these theories have both conservative and dynamic facets. As discussed in the previous chapter, sometimes the judgment must fit with ascribed norms. However, on other occasions it is the potential judgment in light of the facts that triggers the revision of the ascribed norms.

Nevertheless, the critics are correct in one sense. To guide human behaviour, law must be relatively stable, thus there must be a conservative element in theories of law in general and theories of precedent in particular. Otherwise citizens would always have a well-founded fear that judges will change the law when they apply it. The revision of law via judicial interpretation aims to preserve most of its elements, rather than provide a radical re-arrangement of the legal system.[3] The principle of formal equality imposes this constraint on partial revisions. Once a superior court has interpreted a provision it in a certain way, it is expected that similar cases will be treated alike. The conservative elements rest on the fact that legal participants bear the burden of argumentation in showing that the case at hand encompasses constitutionally relevant facts that warrant a distinct treatment. This burden of argumentation must be met to avoid violating the right to equality before courts of law.

[1] Joseph Raz, 'A New Link in the Chain ' [1103] (1986) 74 *California Law Review* 1103, 1111.
[2] Raymond Wacks, 'Injustice in Robes: Iniquity and Judicial Accountability' (2009) 22(1) *Ratio Juris* 128, 144.
[3] See Aleksander Peczenik, 'A Coherence Theory of Juristic Knowledge' in Aulius Aarnio et al (eds), *On Coherence Theory of Law* (Juristförlaget i Lund, 1998) 11;Wlodek Rabinowicz, 'Peczenik's Passionante Reason' in Aulis Aarnio et al (eds), *On Coherence Theory of Law* (Juristförlaget i Lund, 1998) 17, 17-8.

This chapter clarifies the burden of argumentation that legal participants must meet to justify treating apparently similar cases differently and thus allowing judges to make revisions of precedents. Section II defends an interpretation of the practice of distinguishing. The practice of distinguishing allows for making revisions once legal participants succeed in identifying constitutionally relevant facts present in the case at hand but absent in the precedent. Then Section III suggests confining precedents by a more holistic approach than distinguishing when there is already a set of precedents that have tackled similar cases. Confining serves to identify how facts have been treated on prior occasions; thus the scope of a particular precedent may be reduced once it is seen as part of a broader whole. Later, Section IV analyses how the practice of distinguishing and confining may clarify the scope of constitutional provisions but may also create tensions in precedents backed by competing principles. Finally, Section V concludes that partial revision may leave a set of precedents in a state of incoherence and pave the way for overruling a precedent.

II. Distinguishing: Partial Revision of an Ascribed Norm

The coherentist method of Reflective Equilibrium discussed in the previous chapter includes the possibility of modifying principles or previously held beliefs in light of particular circumstances. In the field of deductive and inductive inference, Nelson Goodman put it in this way: 'a rule is amended if it yields an inference we are unwilling to accept; an inference is rejected if it violates a rule we are unwilling to amend'[4]. Likewise, in the field of moral philosophy, when we find inconsistencies between general principles and our account of a concrete situation, we can, as Rawls noted, 'either modify the account of the initial situation or we can revise our existing judgments'[5]. In this way, Equilibrium is a bidirectional process. On occasion it is deductive: our concrete judgment must fit with previous general rules. But on other occasions, it is an inductive process: it is the rule that is modified to fit with the concrete judgment.

A similar bidirectional process occurs with Constitutional Reciprocity as a method for applying precedents. Interpreting and applying precedents is partly deductive and partly inductive. On occasion, judges apply precedential rules to concrete facts so that the judgment fits the pre-

[4] Nelson Goodman, *Fact, Fiction, and Forecast* (Harvester Press, 3rd ed, 1979) 63 (emphasis removed).
[5] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 20.

existing rules. But on other occasions judges modify the precedential rules in light of the relevant facts of the case so that the pre-existing rules are revised to fit the facts.

However, given the institutional context of adjudication, unlike the use of coherentist methods in epistemology or moral philosophy that modify beliefs, when judges modify a precedential rule in light of the relevant facts of the case they are also changing the law and affecting the legitimate expectations of litigants, rather than just changing their mind. Hence, the principle of formal equality imposes a burden of argumentation on judges for departing from precedent and treating apparent similar cases differently. When judges identify an ascribed norm that prima facie covers the facts of the case at hand but are unwilling to apply such rule, they bear the burden of argumentation in identifying constitutionally relevant facts that distinguish the case from the previous decision. That is, they identify a pre-existing rule but instead of issuing a judgment that fits with the rule, they modify the rule to fit with the facts of the case.[6] This technique is the well-known common law practice of distinguishing precedents that allow all judges – from low, intermediate or superior courts – to introduce distinctions where the previous court did not distinguish, and thus issue norms that work as exceptions to the general rule.[7]

Yet, given that there are no identical cases, if judges could distinguish precedents with the mere identification of a new fact, then the practice of distinguishing would be unconstrained. Thus, considering that previous chapters have already determined that the practice of distinguishing precedents is also present in the civil law tradition,[8] the task for this section is to provide the theoretical grounds that allow a constrained approach to distinguishing using civil law techniques.

II.1. Distinguishing ascribed norms

The practice of distinguishing precedents exemplifies the tension between equality understood as treating members of the same category alike and equality as treating members of different categories differently.[9] The tension starts when (a) some facts of the case fall under the

[6] See Chapter IV.
[7] See e.g., J. G. Starke, 'Techniques in The Distinguishing Of Precedents' (1988) 62(3) *Australian Law Journal* 191;Andrei Marmor, 'Should Like Cases be Treated Alike?' (2005) 11(1) *Legal Theory* 27, 32. Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008) 111-5; John D. Heydon, 'How Far Can Trial Courts and Intermediate Appelate Courts Develop the Law?' (2009) 9(1) *Oxford University Commonwealth Law Journal* 1, 7, 19-20.
[8] See Chapter III.
[9] See Chapter II.

antecedent of an ascribed norm, but a legal participant identifies another fact (s) that suggest that a new rule should be created for the case; or (b) when a participant argues that the case simply does not fall under the scope of the rule. The first is an instantiation of distinguishing in the strict sense: there are certain similarities between the facts of the precedent and the case at hand, yet the differences are more significant than the similarities, and a new exceptional rule must be created to fit the case. The latter is an instantiation of distinguishing in the broad sense: the precedent is simply not subsumable under the factual description of the precedent, and its ratio should not be extended through analogy either. The former implies a change in pre-existing law by modifying the scope of the precedent, whereas the latter may suggest that a precedent X is not applicable, and another precedent Y indeed applies to the case, without changing the law.

Despite being a frequent technique of common law adjudication, distinguishing remains mostly under-theorised by common lawyers. For instance, Raz distinguishes between the 'tame' and the 'strong' view of distinguishing that parallels the difference between distinguishing in a broad and a strict sense.[10]Raz correctly notes that the strong view allows judges to issue exceptions to rules but requires that they justify the new rule by appealing to the justification of the original precedential rule.[11] However, as further discussed below, it is also justifiable to distinguish cases by appealing to higher principles that triumph over the reasons considered by the previous court. More recently, Jeremy Waldron has argued that distinguishing requires honest judges not simply to '"come up" with some difference'[12] but to identify 'some additional problematic feature of the subsequent case that requires additional figuring'[13]. But how then do legal participants identify relevant facts that require further reflection? How is the new rule constrained by coherence with principles and a set of rules in order to avoid ad hoc distinguishing?

This Chapter analyses the technique of distinguishing from a civil law perspective and in light of the coherence of pre-existing law that allows for the revision of precedents, but only a constrained one. Just as the civil law concept of *ratio legis* (purpose or principle of a rule) served in previous chapters to show how the scope of application of an ascribed norm may be expanded beyond its wording through the technique of analogy, similarly it can be used to identify how it can be reduced through distinguishing. Analogy works by extending a norm to an unanticipated

[10] Joseph Raz, *The Authority of Law* (Oxford University Press, 2nd ed, 2009) 185.
[11] Ibid 187, 188.
[12] Jeremy Waldron, 'Stare Decisis and The Rule of Law: A Layered Approach' (2012) 112(1) *Michigan Law Review* 1, 25.
[13] Ibid 26.

case because the facts of the precedent and the case to be decided are similar and linked by a common principle. In contrast, in distinguishing, in the strict sense, the scope of a rule is reduced because of relevant factual differences between the cases.

What civil lawyers call the argument of dissociation, or the restrictive interpretation of legislation, is useful for understanding distinguishing.[14] This interpretative technique works by introducing a distinction via interpretation in the scope of a statutory rule when the facts of the case urge the creation of an exceptional rule in light of its purpose, even if it contradicts the so-called textual reading of the rule. The antecedent of the norm may be too ample and thus cover too many cases that must be regulated differently. The goal of the argument of dissociation is to subdivide what was originally a single rule into two rules.[15] Given that the original authority did not anticipate the facts of the latter case, but these are legally relevant, it is permissible to issue an exception.

The argument of dissociation also gives distinguishing a coherentist meaning consistent with the framework of Constitutional Reciprocity advanced in the previous chapter, while granting precedents the character of rules, i.e., as prima facie fixed points backed by formal principles of authority, equality and legal certainty. The argument of dissociation appeals to the ideal of coherence in the law to separate facts or objects that were erroneously encompassed under a single category.[16] To recall what was argued in previous chapters, ascribed norms are formed by an antecedent – i.e., a set of facts and a legal consequence attached to it and a principle that prevailed. The argument of dissociation works by suggesting than an antecedent of a norm was so broad as to encompass objects that do not safeguard the principle backed by that norm. Thus coherence in the law is re-established once a new rule is issued that properly distinguishes between distinct scenarios.

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[14] See Chaïm Perelman and Lucie Olbrecths-Tyteca, *Tratado de la argumentación* (Julia Sevilla Muñoz trans, Editorial Gredos, 1989) [trans of: *Traité de l'argumentation, la nouvelle rhétorique* (first published 1958)] Chapter IV; Riccardo Guastini, *Estudios sobre la interpretación jurídica* (Marina Gascón and Miguel Carbonell trans, UNAM, 1999)39-43. Guastini seems to suggest that restrictive interpretation of legislation in the civil law is the functionally equivalent of distinguishing precedents in the common law. See Riccardo Guastini, 'Defeasibility, Axiological Gaps, and Interpretation' in Jordi Ferrer Beltrán and Giovanni Battista Ratti (eds), *The Logic of Legal Requirements: Essays on Defeasibility* (Oxford University Press, 2012) 182, 188. However, against Guastini, it can be argued that restrictive interpretation narrows a rule in light of the facts *and* the ratio legis or purpose of the rule. The ratio legis, understood as the rational or objective purpose that rules must safeguard is not a concept usually used in the common law. See e.g., Jeffrey Goldsworthy, 'Clarifying, Creating, and Changing Meaning in Constitutional Interpretation: A Comment on Andras Jakab, Constitutional Reasoning in Constitutional Courts - A European Perspective ' (2013) 14(8) *German Law Journal* 1279, 1279 n1.

[15] Perelman and Olbrecths-Tyteca, above n 14, 627-8.

[16] Ibid 632.

H. L. A. Hart's example of no vehicles in the park is useful for illustrating how dissociating rules may create exceptions via judicial interpretation in light of principles.[17] Suppose there is a rule that prohibits vehicles from entering the park. It is clear that it forbids the entrance of cars, but then the question arises whether it prohibits the entrance of *all* vehicles, including bicycles. One possible solution is to appeal to the underlying purpose or principle of the rule to see if the entrance of bicycles undermines or confirms its purpose.[18] Once it is suggested that one plausible purpose is tranquillity and a safe environment in the park, it is reasonable to assume that issuing a new rule that permits the entrance of bicycles would not undermine the purpose. For future scenarios there would then be two rules – one that prohibits the entrance of cars and another that permits the entrance of bicycles – both linked to the principle of tranquillity and a safe environment in the park.

The argument of dissociation re-establishes coherence by issuing a more specific norm that safeguards the original principle. Once the exception is introduced via judicial interpretation, this exception acquires the character of a rule and is applicable to all similar cases.

> The original rule may have been N^{1}: The entrance of vehicles in the park is prohibited.
>
> The later rule divides this rule into two: N^{1}, and N^{2}: It is permitted that bicycles enter the park. N2 appears to be compatible with the principle of safety and tranquillity in the park, even if it adds an exception to the previous rule.

The example also illustrates the differences between what might be called *positive* and *negative* distinguishing. In scenarios of positive distinguishing, the later judge adds an exception that is compatible with the original principle. By contrast, in scenarios of negative distinguishing, the later judge adds an exception that is incompatible with the original principle but is grounded on a principle that is superior in the hierarchy of principles of the given legal community. The example of the rule allowing bicycles to enter the park is an example of positive distinguishing. While the new norm is an exception to the general rule, it nevertheless safeguards the original principle. In positive distinguishing, the burden of argumentation lies first in identifying a

[17] H L A Hart, 'Positivism and the Separation of Law and Morals ' (1958) 71(4) *Harvard Law Review* 593, 607.
[18] Lon L. Fuller, 'Positivism and Fidelty to Law: A Reply to Professor Hart' (1958) 71(4) *Harvard Law Review* 630, 662.

relevant fact that was not explicitly considered by the previous authority, and then in linking such fact to the original principle.

Positive distinguishing creates a second precedential rule that clarifies the scope of the earlier precedent and is compatible with its underlying principle. Maybe the two rules are not strictly deducible from the same principle, but they are axiologically consistent. Both rules can be complied with at the same time without endangering one of the principles. In positive distinguishing, the introduction of the exception presupposes an exercise of balancing principles that seeks to demonstrate that the new rule does not endanger the original principle.

For instance, the permissibility of bicycles may actually be grounded on another principle, .e.g., the right to play sports in the park but is still compatible with the principle of tranquillity and a safe environment in the park. That is, rather than there being a tension between the two rules, there is mutual compatibility, as each can be realised without sacrificing the other. Moreover, it could be argued that without the introduction of this distinction, the original rule was incoherent regarding its purpose. It regulated a factual scenario in a very broad way. The general prohibition of vehicles in the park, including bicycles, may have been unnecessary for safeguarding the original principle.

Thus the introduction of the exception rule that permits the entrance of bicycles modifies the law, but the modification is compatible with the pre-existing principle.[19] In this way the original precedent and the latter form a set of compatible sources, and in the medium term judges may develop a broader body of doctrine confirmed by several precedents compatible with a set of principles.

An example from Colombian law elucidates how positive distinguishing works in constitutional practice. The Colombian Constitutional Court has ruled that the right to health recognised by the Constitution may be a justiciable constitutional right enforceable by courts when the state or private entities fail to provide health services to its citizens and there is no other adequate mechanism to enforce it.[20] Nevertheless, the Court has also argued that the wealth of citizens is a

[19] In this sense, distinguishing is parallel to the phenomenon of over and under-inclusiveness of rules noted by Frederick Schauer. The antecedent of a rule may encompass to many or too few elements in relation to its underlying justification. See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford University Press, 1991) 26-32.

[20] *Constitución Política de Colombia de 4 de julio de 1991* [Colombian Constitution of 4 July 1991] (Colombia), Arts. 1, 48 and 49. On the right to health as justiciable right see e.g.,. T-837-2006, Humberto Antonio Sierra Porto,

decisive factor in granting such constitutional protection.[21] When paying for such services does not disproportionally affect the economic situation of the plaintiff, there may be exceptions to the constitutional protection. The general rule may be that the Constitution commands the state or other entities that perform public health services to provide such services, but the wealth of the plaintiffs is a relevant fact that allows dissociating scenarios that were originally regulated by a single rule.

In this scenario of distinguishing, the framework of Constitutional Reciprocity can be set out according to the five steps discussed in the previous chapter. In this context, assuming there are not too many precedents involved, the method works as a coherentist constraint but in a relatively less holistic fashion.

First, one legal participant may favour a description of the facts of the case that suggest that the right to health is justiciable in all circumstances. In contrast, the other participant may stress the wealth of the other party to suggest that the right to health is only justiciable when the plaintiff is an impoverished citizen. Secondly, both participants systematise relevant sources according to their description of the facts. The main sources are the constitutional principle that recognises the right to health and the landmark precedents that held that it is a judicially enforceable right. Another relevant source is the constitutional principle that promotes equality in a material sense in favour of disadvantaged groups.[22] Thirdly, based on the relevant sources, both participants propose a candidate for an ascribed norm that controls the case. One lawyer may suggest that the precedent that recognised the justiciability of the right to health should simply be applied. In contrast, the other lawyer may suggest that the court should distinguish the case because the plaintiff is not a disadvantaged individual. Fourthly, participants may expand their set of reasons in light of each other's arguments. For instance, one participant may argue that distinguishing cases also favours the economic efficiency of the health system. Fifthly, the court must select the most coherent set of reasons. Even in the absence of many ascribed norms relating to the question, the selection of the norms may be constrained by differences between the cases. The difference, i.e., the lack of analogy between cases, is constitutionally relevant in light of the

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12 October 2006, recital III, section 6; T-094-2016, Alejandro Linares Cantillo, 25 February 2016. For a general analysis see Alicia Ely Yamin, Oscar Parra-Vera and Camila Gianella, 'Colombia: La Protección Judicial del Derecho a la Salud. ¿Una Promesa Difícil de Cumplir?' in Alicia Ely Yamin and Siri Gloppen (eds), *La Lucha Por los Derechos de la Salud: ¿Puede la Justicia ser una Herramienta de Cambio?* (Siglo Veintiuno, 2013) 127.

[21] T-760-2008, Manuel José Cepeda Espinosa, 31 July 2008, section 4.4.5.3.

[22] Colombian Constitution, above n 20, Art. 13 [1].

principle of material equality, which allows distinguishing between wealthy and disadvantaged citizens in favour of the latter.

The distinction would result in a new norm N^b: Constitutional judges are empowered to enforce the right to health when the state or a private entity fails to provide health services to its citizens, and there is no other adequate mechanism to enforce it, and furthermore, the plaintiff lacks the economic means to afford the service.

The positive distinction narrows the scope of the protection of the right to health, but it confirms the original principle. It justifies treating members of society differently because the right to health as a social right aims to diminish economic or material inequality. The requirement to protect disadvantaged members of society is compatible with the lack of protection accorded to wealthy citizens. Both decisions are compatible with a single principle and can be enforced at the same time without introducing tension.

In contrast to positive distinguishing, in negative distinguishing the new norm is indeed in tension with the original principle because the new norm is based on a higher principle. In negative distinguishing, the introduction of the exception presupposes an exercise of balancing principles that seeks to demonstrate that even if the new rule endangers the original principle, it is grounded on a higher principle. Returning to the example of no vehicles in the park, it is clear that an ambulance is an example of a vehicle. Moreover, its entrance clearly affects the tranquillity of the park. Nevertheless, its entrance may be intended to protect a principle highly cherished by the community: the health and life of its inhabitants. The scope of the new rule may be very limited – only in cases of emergency may a vehicle may enter the park – but the new norm is based on another principle. In negative distinguishing, the burden of argumentation lies firstly in identifying a fact not expressly considered by the previous authority, and secondly, in linking such fact with a higher principle. The hierarchy of principles may be at the level of a constitutional norm with the structure of a rule inferred from the constitutional text, or developed progressively by a set of precedents through time. In this scenario, the new norm may be represented as follows:

> N^3: The entrance of ambulances into the park is permitted because the principles of health and protection of life that supports this norm prevail over the principle of tranquillity in the park.

The practical relevance of negative distinguishing is that it may reveal prima facie hierarchies of principles when there is agreement or tension among them in the case of a dispute in the legal community about such hierarchies. In the example of permitting ambulance into the park, it is clear that the right to life or health prevails over the principle of tranquillity and a safe environment in the park. It is not unreasonable to suggest that there is a general consensus in legal communities that the protection of life trumps keeping parks safe and quiet.

However, in real constitutional adjudication, the hierarchy of principles may not be so straightforward. The practice of distinguishing may reveal disagreements within the legal community about the proper ranking of constitutional principles. For instance, there may be disagreement on the prevalence of freedom of speech over the honour of citizens when the first is used to indulge in hate speech against sexual or racial minorities. Is hate speech subsumable under the principle of freedom of expression and thus protected regardless of its content? Or such facts should rather be framed as an unworthy act of communication that reinforces prejudices against minorities, so that the right to honour and non-discrimination prevail over freedom of expression? In this scenario, dissociating a rule to link it with another principle reveals tensions in the legal community as recorded by precedents.

The next case, from the First Chamber of the Mexican Supreme Court, illustrates the implication of negative distinction.[23] Returning to an earlier example discussed in Chapter II, in A.D. 28-2010,[24] the First Chamber of the Mexican Supreme Court balanced a journal's right to honour and prestige against the right to freedom of expression of another journal, and held that the latter prevailed. To recap briefly. the facts of the cases were as follows (F^1) that journal X signed an agreement with a Spanish journal sympathetic to the Basque country separatist movement, and that (F^2) a journal Y published a report referring to journal X as an 'accomplice of terrorism', and that (F^3) both journals engaged in an exchange of reports, and further that (F^4) journal X sued journal Y for moral damages and the violation of its prestige, and finally that (F^5) there was a lack of evidence of actual malice in the report describing X as a terrorist. The Chamber then held that freedom of expression prevailed over the right to honour and ruled against the accusation of moral damages. Freedom of expression prevailed over honour in the case of an exchange of reports between journalists.

[23] See Chapter II.
[24] A.D. 28-2010, Arturo Zaldívar Lelo De Larrea, 23 November 2011.

However, in a later case a 3-2 majority of the Chamber reduced the scope of the right to freedom of expression in light of the right of sexual minorities to be free of discrimination. In A.D.R-2806-2012,[25] the same Chamber resolved a dispute between two journalists regarding the question whether homophobic language is protected by the constitutional right to freedom of expression. In light of the facts, (F^1) journalist X published a report criticising members of another journal, whereupon (F^2) journalist Y published a report replying to X and calling him and other columnists 'faggots' and 'pussies', with the consequence that (F^3) X sued Y for moral damages affecting his right to honour. The Chamber held that homophobic expressions are not protected by freedom of expression because they reproduce stereotypes characterising homosexuals as inferior. In this scenario, the right to honour prevailed over freedom of expression. It is a negative distinction because there were different facts, and non-discrimination is a higher principle than freedom of expression.

Although the Chamber argued that the latter judgment cohered with the precedent,[26] it appears that this creates a tension between principles. The first judgment seems to uphold freedom of expression in a liberal sense. It promotes the exchange of ideas as long as they are not patently false. The symmetry between speakers is assumed and any expressive act can be replied to. In contrast, the second judgment recognises an asymmetry between speakers. Some words imply the inferiority of sexual minorities even if the speaker does not intend them in this way, but only wishes to challenge their professional credentials. In the second case the purpose is to defend democratic ideals, thus taking a more substantive approach to freedom of speech.

In fact, one member of the minority noted the tension between freedom of expression and non-discrimination. Justice Cossío dissented and observed that in this case the homophobic expressions did not affect the homosexual community, but were aimed at condemning professional incompetence.[27]He also suggested that hate speech must be combated with responses from the national community, rather than by state-sponsored suppression or restriction of controversial speech.[28]

The dissenting opinion may suggest that there may be disagreement within the legal community about the hierarchy of principles, or about their precise understanding. In case of a collision,

[25] A.D.R. 2806-2012, Arturo Zaldívar Lelo De Larrea, 6 March 2013.
[26] Ibid recital VII, section 4, subsection b).
[27] Ibid (José Ramón Cossío Díaz, dissenting), [28].
[28] Ibid [32-36].

some members of the community may place freedom of expression above non-discrimination, or vice versa. The first group may prefer a content-neutral approach to freedom of expression while the second may prefer a more militant approach that places limits on speech when it threatens substantive democratic values.[29] At some point in time a conflict between principles may be unavoidable, but perhaps, as courts progressively decide more cases, they will develop a fairly consistent set of precedents.

Perhaps the tension caused by negative distinguishing is more apparent rather than real. It may be argued that the latter precedent establishes an exception to the general preference for freedom of expression over other rights. The exception may occur when the speech is aimed at denigrating sexual minorities, rather than being informative or making a political statement of public relevance.

One way to solve the tensions between precedents is to take a more holistic approach. Instead of analysing the case at hand with a single precedent, greater sets of precedents may clarify the scope of a particular precedent. Section III analyses the holistic technique of confining precedents. In any case, when there are few precedents or there are inconsistent lines of precedents, the tension between them may at least reduced, if not eliminated.

II.2. Is Distinguishing an Unconstrained Technique? The Constraint of Coherence with the Law

One of the objections against the practice of distinguishing is that it reduces the constraining effect of precedents. Considering that there are no two identical cases, judges may stress the presence of a fact in the case at hand that is absent in the precedent to exaggerate or invent a difference between cases in a manner convenient for avoiding the scope of the precedent.[30] Thus, critics argue, distinguishing is akin to overruling in disguise, which in extreme cases may allow inferior judges to disregard vertical precedent.

This is the objection that Larry Alexander has raised against distinguishing. Although his analysis is primarily concerned with the common law in general, Alexander's critique can be applicable to the use of the common law method in constitutional interpretation. In the common law, once the

[29] For a comparative analysis on both approaches to freedom of expression see Mayo Moran, 'Talking About Hate Speech: a Rhetorical Analysis of American and Canadian Approaches to The Regulation of Hate Speech' (1994) 1994(6) *Wisconsin Law Review* 1425,especially at 1486-8.
[30] See Julius Stone, *Precedent and Law: Dynamics of Common law Growth* (Butterworths, 1985) 129-37.

judges issued a rule, later judges simply need to apply it. Likewise, in statutory or constitutional law, once they have ascribed a norm to a given provision, that norm governs all similar cases. According to Alexander, only a model of strict rules can constrain judges.[31] Under this model, when judges solve cases they also issue rules independent of the reasoning, and future judges must either follow or overrule them; they cannot distinguish them.[32] Given that judges can always find relevant facts to distinguish cases, this practice would be a kind of overruling. Thus precedents would work as strict rules. Later judges must simply apply pre-existing rules they cannot modify their scope.

Alexander opposes his model of precedents as strict rules to the *result* model advanced by scholars such as Raz.[33] Raz starts by acknowledging that only supreme courts can overrule mistaken precedents, while all courts can distinguish them by introducing exceptions.[34] According to Raz, distinguishing works by adding a condition that narrows the scope of the original rule, but is nevertheless justified in light of its reasoning.[35] Therefore, while the second court is constrained by the ruling of the first, the second can add relevant conditions in light of the circumstances of the case at hand.

Alexander claims that the result model of precedent that allows distinguishing precedents does not constrain future judges. For instance, using a common law example, Alexander claims that if in P^1 a judge ruled that having a pet bear in a residential neighbourhood is a nuisance, then in P^2 a judge who faces the similar case of a pet crocodile in a residential neighbourhood can circumvent the rule by re-formulating it as '[f]urry wild animals in residential neighbourhoods are nuisances'[36]. Then, Alexander claims, the constraint of a past decision vanishes, as it is always possible to find a difference in the subsequent case and yet justify the original precedential rule.

It must be conceded to Alexander that precedential rules are not absolute but prima facie rules. Precedential rules are decisions from judicial authorities backed by formal principles that can be

[31] Larry Alexander, 'Constrained by Precedent' [1] (1989) 63 *Southern California Law Review* 1.
[32] Larry Alexander, 'Precedential Constraint, Its Scope and Strength: a Brief Survey of the Possibilities and their Merits' in Carlos Bernal Pulido and Thomas Bustamante (eds), *On the Philosophy of Precedent* (Franz Steiner Verlag, Nomos, 2012) 75, 77.
[33] Alexander, above n 31, 29. Alexander also identifies Schauer as a follower of the result model because even if he is a rule theorist, he accepts that precedential rules can be distinguished or narrowed, at 46. See Frederick Schauer, 'Precedent' (1987) 39(3) *Standford Law Review* 571, 579-582.
[34] Raz, *The Authority of Law*, above n 10, 186.
[35] Ibid 186-8.
[36] Alexander, above n 32, 77.

revised by later judges provided they meet the burden of argumentation imposed by formal principles. For the purposes of this chapter, the most relevant principle is that of formal equality. Once a court has issued a precedent, it is presumed that later cases will be treated alike. The burden consists in identifying a factual difference between the two cases, where this fact is relevant in light of a legal principle. In contrast, a clear constitutional rule found in the text would pre-empt future interpreters from limiting its scope of application in light of the facts of a case.[37] The constraint of precedential rules works by placing a general, although defeasible, burden of argumentation on later interpreters. When later judges or lawyers fail to identify a relevant fact that must not be subsumed under the original rule, then the precedent indeed constrains them. The constraint of constitutional rules is absolute while that of precedential rules is general or prima facie.

Alexander may insist that this is precisely the illusion of constraint that distinguishing creates in judges. Either precedential rules work as absolute constraints or they do not function as rules at all. However, in reply, it can be argued that the constraint becomes tangible rather than illusory when it is taken into account that precedential rules are composed not only by an antecedent and a consequent, but also a principle or underlying reason that justifies the rule. Then, in Alexander's example, there is at least one underlying principle: protect the residential neighbourhood from dangerous animals.

Thus the technique of distinguishing can be constrained by the facts of the previous case in light of this principle. As a matter of coherence between sources, the notions of similarity and difference work as a constraint on later rules linked by a common principle. If a pet bear is considered a nuisance, then for the same reason, or even more so, a crocodile must be. The lack of fur in the latter is not a relevant difference for the purpose of protecting the neighbourhood. In other words, in light of the principle it is unjustified to dissociate pet bears and create a new category for crocodiles. The precedent constrains unless and until the interpreter can come up with a higher principle that prevails over the protection of the neighbourhood and can encompass the crocodile. In this way, distinguishing can be justified reasonably by appealing to principles that make certain facts relevant.

[37] See Chapter IV.

In fact, Raz seems to be suggesting that positive distinguishing is the only way in which low or intermediate court judges can modify precedents. Raz notes that the modified rule 'can usually be justified only by reasoning very similar to that justifying the original rule.'[38] and 'so long as they preserve its fundamental rationale'[39]. That is, just as lawyers can infer a *ratio legis* or purpose that justifies statutory rules,[40] likewise, precedential rules can be linked to a principle. Then the modified rule may be an exception to the general rule, but it nevertheless needs to support the original principle. The scope of the precedential rule may be reduced in light of the differences of circumstance *and* relevant facts in light of the principle.

As previously discussed, in addition to positive distinguishing, there can also be negative distinguishing grounded on a higher principle. In this instance, the later case may be in tension with the original precedent, but the new rule is based on a higher principle not considered by the previous court. The hierarchical status of the later principle may be inferred from a clear rule found in the constitutional text. For instance, the protection of life may be cherished as one of the most fundamental principles of a given legal community. Alternatively, as will be discussed in the next section, the scope of a precedent may be reduced in light of a set of other precedents. In such scenarios, subsequent judges may reduce the scope of a precedent even if the new rule is in tension with it, but they bear the burden of argumentation of identifying the higher principles that prevail over the one that supported the original precedent.

Another reason to question a strict model of rules as proposed by Alexander is that it neglects the fact that distinguishing is a well-rooted judicial practice. It is common practice among lawyers to prompt low or intermediate courts to distinguish precedents from superior courts, yet the principle of formal equality places the burden of argumentation upon them. The institutional context makes it necessary to differentiate between distinguishing a precedent and overruling it. Distinguishing implies a choice between treating all members as part of the same category and creating a new subcategory for the members of the case at hand. In contrast, overruling implies the tension between affirming a category and eliminating it altogether.

[38] Raz, *The Authority of Law*, above n 34, 187.
[39] Ibid 188.
[40] For a pragmatic and intersubjective approach to infer the *ratio legis* of statutory provisions see Damiano Canale and Giovanni Tuzet, 'What is the Reason for this Rule? An Inferential Account of the Ratio Legis' (2010) 24 *Argumentation* 197.

Adam Rigoni has noted that analogical theories of precedent justify the existing practice of distinguishing in the common law tradition while rule theories such as Alexander's do not.[41] According to these theories, following a precedent is not a question of the subsumption of the facts of the case under the precedential rule, but a matter of comparing similarities and differences between cases.[42] Rigoni claims that analogical theories do not consider any fact as legally relevant, as Alexander seems to suggest, but only those that are linked to 'reasons' in favour or against the parties' claims in both cases.[43] Reasons serve as a filter to determine the legal relevance of facts, and to justify distinguishing. If subsequent interpreters fail to identify legally relevant reasons distinguishing the cases, then the precedent applies, even if precedents are not considered as strict rules.

While less common, the practice of distinguishing is also present in the civil law.[44] In fact, a civil law approach to the *ratio legis* of legislative rules can help to illustrate how precedents can have a graded rather than an absolute character without losing their character as rules. Sometimes it is argued that the difference between legislative and precedential rules is that the latter lack a canonical formulation and thus are less binding than the former.[45] However, although less frequent in the common than in the civil law,[46] the scope of statutory rules can be expanded beyond the wording to cover unanticipated cases through analogy legis. Likewise, their scope can be reduced through dissociative argument or restrictive interpretation. Thus the interpretation of rules, both legislative and judicial, is guided and constrained first by the principle that underlies them, and also by their interaction with other sources.

Alexander could still argue that even if the practice of distinguishing exists, it should be abandoned to constrain judges. Under this view, even if it is descriptively accurate that judges distinguish cases, this does not mean that they should do so. Doing so makes the principle of authority the fundamental rationale for a having a doctrine of precedent. Rather than adapting the

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[41] Adam Rigoni, 'Common-Law Judicial Reasoning and Analogy' (2014) 20(2) *Legal Theory* 13. But see Frederick Schauer, 'Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) About Analogy' in Christian Dahlman and Eevelin Feteris (eds), *Legal Argumentation Theory: Cross-Disciplinary Perspectives* (Springer, 2013) 45 (Arguing that analogical theories cannot explain the constraining effect of precedent.)

[42] Rigoni, above n 41, 139-40.

[43] Ibid 151-5.

[44] See chapters II and III. See also Diego López Medina, *El derecho de los jueces* (Legis, 2nd ed, 2006) 205-15; Carlos Bernal Pulido, *El Derecho de los Derechos* (Universidad Externado de Colombia, 2005) 181-3.

[45] Grant Lamond, 'Do Precedents Create Rules?' [1] (2005) 11(1) *Legal Theory* 1, 2-3, 23. Although Lamond notes that he is interested in pure common law methodology, rather than its application to statutory interpretation.

[46] See e.g., Shael Herman, 'The "Equity of the Statute" and Ratio Scripta: Legistave Interpretation Among Legislative Agnostics and True Believers' (1994) 69 *Tulane Law Review* 535, 538-40; Aleksander Peczenik, 'Jumps and Logic In The Law' (1996) 4(3) *Artificial Intelligence and Law* 297, 311.

theory to practice, it is arguably the practice that should be abandoned to fit with Alexander's strict rule approach.

Against Alexander, it can be argued that while the principle of authority captures one of the central elements of a doctrine of precedent, *equality* before courts of law is also fundamental.[47] From the perspective of citizens and litigants, it is more important to enforce the right to equality before different courts of law, than enforce the constraining effect that past decisions exert on a current judges in the case at hand, grounded on the hierarchical structure of the judiciary. An approach to precedent that is justified merely on authority does not give proper attention to the fact that a broad rule can cover facts that should not be encompassed because it will lead to absurd or unjust results in light of the principles of the legal system. Of course, the injustice or absurdity may be subjective and controversial, but participants bear the burden of argumentation in identifying the fact that is legally relevant in light of a legal principle. Distinguishing allows the possibility of correcting or improving on the inadequacy of all-encompassing categories – i.e., antecedents of norms – in order to safeguard the right to equality by treating different members of society alike.

A theory of precedent that allows distinguishing grounds its practice first on the right to equality. It treats rules as prima facie rules by imposing burdens of argumentation on later interpreters who seek to depart from precedent. In this way, distinguishing makes it possible to avoid treating members of different categories alike by urging judges to give transparent justifications. It also urges judges treat the new rule also as a prima facie one into which the members of the new category fit.

The distinction is also grounded on the appeal to coherence between a rule or a set of rules and their underlying principle. When judges introduce exceptions that are compatible with the principle that backed the original judgment, they enhance coherence in the law. When judges introduce exceptions based on higher principles they can also enhance coherence when there is agreement on the hierarchy. However, when the exception is grounded on another principle whose prevalence is controversial, the distinction may reveal a tension within the legal community.

[47] See Lon L. Fuller, *The Morality Of Law* (Yale University Press, 1969) 113. (Arguing that the principle of authority as verticality is important but is not the fundamental element of law). See also, Lon L. Fuller, 'Reason And Fiat In Case Law' (1946) 59 *Harvard Law Review* 376.

The tension that may be caused by distinguishing precedents on higher principles reminds us that coherence in the interpretation of the law is in itself a rationale for having a doctrine of precedent.[48] A consideration of previously ascribed norms serves to minimise incoherence in judicial doctrine. However, tensions may be unavoidable given disagreements in the legal community. In fact, seeing precedents as part of a broader whole that is as coherent as possible is one component that helps to reduce the abuse of judicial discretion that Alexander fears. Once a fact is considered relevant enough to be subsumed under a certain rule or principle, it is expected that later judges will follow such a decision. The more precedents – as prima facie rules – that support a particular decision, the more difficult is to support its negation. The next section suggests a more holistic approach to the interpretation and application of precedents, to reduce judicial discretion.

III. Confining Ascribed Norms

This section suggests *confining* as a more holistic approach for reducing the scope of a given ascribed norm, than the two-case approach of distinguishing.[49] Instead of comparing the case at hand with a single precedent, a precedent is analysed as a member of a greater set of ascribed norms. The set of precedents is linked by the similarity of facts and common principles aimed at forming a rational whole. Given that this set is not given or predetermined, the set is 'rational' from the perspective of the interpreter. The legal participant who reconstructs and systematises precedents does so to support a particular claim. However, it is necessary to defend a particular claim or judgment before fellow legal participants in the intersubjective context of adjudication. In this way, each prima facie rule backed by one principle adds weight to the normative status of another compatible rule and makes a claim or a potential judgment better justified than its alternatives.

As anticipated in section II, Constitutional Reciprocity may be more, or less, holistic. When there is only one precedent on a relevant, legal question subsequent judges still enjoy a high degree of

[48] See Introduction and Chapter I.

[49] The technique of 'confining' precedents is taken from the analysis of common law practice made by Jeffrey Marshall but a holistic feature is added. Marshall also stressed the holistic aspect when referring to 'napping' precedents, i.e., a set of precedents is stronger than a couple just like a poker is stronger than a pair of aces. See Jeffrey Marshall, 'Trentatre cose che si possono fare con i precedenti: Un dizionario di common law' (1996) 6 *Ragion Pratica* 29, 30, 32. See also Chapter III and the discussion on backward and forward-looking relevance.

interpretative discretion, as a single ascribed norm is insufficient to control a variety of facts, thereby leaving the possibility of creativity for adjudicating unanticipated facts and revising the law. This possibility of judicial law-making occurs when judges distinguish a single case in light of a precedent. However, the more ascribed norms there are supporting a particular claim, the less judicial discretion there is. Thus, without the need for abrogating an ascribed norm, judges can reduce its scope through the technique of confining, indicating that the confined norm enjoys a narrow and highly specific factual scope of application. Hence, distinguishing may be a coherentist, but not that holistic, an application of Constitutional Reciprocity that allows judges to modify ascribed norms in light of concrete facts. In contrast, confining is a coherentist and holistic technique that serves to systematise or reconstruct a set of precedents to narrow the scope of another norm.

Before going deeper into how confining can operate within the framework of Constitutional Reciprocity, it is important to stress the relevance of a more holistic approach over other less comprehensive techniques for interpreting precedents. Firstly, in justification in general, a certain degree of holism is the traditional ally of coherentism and its ideal of mutual support.[50] The more arguments that support a claim, the more coherent it is. Similarly, seeing precedential rules as part of an interconnected set of sources rather than an isolated decision seems more compatible with the coherentist approach of Constitutional Reciprocity. A particular interpretation of the law is more coherent when it finds greater support through more precedents than its alternatives. In contrast, comparing the case at hand with a single precedent may have the negative consequence of ignoring other precedents that support an alternative claim. Thus, legal participants can appeal to more precedents to question or support a potential judgment.

Secondly, given the overproduction of constitutional precedents in the civil law, taking a holistic approach is almost a practical necessity.[51] Considering that constitutional courts decide thousands of cases each year, it is likely that they have already decided similar cases and have linked a fact to a particular principle. For example, in less than a century the Mexican Supreme Court has issued more than one hundred and sixty-eight thousand precedents, of which thousand are formally binding.[52] The more cases that are adjudicated, the more precedents there are, and the

[50]See Robert Alexy, 'Coherence and Argumentation or the Genuine Twin Criterialess Super Criterion' in Aulis Aarnio et al (eds), *On Coherence Theory of Law* (Juristförlaget i Lund 1998) 39, 39.
[51] See Introduction.
[52] Camilo Emiliano Saavedra Herrera, 'El precedente en la Suprema Corte de Justicia de la Nación: una aproximación empírica' in Carlos Bernal Pulido (ed), *El precedente en la Suprema Corte de Justicia de la Nación*

more likely it is that participants invoke not one but a whole set of precedents. On the one hand, overproduction of precedents is a challenge to be managed without the assistance of clerks and databases. However, on the other hand, overproduction provides a useful record that monitors how distinct interpreters read similar provisions on different occasions, organised around landmark cases and their subsequent interpretations. Thus, instead of comparing a single case and issuing a new precedential rule in light of different facts, it may be preferable to see how that fact has been treated in a set of precedents.

Thirdly, a more holistic approach to precedents compensates the lack of factual information in abstract constitutional review cases. While concrete constitutional review cases of *Tutela* and *Ampar*o are rich in factual details useful for forming the antecedent of a precedential norm, abstract constitutional review cases are devoid of facts in a conventional sense.[53] In abstract cases, such as Colombian or Mexican *Acciones de Inconstitucionalidad,* there are no particular facts. The Court only contrasts constitutional provisions with infra-constitutional sources, and invalidates, upholds or attaches the interpretation to the latter in light of the constitution. Thus the factual information that is useful for distinguishing cases is absent in this kind of complaint.

Although a more holistic approach is preferable to the two-case comparison of distinguishing, it must be acknowledged that it is necessary when there are few precedents in a given area of constitutional law. There can be few precedents when a jurisdiction enacts a new constitution, or when an amendment introduces new elements. Yet in the mid term, it is possible that a set of precedents clarifies the scope of a given provision as the set of precedent grows.[54]

III.1. Confining Precedents: Limiting the Scope of an Ascribed Norm in Light of Others

(Suprema Corte de Justicia de la Nación, Forthcoming), 3. To recall, Mexican legislative doctrine of *Jurisprudencia* makes a strict division of precedents that are binding and those that are merely persuasive. See Chapter I.

[53] There is a parallelism between abstract constitutional review in the civil law and 'facial' judicial review in the common law, i.e., when parties challenge the unconstitutionality of a statute on its face rather than its judicial interpretation. On facial challenges see Richard H. Fallon, 'As-Applied and Facial Challenges and Third-Party Standing' (2000) 113(6) *Harvard Law Review* 1321, 1336,1339-41;Alec Stone Sweet 'Why Europe Rejected American Judicial Review: And Why It May Not Matter' (2003) 101(8) *Michigan Law Review* 2744, 2774-6.

[54] However, it is also possible that distinguishing may develop tensions in precedents thereby paving the way for overruling. See Chapter VI.

With the technique of confining, a legal participant links a particular fact with a set of judicially ascribed norms to identify a pattern that narrows the scope of a precedent where the purpose is to avoid its application. Confining is linked to backward looking relevance discussed in chapter III. That is, once a court has interpreted a fact to be subsumable under a given rule or principle, it is presumed that later judgments will ascribe norms compatible with such treatment. Legal participants can link a set of precedents in which one fact was linked to a principle, to reduce the scope of a given precedent that supported the competing principle.

An example from Mexican Constitutional law illustrates both the inadequacy of distinguishing in cases of abstract review and the usefulness of confining. In the abstract review complaint of A.I. 03-2010,[55] the Plenum of the Supreme Court upheld the constitutionality of a state law that authorised the removal from city councils of civil servants because of permanent physical or mental incapacities. The majority differentiated between 'incapacities' that are absolute impediments for carrying out a public service and 'disabilities' which are relative impediments, thus potentially compatible with public service.[56] In this case, the principle that prevailed was efficiency in city councils. The ascribed norm in A.I. 03/2010 may be formulated as follows:

> N^1: It is *permitted* for authorities to dismiss public servants when their physical incapacities are incompatible with public functions.

However, in the concrete review case A.I.R. 410-2012,[57] the First Chamber distinguished this precedent. The Chamber upheld the constitutionality of a law that *prohibited* insurance companies from discriminating in light of physical disabilities. The Chamber ruled against the insurance company, which challenged the statute for violating its freedom of commerce. The Chamber argued that it is the duty of public and private actors to change practices and premises to make them accessible for people with disabilities, to eradicate discrimination on the basis of physical disabilities.[58] According to the Chamber, the main reason for distinguishing precedents was that the Plenum only discussed the conceptual difference between incapacities and

[55] A.I. 3-2010, José Fernando Franco González Salas, 19 January 2012.
[56] Ibid 48-9.
[57] A.I.R 410-2012, Arturo Zaldívar Lelo de Larrea, 21 November 2012.
[58] Ibid 12-13, 18-9, 24-5, 45-8.

disabilities, without exhausting the issue.[59] The ascribed norm in A.I.R. 410-2012 may be formulated as follows:

> N^2: It is *prohibited* to private actors to discriminate among persons on the basis of physical disabilities.

Certainly, the second precedent is preferable in terms of morality, but it is unsound as a precedential argument, as it develops a tension between precedents without providing a justification. In the abstract review precedent ruled by the Plenum, state actors can lawfully distinguish citizens on the basis of physical incapacities. In contrast, in the subsequent case resolved by the First Chamber, private actors are obliged to transform their premises and practices for the sake of the inclusion of persons with disabilities. If it is prohibited for private actors to discriminate, with all the more reason is it prohibited for state actors.

The case also suggests that the technique of distinguishing in abstract review cases is inadequate because of the lack of factual information. The facts can be characterised as follows: F^1, a statute allows discrimination on the basis of physical and mental incapacities, and F^2, physical incapacities can be an obstacle to the proper functioning of a public institution, and finally, F^3: physical disabilities may be compatible with public service. Thus it is permitted for state actors to distinguish because of physical incapacities.

Nevertheless, these facts do not suffice to answer an array of questions. Is the difference between incapacities and disabilities a gradual one? If so, how can courts distinguish among the ample diversity of citizens? Is a person who has amyotrophic lateral sclerosis – the disease that Stephen Hawking suffers from – able to fulfil the functions of a civil servant? Can private actors discriminate on the same basis? The facts in the abstract review are so general that its specific scope of application is difficult to discern.

Instead of distinguishing, judges may confine the scope of the precedent of the Plenum in light of other precedents. Legal participants seeking to reduce the scope of a precedent that they find unjust, imprecise or absurd can read a precedent in light of other precedents to clarify its meaning.

[59] Ibid 20-1.

In the interpretation of legislation, civil lawyers use the *sedes materiae* or topographic argument to situate the provision in light of surrounding provisions, articles or titles of chapters to justify a given interpretation.[60] Similarly, legal participants can appeal to a set of related precedents to clarify the meaning of a particular precedent.

The technique of confining is grounded on the formal principles of both equality and authority. On the one hand, it can be used to reduce the scope of a precedential rule to be applied to a very specific context. Thus, just as occurs with the technique of distinguishing, the antecedent of a norm is reduced to cover a more reduced factual scenario. In this way, a category is reduced to include fewer members. Thus it safeguards the right to equality by identifying the proper category under which a citizen should be encompassed. On the other hand, confining uses a set of precedents to determine how previous courts have linked a fact with a given rule or principle, to reduce judicial discretion. Rather than distinguishing *tabula rasa*, the legal relevance of certain facts is grounded on a set of precedents. As Chaïm Perelman and Lucie Olbrechts-Tyteca note, on occasion, distinctions are introduced for the first time in the course of argument, but on other occasions distinctions that were apparently forgotten are recalled.[61] In other words, whatever was considered legally relevant to be subsumable under a given rule or principle, it is presumed that such fact will be linked to similar rules or principles in other cases.

The use of confining may illustrate, for instance, the special protection that persons with physical disabilities enjoy in connection with the principle of non-discrimination in Mexican Constitutional Law. For example, the Plenum ruled that laying off members of the army for being HIV positive is unconstitutional because the disease does not necessarily affect their physical performance.[62] In another precedent, the Plenum also held that people with disabilities are a vulnerable group subject to special legal protection, even if they are not economically vulnerable.[63]

However, the other party could have invoked other precedents that were less favourable to persons with disabilities. For instance, the Second Chamber ruled that the dismissal of public servants because of decreased visual acuity may be constitutional, although the state bears the burden of proof in showing the incompatibility between having the condition and performing the

[60] See Guastini, *Estudios sobre la interpretación jurídica*, above n 14, 44.
[61] Perelman and Olbrecths-Tyteca, above n 14, 649.
[62] A.I.R. 2146-2005, Margarita Beatriz Luna Ramos, 27 February 2007.
[63] C.C.41-2006, José Ramón Cossío Díaz, 3 March 2008, 176.

public function.[64] Another precedent from the Second Chamber held that the gradual protection of social security for labour accidents is constitutional because the greater the disability, the lesser is the possibility of working.[65]

After a more holistic analysis of precedents, the scope of the precedent that upheld the removal of public servants because of physical incapacities is less ample. Prior decisions held that the protection of people with disabilities usually prevails over other purposes, and in any case, the other parties bear the burden of proof in showing the incapacity. Still, someone may argue that the need for rebutting this subjecting people with disabilities to such procedure is itself a violation of the right to non-discrimination.

In this way, legal participants can use the technique of confining to reduce the scope of a precedent without overruling it. At the same time, confining may reveal tensions in precedents. Some precedents favoured state efficiency over the right to non-discrimination while others suggested the contrary. However, most of the precedents clarified that as a general rule, the premises and policies need to be adapted in favour of persons with disabilities, rather than vice versa.

Confining served to achieve two goals. First, without overruling, it served to reduce the scope of a precedent once it was read as part of a set of interlinked decisions. Second, the holistic analysis revealed that there were tensions in precedents. Although most cases seem to favour the principle of non-discrimination in favour of persons with disabilities over efficiency or freedom of commerce, there are some decisions that appear to be in conflict with this. The fact that more precedents from the same Plenum suggest that non-discrimination must prevail may be an indication that the precedent that distinguished between incapacities and disabilities may be overruled in the near future.

IV. Unanticipated Consequences of distinguishing and confining

IV. 1. Coherence and Tensions in Ascribed Norms

[64] A.I.R. 495-2009, José Fernando Franco González Salas, 17 June 2009, 112-5, 156-60.
[65] A.I. R. 711-2011, Sergio A. Valls Hernández, 9 November 2011, 23-4.

The techniques of distinguishing and confining may reveal agreement in the legal community. Once legal participants reconstruct precedents as part of a broader set, it is possible that such set may be relatively coherent and uniform. The coherence of the set of precedents may be evidence that the legal community agrees on the meaning, scope and hierarchical structure of a given constitutional provision.

Examples of positive distinguishing illustrate that exceptions may be introduced without undermining the core of a precedential rule. Subsequent decisions clarify the scope of a precedent without developing tensions or instability in the law. The use of confining may also reveal that most of the precedents support one principle over others. In these scenarios, a holistic analysis of precedents shows that, despite a few tensions, there is overall coherence regarding a particular provision or doctrine. For instance, the use of confining suggests that there is general agreement in the community that in the case of conflict between the right to non-discrimination of persons with disabilities and other principles such as freedom of commerce or efficiency, the first prevails. Perhaps, if a similar case were to reach the Plenum, it would prompt it to overrule the constitutional possibility that physical disabilities may impede persons from performing public or private tasks. Given this scenario, the Plenum could abrogate such rule and substitute it with a new one that always favours the person with disabilities.

The overall coherence of a set of precedents may indicate that a given precedent that is at odds with it is a mistake that must be confined, and in the case where the court was competent, it could overrule it. For example, the legal category of 'incapacity' may be confined to very specific contexts or even be abrogated. The idea that physical barriers may be obstacles to performing an occupation may be incompatible with the inclusive measures of non-discrimination in the public and private field.

However, there can also be tensions among precedents that reveal divergence in the legal community. This may be the case with the uses of negative distinguishing, where there is a lack of agreement in the legal community regarding the hierarchy of principles. In constitutions that recognise a plurality of principles expressed in vague and ambiguous terms, it is not surprising that legal participants disagree about their content and the hierarchy. The example of the clash between freedom of expression and non-discrimination revealed this tension. Perhaps the weight that the legal community attaches to the principle is changing in such a way that the protection of minorities may trump freedom of expression.

For instance, the case that distinguished the precedent may be the beginning of a new interpretative path regarding freedom of expression.[66] It may indicate that the hierarchy of principles of the Mexican legal community is changing towards a more militant or substantive approach to freedom of speech. Alternatively, it may be that the legal community will abandon the more substantive approach and return to a liberal view about freedom of speech, regardless of the content of the speech.

Thus, in addition to the protection of the right to equality before the law, another reason for considering distinguishing as component of a theory of precedent is that it considers the *dynamic* nature of law. A theory such as Alexander's that considers precedents as absolute constraints, and considers that judges can only apply or overrule precedents without acknowledging the possibility of distinguishing them, cannot identify changes or trends in the law. Precedents would be absolutely binding, but also static. There would not be intermediate paths between creating a precedent and overruling it. There would not be a judicial process in which a certain legal concept or category is rethought and improved upon before its abrogated.[67]

Conversely, a theory that accepts the technique of distinguishing as a component of a doctrine of precedent may serve to identify how precedents indicate new directions. Legal changes may start progressively with the distinction of precedents, rather than radically through overruling.[68] The changes start either because an interpretation of a provision no longer matches the principles of the community, or precisely because the community is in the process of re-assessing its preferences. The meaning ascribed to a provision starts to vary as the legal community changes.

When low or intermediate courts use negative distinguishing to reduce the scope of a precedent, they may start a bottom-up dialogue with superior courts. The superior court may confirm the distinction of the precedent and agree with the inferior court. In turn, this may be the preamble to a revision of judicial doctrine. Contrariwise, when the inferior court distinguishes a precedent on unsound grounds from the perspective of the superior court, it may lead the superior court to reaffirm old doctrine.

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[66] On the possibility of justifying legal change through a coherent path in the law rather than strict consistency see Kenn Kress, 'Coherence' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing, 2nd ed, 2010) 521, 528. See also Chapter VI.

[67] See Edward Levi, 'An Introduction to Legal Reasoning' (1948) 15(3) *The University of Chicago Law Review* 501, 506-19.

[68] William O. Douglas, 'Stare Decisis' (1949) 49(6) *Columbia Law Review* 735, 747.

Similarly, when last-resort courts use negative distinguishing with their own precedents, they may start to second-guess their own rulings without abandoning them immediately. Courts can engage in dialogue with their predecessors and cope with the needs of dynamic societies whose ideals and hierarchies of principles change over time. Previous courts may have failed to anticipate all the factual peculiarities and principles at stake.

V. Paving the way for Overruling Ascribed norms

This chapter analysed the role of distinguishing and confining to tackle the tension between conservative and dynamic elements of Constitutional Reciprocity. The conservative elements urge judges to apply or follow precedents rather than revise them. The dynamic elements urge judges to revise precedents by considering the circumstances of the case at hand, yet there must be a pre-existing legal source that constrains the revision, otherwise the revisions may be based merely on personal preferences.

The argument of dissociation used by civil lawyers in the interpretation of legislation served to justify the practice of positive and negative distinguishing of ascribed norms. In the case of positive distinguishing, the new precedential rule adds an exception to the general rule but is still supported by the original principle. In this way, the tension between conservative and dynamic elements is reduced. On the one hand, appealing to a pre-existing principle or purpose of a rule can serve to justify the creation of a new exceptional rule in light of unanticipated circumstances that reduce the scope of the general rule, but it nevertheless backs the original principle. On the other hand, the creation of a new rule makes it possible to face unanticipated circumstances and still be partially constrained by the law.

However, negative distinguishing is more controversial. When the distinction is grounded on a higher principle, the tension may be harder to minimise. Perhaps there is general agreement on the prevalence of one principle over the other. In such case there will be no tension, as most members of the community may accept the new norm. The problem arises when there is disagreement on the hierarchy of principles. Even in this scenario, distinguishing serves to identify tensions or trends in precedents that may indicate a more radical change in precedents.

In contrast to distinguishing, which consists in analysing one precedent in light of another, confining is a more holistic approach that judges may use to reduce the scope of a given precedent once it is seen as part of a broader whole. The scope of a precedent is reduced when a greater set of precedents dealt with a similar scenario but backed a competing principle.

Both negative distinguishing and confining precedents are techniques that may reveal agreement and tensions in precedents. In the case of agreement, most precedents may reduce the scope of a precedent in such a way that it is a matter of time before the last resort court formalises this process of progressive repeal through overruling. In cases of tension, the last resort court can guide and conclude the debate by abrogating a set of precedents and issuing new rules, and thus re-establishing coherence in a given area of constitutional law.

To summarise, there are two reasons that support adopting the conception of distinguishing and confining advocated in this chapter. First, the defended conception of distinguishing allows change in the law but only a constrained one. To distinguish a case, the facts between cases must be not only different but relevant in light of a constitutional principle. This relevance according to the constitutional system suggests that the set of facts is significant enough to be regulated by a specific ascribed norm tailored to the case at hand by judges in their endeavour to develop the law via interpretation. Moreover, judges bear the burden of argumentation for showing that the new norm is compatible with a preexisting principle. Thus while the judgment plays a dynamic role in modifying the previously ascribed rule, at the same time the judge is constrained by a pre-existing source of law.

Secondly, negative distinguishing and confining may serve to detect not only tensions in precedents, but also disagreement inside the legal community regarding the hierarchy of principles. Both techniques instantiate a dynamic but also progressive element of the doctrine of precedent. Precedents serve to monitor how similar constitutional provisions are interpreted at different times by several judges. Also, both techniques serve to enrich the discussion on a particular constitutional question and pave the way for the Supreme or Constitutional Court to end the debate by overruling, i.e., abrogating a norm whose validity has been progressively questioned or reduced in other precedents. Through the technique of overruling, the precedent is abrogated and substituted with a new one, rather than being reduced in scope. The next chapter

analyses the technique of overruling – a more radical technique that culminates in a complete revision of ascribed norms.

Chapter VI The Second Dynamic Feature of Constitutional Reciprocity: Overruling Ascribed Norms

This chapter tackles the possibility of abrogating ascribed norms though the common law technique of overruling. If all judgements needed to be supported by a set of pre-existing sources, then the law would be static and inherently conservative. However, Constitutional Reciprocity not only assists legal participants in reconstructing sets of sources that are coherent as a whole, but also serves to identify anomalies that trigger the revision of the law. Constitutional Reciprocity allows normative change, using the distinction between synchronic and diachronic coherence. Synchronic coherence is mutual support among members of a particular set abstracted from time. Diachronic coherence relates to the re-establishment of the coherence of a set in light of new information. Similarly, doctrines of precedent in exceptional cases allow for making revisions of precedents through the technique of overruling, thereby producing change in the law. Supreme or Constitutional Courts are required to meet the burden of argumentation by showing that the new precedent is more diachronically coherent with the set of relevant precedents than the overruled precedent. In this way, the chapter advances the outline of a coherentist conception of overruling that allows for constrained change in constitutional precedent.

I. The Complete revision of constitutional precedent: abrogating ascribed norms

The last chapter analysed how judges can make partial revisions of ascribed norms, in reply to the criticism that coherentist theories are inherently conservative and thus irremediably tied to the past. In reply to critics, it was argued that intermediate judges can make partial revisions through the techniques of distinguishing and confining precedents. With partial revisions, judges reduce the scope of an ascribed norm, but it nevertheless remains a valid source of law. Thus partial revision may allow progressive rather than radical changes in the law.

This chapter continues with the reply to the charge of conservatism by analysing overruling as a complete revision or abrogation of ascribed norms. In contrast to partial revisions, the abrogation of an ascribed norm consists in its complete elimination from the legal system. Moreover, in overruling, the facts of the case are indistinguishable, and thus a new ruling is a direct contradiction of the precedent. The justification of such abrogation lies in the fact that the overruled norm has become incoherent in light of surrounding normative changes. In addition to identifying the 'incorrectness' of a past interpretation of the constitutional text, an additional burden of argumentation is needed to reduce judicial discretion of last-resort judges when overruling. Otherwise, each subsequent court could argue that the previous court erred when interpreting the law, and thus ascribed a mistaken norm to a constitutional provision. If judges were to follow only 'correct' precedents, then precedents would not constrain judges but merely confirm preconceived ideas about the law. Under which circumstances, therefore, should a Supreme or Constitutional Court overrule a precedent? What burden of argumentation is adequate to limit judges in their lawmaking task of abrogating precedents?

To answer these questions, it is essential to recall the fact that legal theories that embrace coherentist elements have conservative and dynamic features.[1] One function is to reconstruct components – i.e., beliefs, principles, considered judgments, etc. – to form coherent wholes. Nevertheless, this process of reconstruction may serve to detect tensions or anomalies that must be revised to re-establish coherence. As Norman Daniels has observed, the coherentist method of Reflective Equilibrium 'does not merely systematize some determinate set of judgments. Rather, it permits extensive revision of these moral judgments'[2]. That is, in the process of achieving coherence between a set of considered judgments, a moral agent may first identify a tension among beliefs. Then they may overcome this tension by amending or eliminating altogether this previously held belief to confirm others that are better justified.

However, the process of the revision of ascribed norms in Constitutional Reciprocity needs to be more fixed and constrained than the revision of moral beliefs in a moral agent. Moral agents can perform a radical revision of all the beliefs that confirm their theory of morality, revising all elements until a completely new theory is developed.[3] In contrast, judges cannot remove all precedents and abandon settled law altogether to develop an entirely new theory of, say, freedom

[1] See Chapter IV.
[2] Norman Daniels, 'Wide Reflective Equilibrium and Theory Acceptance in Ethics' (1979) 76(5) *The Journal of Philosophy* 256, 266.
[3] See Michael R. Depaul, 'Two Conceptions of Coherence Methods in Ethics' (1987) 96(384) *Mind* 463, 468-73.

of expression. Judges can amend or abrogate *some* conflicting precedents, but they cannot abrogate *all,* because they must base their decision – even the decision to overrule – on other precedents.

When judges overrule a precedent, they are not only changing their mind. Instead, they are arguing that a rule that controlled a case is incorrect and must be eliminated, even if that means destabilising part of the law, treating similarly situated individuals differently, and threatening the principle of legal certainty. The stability of the law is more important than the stability of a set of an individual's beliefs, because the first serves as a guide of the behaviour of all other individuals of the constitutional community, irrespective of their individual morality. Moreover, given that overruling takes place in the adversarial context of adjudication, there will be parties arguing in favour of following the precedent for sake of stability and others suggesting that the precedent should be overruled for the sake of correctness or concrete justice.

Further, as Amalia Amaya has argued, the criticism of conservatism is actually addressed to legal reasoning in itself, rather than against coherentism.[4] Amaya assures us that legal discourse is moderately conservative in nature because reasons from authority enjoy a preferential status over new reasons.[5] In fact, Amaya's work also suggests that coherentism can find the means to justify a normative change in the literature dealing with belief revision.[6] Just as an epistemic agent can abandon a set of beliefs and replace it with a more coherent one in light of more information, so too, judges can justify an overruling by improving the law and making it more coherent. Nonetheless, this approach still remains too abstract to be applied in everyday constitutional adjudication. Also, if a new component does not cohere with previous sources, why was it not rejected in the first place because of its incoherence?

Although the practice of constitutional adjudication allows change by correcting past incorrect interpretations of the constitutional text through the technique of overruling, an effort to justify overruling through a test of coherence is still missing. Overruling allow judges to abrogate precedents by providing special reasons that justify changing the law instead of following it. Furthermore, from a coherentist perspective, when a precedent no longer fits with the relevant

[4] Amalia Amaya, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument* (Hart Publishing, 2015) 533-4.
[5] Ibid.
[6] Ibid 245-79. On belief revision in epistemology see e.g., Matthias Hild, 'The Diachronic Coherence of Ungraded Beliefs' (1999) 50(2) *Erkenntnis* 225. See also Aleksander Peczenik, 'Jumps and Logic In The Law' (1996) 4(3) *Artificial Intelligence and Law* 297,304-6.

body of law united by a common principle, there may be good reasons for overruling it. However, this means that at some point in time there was a precedent that did not cohere with pre-existing law. The question for the legal coherentist is: If, based on a, b, and c, the answer *was* x, how can the same theory justify that *now* the answer is not x?

Even when the practice of overruling and the ideal coherence among sources are linked, the analysis is done only in passing. For instance, James W. Harris has argued that in order to overrule, judges need to consider justice, legal certainty, and coherence.[7] Thus Harris claims that supreme courts should overrule when lower courts have distinguished a precedent, leaving the law in an 'unsatisfactory state'[8]. However, the notion of an unsatisfactory state in the law is vague. Is a satisfactory state of law one in which all precedents that form a legal doctrine perfectly support each other? Or, alternatively, is the coherence among precedents a matter of degree? Is the act of distinguishing necessarily detrimental to the degree of coherence of a particular doctrine? It is evident from Harris's work that overruling a precedent must seek to improve the law my making it more coherent. Nevertheless, it is still uncertain how this coherence-enhancing mechanism takes place, or should take place, in adjudication.

Similarly, Steven J. Burton has proposed a theory of overruling inspired by the Fifth Amendment's Due Process Clause of the U.S. Constitution, arguing that 'the Constitution and precedents interpreting it should form a *coherent* corpus of law, widely perceived and practiced as such.'[9] Following the United States Supreme Court in *Adarand Constructors, Inc. v. Pena,* [10] Burton argued that anomalous precedents that do not find support in a set of precedents should be overruled.[11] This task of debugging anomalous precedents is a practical instantiation of the ideal of coherence.[12]Nevertheless, Burton leaves the notion of an anomalous precedent undefined. What is more, in some cases an anomalous precedent may be overruled for the sake of coherence, but it is at least possible that an anomalous precedent may trigger the revision of the pre-existing law.

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[7] James W. Harris, 'Towards Principles of Overruling -When Should a Final Court of Appeal Second Guess?' (1990) 10(2) *Oxford Journal of Legal Studies* 135, 152-6.
[8] Ibid 153.
[9] Stephen J. Burton, 'The Conflict Between Stare Decisis and Overruling in Constitutional Adjudication' (2014) 35 *Cardozo Law Review* 1687. Emphasis added.
[10] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229–32 (1995) (overruling *Metro Broadcasting. Inc. v. F.C.C.,* 497 U.S. 547 (1990).
[11] Burton, above n 9, 1703.
[12] Ibid 1704.

Civil law scholars have also contributed to the literature on overruling. For instance, analysing the work of the Colombian Constitutional Court, Diego López Medina and Carlos Bernal have noted that normative or axiological changes in the legal system may reflect changes in society and thus authorise the overruling of an out-dated precedent.[13] Similarly, Isabelle Rorive, analysing Belgian law and following Harris' work on overruling, notes that the tension between stability and change is also present in civil law courts[14] – a tension that may justify overruling whenever it is backed by specially good reasons of justice, consistency and legal certainty.[15]

However, there is still the need for making a more specific case for coherentism in overruling. While a conservative test of coherence focuses on how a judgment fits with pre-existing law, a dynamic test of coherence focuses on how incoherent precedents should be overruled because they no longer fit with relevant law. This chapter seeks to cast light on how constitutional precedent can constrain even last-resort Courts. Supreme or constitutional courts are final, and thus their rulings cannot be reversed by another court. However, if courts are allowed to overrule a precedent simply because the current composition of the court considers that the past decision was a mistaken interpretation of the text, then there will be no constraint exercised by precedent. Courts need to show something more than an interpretive mistake to justify the overruling of a precedent. They need to show that the new precedent coheres better than the overruled precedent.

This chapter defends two interconnected claims regarding the possibility of overruling within the framework of Constitutional Reciprocity. First, anomalous precedents, i.e., ones that regulate behaviour in the opposite way to most settled law, are necessary for normative change. Second, courts should show that there is a set of precedents linked by a substantive purpose that justifies overruling, and outweighs the formal principle of legal certainty that requires courts to follow the overruled precedent. In this way, the process of reconstruction or systematisation of ascribed norms serves to identify anomalous precedents that need to be abrogated to re-establish coherence in a particular area of constitutional law.

[13] Diego López Medina, *El derecho de los jueces* (Legis, 2nd ed, 2006) 89; Carlos Bernal-Pulido, 'El precedente constitucional en Colombia' in Edgar Carpio Marcos and Pedro P. Grández Castro (eds), *Estudios al precedente constitucional* (Palestra Editores, 2007) 175, 185.
[14] Isabelle Rorive, 'Towards Principles of Overruling in a Civil Law Supreme Court' in Timothy A. O. Endicott, Joshua Getzler and Edwin Peel (eds), *Properties of Law: Essays in Honour of Jim Harris* (Oxford University Press, 2006) 277, 284.
[15] Ibid 289.

To defend these claims, the rest of the chapter is structured as follows. Section II analyses the distinction between synchronic and diachronic coherence. The former is coherence among sources abstracted from time, whereas the latter is coherence across different stages in time. The section also analyses how anomalous precedents affect the law. Anomalous precedents may be overruled, but they may also challenge pre-existing law and trigger the overruling of other precedents. Section III proposes a burden of argumentation that courts should meet when overruling a constitutional precedent. The section argues that the substantive link between a set of precedents can outweigh the formal principle of legal certainty that supports following a single precedent. Finally, Section IV concludes with some final remarks.

II. Diachronic Coherence and Precedent

II.1. Synchronic and Diachronic Coherence

Legal theorists distinguish between *synchronic* and *diachronic* coherence among statements or propositions.[16]According to Aleksander Peczenik, synchronic coherence is abstracted from time and requires (a) logical consistency but also (b) mutual support, (c) generality and (d) comprehensibility among propositions.[17] Logical consistency refers to the lack of formal contradiction among propositions, e.g., a judgment cannot assert that according to the legal system certain human behaviour is prohibited and commanded at the same time. Mutual support is the most important requirement of coherence and refers not to formal or deductive consistency, but to the argumentative compatibility or links between propositions. Generality refers to the scope of a given claim: the more phenomena that are explained by a single claim, the more coherent it is. Finally, comprehensibility or holism refers to the number propositions that support a given claim. According to the ideal of synchronic coherence, the more a claim is supported by a set of interrelated statements and sources that comply with these requirements, thus approximating to a 'perfect supportive structure',[18] the more coherent the claim is.

Thus synchronic coherence refers to the degree of mutual support between propositions here and now, without reference to changes in time. Legal interpreters reconstruct these propositions -

[16] See also Chapter I.
[17] Aleksander Peczenik, 'Coherence' in Christopher B. Gray (ed), *The Philosophy of Law: An Encyclopedia* (Garland Publishing, 1999) 12; Robert Alexy and Aleksander Peczenik, 'The Concept of Coherence and Its Significance for Discursive Rationality' (1990) 3(1 bis) *Ratio Juris* 130.
[18] Alexy and Peczenik, above n 17, 130; Aleksander Peczenik, *On Law and Reason* (2nd ed, 2009) [trans of: *Rätten och Förnuftet* (first published 1989)] 132.

arguments or legal sources - to make rational wholes that support a particular claim. For instance, a judgment cannot hold simultaneously that the Constitution commands that abortion be punished in all cases, and also prohibits this, without violating the requirement of consistency. The judgment would not be synchronically coherent either, if it was not supported by a number of constitutional provisions, judicial precedents and arguments.

In contrast, according to Peczenik, diachronic coherence does not require logical consistency and is particularly concerned with coherent change in time. A new theory may be inconsistent with a previous law, but it can also be a coherent evolution of a particular legal tradition.[19] The three criteria of diachronic coherence concern (a) how many of a theory's components (rules, principles, precedents, claims and values) are justified by the legal tradition, (b) how long the tradition is, and (c) how much this justification approximates the criteria of synchronic coherence.[20] In this sense, Peczenik claims, for instance, that legal theories rooted in Roman law that use general concepts to cover the whole area of private law, are interconnected by chains of arguments, and are explained by a long tradition, are more diachronically coherent than theories with a limited history and scope.[21]

Thus synchronic coherence refers to the degree of mutual support that a particular claim has because of the interconnection of arguments and sources at a given time, while diachronic coherence seems to be subordinated to synchronic coherence and aims to explain change from time T^1 to time T^2. In brief, diachronic coherence is coherence across time.

What divides the two approaches to coherence is their temporal dimension. Synchronic coherence urges judges to treat equally all individuals linked by a common property, or to point out certain difference that justify a distinct treatment *at a particular time*. It is synchronically coherent to treat some individuals differently at the same time because they lack a common property. For example, it is coherent to treat children and adults differently today because the former lack the maturity of the latter.

Contrariwise, diachronic coherence is concerned with justifying similar or different treatment of individuals *across time*. It is diachronically coherent to treat individuals differently across time

[19] Peczenik, 'Coherence', above n 17, 124. On changes inside the legal tradition, see Martin Krygier, 'Law as Tradition' (1986) 5(2) *Law and Philosophy* 237, 239-42, 248, 251-4.
[20] Peczenik, 'Coherence', above n 17.
[21] Ibid.

because new information has triggered the re-interpretation of sources. For instance, it is diachronically coherent to grant women access to abortion today because of new information regarding their health, even if such access was denied in the past when such information was absent. If the legal answer is different today than it was yesterday because the surrounding law has changed, judges must meet the burden of argumentation in showing the normative path that justifies change across time.

Peczenik has applied diachronic coherence to the role of precedent in legal reasoning. He argues that precedents must be understood diachronically rather than statically; subtle changes in legal practice may prompt and justify the abrogation of a precedent.[22] Some precedents may generate uncertainty, apparently contradicting the settled law. However, subsequently, these precedents may provide reasons for overruling an older precedent in such a way that this period of uncertainty is overcome. The state of uncertainty is overcome when a precedent is overruled and coherence within a particular legal doctrine is reestablished.[23]

Peczenik's conceptions of coherence are illuminating but also puzzling. By requiring logical consistency to be an element of synchronic coherence, but not so in the case of diachronic coherence, he places himself in a paradox. It is only thanks to inconsistent precedents that the law evolves. For instance, a precedent in the early 20th century in the U.S. that ruled against racial segregation may have been inconsistent with the established doctrine of 'separate but equal'.[24] At the same time, an inconsistent precedent paved the way for overruling such a doctrine. Some precedents contain normative statements that contradict the settled law, but these statements may also find support in other sources or in alternatives interpretations of them. Some member of the legal community may have interpreted the equal protection of the laws as permitting segregation and others as prohibiting it. Thus it seems that tension between formal consistency and substantive principles is necessary for normative change.

Despite this apparent paradox, Peczenik's work does cast a light of the tension between synchronic and diachronic coherence. Peczenik makes it clear that logical consistency is only

[22] Aleksander Peczenik, 'Sui precedenti vincolanti de facto' (1996) 6 *Ragion Pratica* 35,, 42.
[23] Ibid 42-3; See also Aleksander Peczenik, 'The Binding Force of Precedent' in Neil MacCormick and Robert S. Summers (eds), *Interpreting Precedents* (Darthmouth Publishing, 1997) 461, 469-72.
[24] See *Mendez,* et al *v. Westminister [sic] School District of Orange County, et al*, 64 F.Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947) (en banc).

necessary for 'perfect' coherence but not so for *reasonable* coherence.[25] Thus there can be some inconsistent sources that are in conflict with a particular claim, but it can still be coherent with most of the law.

Peczenik has also stressed that law evolves progressively; thus any of its components may change, but not all its components can change at the same time.[26] Legal systems are dynamic, but not all their rules, principles and branches change at the same time. Moreover, no legal participant can become aware of each and every change in the legal system. At some point, the changes inside a particular branch or doctrine may trigger change in another. This interaction means that there is no general subordination of one kind of coherence over another. Rather, there is a tension between both: on some occasions synchronic coherence prevails and pre-existing law is applied or followed, but on other occasions diachronic coherence prevails and it is preferable to eliminate a particular rule or change the understanding of a principle for the sake of coherence.

One last clue that Peczenik provides is that lawyers can question some sources or interpretations of them at some time, but lawyers cannot question all sources simultaneously.[27] In other words, lawyers need a legal base to challenge a mainstream interpretation of a law. This base may be a set of precedents that forms an emerging trend that useful to destabilise once settled law. What was settled law at T^1 was later questioned at T^2, causing tension and uncertainty, but then came to substitute settled law at $T^{3.}$ A distant change in one area of the law may eventually reach the core of a once settled doctrine. Thus some recent sources become the basis for challenging older sources.

The tension between synchronic and diachronic coherence is not only unavoidable for legal systems but can be profitable, by creating change in the law. Some precedents may look unrelated to settled law or may be considered mistakes because they contradict settled law. These precedents may have been based on sound arguments and on positive law. The tension with precedents may lead either to the reiteration of a settled doctrine or the establishment of a new paradigm. In any case, what is relevant is that there can be tension between two claims, both of which claim to cohere with pre-existing law. At some stage in time the tension regarding a certain

[25] Peczenik, 'Jumps and Logic In The Law', above n 6, 317.
[26] Aleksander Peczenik, 'Can Philosophy Help Legal Doctrine?' (2004) 17(1) *Ratio Juris* 106, 107.
[27] Peczenik, 'Sui precedenti vincolanti de facto', above n 22, 40.

doctrine is settled. However, the process may continue with regard to some other area or branch of the law.

Neil MacCormick has also given considerable attention to the temporal dimension of coherence. He originally divided coherence into two dimensions: a normative and a narrative one.[28] Normative coherence relates to matters of law, while narrative coherence relates to questions of fact. Normative coherence aspires to the ideal in which sources are interrelated by a common value, principle or purpose in such a way as to form a coherent whole.[29] In contrast, narrative coherence concerns links between facts such as to make a credible or persuasive narrative as a whole.[30] Normative coherence is concerned with the practical question of what is permitted, prohibited or commanded, and its subject matter is legal sources. In contrast, narrative coherence is concerned with facts or events that are narrated indirectly in adjudication by such evidence as witnesses declarations, or documents, and its subject-matter is events in the world.

Several scholars have questioned MacCcormick's distinction between normative and narrative coherence. Jan M. van Dunné argues that the distinction between norms and facts is artificial.[31] Ultimately, sources regulate facts and the former are applied to the latter in light of legal participants' narratives of events.[32]Similarly, Gerald Postema has questioned MacCormick, arguing that what matters is not coherence abstracted from time, but coherence in action.[33]Postema criticises MacCormick from his subordination of diachronic to synchronic coherence.[34] According to Postema, what matters is a coherence that guides behaviour not at a particular time but across time.[35] He argues that MacCormick's preference for synchronic rather than diachronic coherence becomes particularly troublesome when we consider that legal purposes 'unfold over time'.[36] In short, the objection to MacCormick's conception of coherence is that norms are part of a broader project, one that is developed by several generations and institutions across time.

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[28] Neil MacCormick, 'Coherence in Legal Justification' in Aleksander Peczenik, Lars Lindahl and Bert Van Roermud (eds), *Theory of Legal Science: Proceedings of the Conference on Legal Theory and Philosophy of Science* (D. Reidel Publishing Company, 1984) 235, 235.
[29] Ibid 236-8.
[30] Neil MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005), 227-8.
[31] Jan M. Van Dunné, 'Narrative Coherence and Its Function in Judicial Decision Making and Legislation' (1996) 44(3) *he American Journal of Comparative Law* 463, 466-7.
[32] Ibid 468-9, 471.
[33] Gerald J. Postema, 'Melody and Law's Mindfulness of Time' (2004) 17(2) *Ratio Juris* 203, 210.
[34] Ibid 222.
[35] Ibid 222-5.
[36] Ibid 223.

Thus MacCormick has acknowledged that his conception of normative coherence neglects the historical dimension of legal interpretation.[37] He concedes that particular legal doctrines are themselves attached to a particular stage in time. In later cases these doctrines may be questioned or reconfigured even if that requires a justification to treat people differently at T^2 to how they were treated at T^1.[38] MacCormick argues, for instance, that feminists question mainstream theories of self-defence that justify violence conceived only as an immediate response to physical harm, because of their awareness that victims of domestic violence may suffer from it in a progressive and constant way, and the reaction may not be immediate.[39] Still, when judges introduce this exception for the sake of gender-equality, they are obliged to justify the change in doctrine by showing how new information rebuts the previous approach. What was considered a reasonable rule or doctrine at T^1 was later questioned, and a new approach justified at T^2.

The temporal dimension of normative coherence recognises that new information may trigger a revision of a set of norms. However, this revision also alters the law. There is a constant interaction between synchronic and diachronic coherence because old facts seem to be analysed in light of new purposes or new interpretation of them. A new precedent may destabilise preexisting law, affecting legal certainty for the sake of substantive purposes advanced by law.

It must be pointed out that the dichotomy between normative coherence concerned with sources and narrative coherence concerned with facts is particularly questionable regarding precedents. Precedents regulate a set of facts and attach a consequence to them in light of the values or purposes cherished by a legal system. Moreover, general facts can only be understood in legal discourse as regulated, or not, by a particular rule or principle.[40] Then a set of facts may have distinct, even contradictory, legal consequences across time because purposes are valued differently. In the U.S. in the late 19th century, assigning different facilities or services to people on the basis of their race may have been *permitted* by state legislatures and approved by most of the legal community, but later, in the early 20th century, the community questioned such practices, and now they are *prohibited* because segregation does not achieve a valuable purpose.

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[37] MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning*, above n 30, 233.
[38] Ibid 234-6.
[39] Ibid 234.
[40] See Jerzy Wróblewski, 'Il precedente nei sistemi di "civil law"' in Giovanna Visintini (ed), *La giurisprudenza per massime e il valore del precedente: con particolare riguardo alla responsabilità civile* (CEDAM, 1988) 25, 29-30. On the link between facts, rules and principles see also Chapter II.

The practical question is not whether diachronic coherence is in general more important than synchronic coherence; it is rather a question of *when* changing the one component of the law for substantive purposes is preferable to following pre-existing law. In other words, the tension between synchronic and diachronic coherence is an instantiation of the collision between the formal principle of legal certainty and substantive justice. On the one hand, legal certainty urges the law to follow an established line of precedent in order to treat individuals at T^2 as they were treated at T^1. On the other hand, substantive justice urges the law to disturb pre-existing law, based on an emerging and perhaps not so established line of precedents.

The tension between synchronic and diachronic coherence can be represented by following the first three steps of Constitutional Reciprocity as sketched in Chapter IV. First, participants identify relevant sources in light of their particular description of the facts. In this scenario there is an agreement regarding the characterisation of facts; both parties agree on the relevant facts, otherwise there will be a possibility of distinguishing or confining rather than overruling. For all legal purposes, the facts are identical, even if participants disagree about the validity of a precedent. Second, both participants systematise ascribed norms that support a particular claim. When a particular ascribed norm has not been reiterated in later cases, or has been explicitly questioned, or is in tension with later decisions, it is easier to question the current validity of the norm. Third, one participant proposes that a pre-existing ascribed norm should be *applied.* The other party proposes that the ascribed norm should be *abrogated* and that a new norm that contradicts it should govern the case.

Therefore, the key question to ask within the framework of Constitutional Reciprocity is whether it is constitutionally justifiable, according to the current state of the law at T^2, to subsume the facts of the case under the antecedent of the pre-existing ascribed norm and to attach the same legal consequences to it as at T^1. If it is not justifiable, what has changed between T^1 and T^2? The party suggesting the application of the pre-existing norm ascribed at T^1 supports his or her claim on the original substantive principle or purpose that prevailed in that time. In addition, the claim is also supported by the formal principles of equality and legal certainty that count in favour of applying or following a precedent. It is the other participant who bears the burden of argumentation in showing that it is preferable to change the law by abrogating a norm than to apply it.

Certainly, on some occasions, substantive purposes prevail over formal principles such as legal certainty. Sometimes overruling a previous interpretation of the constitution may be justified. However, courts need to justify such changes, otherwise sources will not constrain judges at all. The justification may be based on a recent trend in precedents, but the emergence of such precedents is only possible for judgments that do not completely cohere with pre-existing law.

To conclude, there is a tension between synchronic coherence and formal principles that requires judges to follow pre-existing law, on the one hand, and diachronic coherence and substantive purposes that urge judges to change the law, on the other. It is inaccurate to say that synchronic coherence must prevail over the other, or vice versa. In some scenarios it is better to follow the law because legal certainty require judges not to disturb what has been settled. In other scenarios, it would be better to change the law for substantive purposes even if that disturbs the law and disappoints the legitimate expectations of citizens. It may be argued that the change in the law is itself based on a recent trend of precedents by the same court or lower courts that has gone unnoticed. Yet it may be that the trend only started thanks to a judgment that went against the flow, developing a tension within legal doctrine. It may be that the same court that issued a judgment contradicted its previous rulings without noticing, or a lower or intermediate court's judgments contradicted a superior court's precedents without being reviewed in later instances.

Does this mean that anomalous precedents are only possible thanks to neglect or last-resort courts or the recklessness of intermediate ones? This would seem to confirm Peczenik's paradox: only through inconsistent precedents can law change. It can be that the majority of justices in the last-resort court might fail to consider a precedent or precedents. It can also be the case that an intermediate court dared to challenge the settled doctrine of superior courts, knowing that its judgment would not be reviewed, or even if reviewed, that the current composition of the supreme court would confirm the new judgment. Thus this kind of judgment could start a new trend akin to the maxim according to which the younger law overrides the older, compelling courts to later overrule the precedent explicitly in subsequent cases.

It may be that the negligence of superior courts or lack of subordination of intermediate courts may generate anomalous precedents. However, there is also the possibility that anomalous judgments can be produced because they tackled a set of facts apparently uncontrolled by precedent. Subsequently, these precedents may clash with the settled law's subject matter, thereby developing tensions within legal doctrine.

II.2. Anomalous Precedents

Anomalous precedents are judgments that regulate behaviour inconsistently with the mainstream precedential trend.[41] This means that a particular kind of behaviour receives incompatible legal consequences: the general precedential trend may command or permits an action while an anomalous precedent prohibits it, or vice versa. This inconsistency may be caused because members of the legal community start to consider some behaviour more, or less, worthy of being pursued. For instance, at T^1 it may be permitted to distinguish individuals on the basis of race, then at T^2 it may be prohibited to do so, and at T^3 it may be permitted to distinguish on the basis of race, but only for the purposes of redressing a history of racial discrimination through affirmative action.

As anticipated in the previous section, there are at least three *causes* of an anomalous precedent. First, the court may have ignored a precedent or set of precedents that required to rule in the opposite way. Second, the Court may have implicitly challenged the precedent without formally overruling it. Third, and more interestingly, the court may have issued a judgment considering that the behaviour in question was a case of first impression, that is a legal question not yet settled by previous decisions.

The third scenario requires further elaboration and may be called a case of 'unnecessary holism'. For the purposes of solving the particular controversy, it may be unnecessary for the court to link a set of apparently unrelated cases that regulate different concrete behaviour. A set of precedents that first appears unrelated because it regulated different behaviour later creates incoherence in the law when it is seen as part of a broader whole connected by a single purpose. That holistic effort would be strictly unnecessary for deciding the particular case; it would be an obiter dictum, but perhaps an illuminating one from the perspective of legal doctrine.

The Colombian Constitutional Court decided a set of cases that illustrate this third scenario of unnecessary holism. At T^1 the court ruled that is was constitutionally *commanded* for authorities

[41] The term is inspired in Kuhn's concept of anomaly to refer to physical phenomena that cannot be explained by current scientific theories what prompts the revision, crisis or rejection of such theories. See Thomas S Kuhn, *The Structure of Scientific Revolutions (50th Anniversary Edition)* (University of Chicago Press, 2012) xi, 52-65.

to punish women or physicians for abortion because of the state's duty to protect human life.[42] Later, at T^2, the Court ruled that it was *prohibited* for authorities to punish individuals for consuming drugs because of the state's duty to protect the right to the free development of one's personality.[43] Similarly, at T^3, the Court ruled that it was *prohibited* for authorities to punish individuals for ending their life, or for assisting others to do so, when they are terminally ill, because the duty of protecting life yields to the human dignity of patients.[44] Although one case refers to ending the life of a foetus, another to the life of a terminally ill patient, and another to the consumption of drugs, they may be linked by a common and more general principle: protecting individual autonomy.

In this manner, a set of precedents that first appeared unrelated, later develops tensions in the law when they are seen as part of a broader whole connected by a single purpose. It was unnecessary for judges to consider the implications that the rulings on euthanasia or drug consumption had for the case of abortion, because only the latter directly affected the life of another being. Nevertheless, once it was acknowledged that there could be a link between them, a tension appeared within the doctrine related to personal autonomy: at certain times the will of the individual prevails, but regarding abortion, the will of the mother yields to the life of the foetus.

The above-mentioned are three possible causes for anomalous precedents, and Harris has identified one possible consequence that they produce for legal doctrine. Anomalous precedents trigger the revision of old doctrine. Analysing the judgments of the then House of Lords, Harris noted that sometimes the practice of 'subtle' distinguishing leaves the state of the law in an unsatisfactory state, which in turn prompts superior courts to overrule precedents for the sake of coherence regarding a particular doctrine.[45] Harris seems to be referring to the unsatisfactory state that pertains when the grounding reasons for a precedent are later implicitly disapproved of by the legal community in a subsequent decision that distinguished the precedent.[46] Then, just as legislators should aspire to issuing provisions that make sense as part of a statute, and different legislatures should issue statutes that cohere with other statutes, likewise, judges should aim to develop doctrines that are as coherent as possible. Thus when two or more precedents are analysed as part of a broader whole, it may be necessary to abrogate one of them. This abrogation

[42] C-133-1994, Antonio Barrera Carbonell, 17 March 1994.
[43] C-221-1994, Carlos Gaviria Díaz, 5 May 1994.
[44] C-239-1997, Carlos Gaviria Díaz, 20 May 1997.
[45] Harris, above n 7, 156. See also the discussion on negative distinguishing in Chapter IV.
[46] Ibid.

can be justified as a way for reestablishing coherence in the law. In this scenario, what Harris calls subtle distinguishing prompts the revision of old doctrine in light of subsequent changes in the law.

Although Burton did not pay considerable attention to the concept of anomalous precedents,[47] he did identify another possible consequence of them: an anomalous precedent is rejected and the old doctrine is reiterated. In passing, he points out that a precedent needs to be overruled when it is inconsistent with a rooted line of decisions.[48] For instance, the U.S. Supreme Court in *Adarand Constructors*[49] overruled *Metro Broadcasting, Inc. v. F.C.C.*[50] because it was inconsistent with the Court's jurisprudence on racial discrimination. In *Metro,* the Court ruled that federal programs of affirmative action on the basis of race were subject to intermediate scrutiny – that is, a medium level of constitutional review. However, only six years later, the Court held that such a ruling was inconsistent with a line of decisions that required strict scrutiny of state programs of affirmative action established on the basis of race. Thus *Metro* had created a double standard: at the federal level such programs were subject to intermediate scrutiny but at the state level they were subject to strict scrutiny. The Court overruled *Metro*, and explicitly stated that '[b]y refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of the law; we restore it'.[51] In this second scenario, an anomalous precedent, instead of triggering the revision of old doctrine, was overruled, and the old doctrine was confirmed.

Thus anomalous precedents may cause change in the legal system, but their existence can also be transitory, as they can be rejected. Legal systems are constantly changing, but as Peczenik noted, not all the components of the legal system change simultaneously. Furthermore, a particular anomalous precedent may not be sufficiently justified by other precedents and may be reversed by a later court. In order to justify an overruling for the sake of coherence, several apparently unrelated cases need to be connected to form a broader doctrine that regulates a common form of behaviour linked by a single principle.

When an anomalous precedent is subsequently rejected, it may be an indication that the majority of the legal community still adheres to the old doctrine and resists any change. Perhaps the

[47] Burton, above n 9, 1703-4.
[48] Ibid 1703 note 72.
[49] *Adarand Constructors, Inc. v. Pena* , above n 10.
[50] *Metro Broadcasting, Inc. v. F.C.C* , above n 10
[51] *Adarand Constructors, Inc. v. Pena* , above n 10, at 234.

anomalous precedent is still not mature enough to substitute for the old doctrine. In order to reach this level of maturity, supporters of the anomalous precedent need show that the old doctrine is out-dated and unable to cope with the principles that society currently cherishes. A rooted and well known doctrine may later be questioned until it is no longer certain that courts will uphold it. A segregationist society may have thought that segregation was compatible with equality, but later generations may have become aware that segregation was incompatible with equality. A well-established doctrine can be questioned by an isolated, and anomalous precedent, but then the anomaly starts to become the general rule rather than the exception, until the old doctrine becomes almost untenable and is therefore overruled.

This subsection has shown that anomalous precedents are not only unavoidable but may be a preamble to a change of law.[52] The inconsistency among precedents shows that the legal community is divided regarding how a particular kind of behaviour is treated by the law. The real controversy is concerned with the question of what is legally valuable for certain members of the community. Some members may convince others that an old doctrine can no longer be sustained for achieving the purposes of the law as currently understood. Then, at some point, for the sake of the coherence of legal doctrine, a particular precedent may be abrogated because at this later time the doctrine is aimed at achieving a different purpose from the one originally pursued.

III. The Constraint of Coherence when Overruling Precedents

The previous section analysed the distinction between synchronic and diachronic coherence and the notion of anomalous precedents. Synchronic coherence is the ideal according to which sources and normative statements are as mutually supported and linked by a common purpose at a given time. Diachronic coherence is the ideal according to which changes in normative sources or in their interpretation are justified across time. Thus, while at some stage the new interpretation or source is more coherent than the old precedent, this also means that at an earlier stage in time a judgment was issued inconsistent with the relevant law. This judgment became an anomalous precedent that could either trigger the revision of settled doctrine or be reversed later because the old doctrine was still supported by the majority of the legal community.

[52] See Willen van der Velden, 'Coherence in Law: a Deductive and a Semantic Explanation of Coherence' in Bob Brouwer et al (eds), *Coherence and Conflict in Law: Proceedings of the 3rd Benelux-Scandinavian Symposium in Legal Theory, Amsterdam, 1992* (Kluwer Law and Taxation Publishers, 1992) 257, 281-2.

This section indicates how the framework of Constitutional Reciprocity favours a constrained approach to overruling. It claims that in order to overrule, courts need to show that the new ruling meets two requirements. First, the court needs to identify and systematise a set of precedents connected by a substantive principle that has defeated similar principles linked to the overruled precedent. Secondly, the court needs to show that the substantive link outweighs the burden of argumentation imposed by the formal principle of legal certainty that counts against overruling.

III. 1. The Burden of Argumentation: Linking Precedents by a Common Principle

Courts willing to overrule a precedent bear the burden of linking a set of apparently unrelated precedents to a common purpose in such a way that the overruling improves the coherence of a particular doctrine.[53] A doctrine is a set of precedents that regulate a common form of human behaviour at a moderate level of abstraction.[54] In this way, although judgements deal with concrete instances of human behaviour, apparently unrelated topics can be encompassed by subsuming them under a higher level of abstraction united by a common principle.

The case study of the Colombian Court previously discussed illustrates this link in light of a common principle. The concrete legal questions dealt with abortion, drug consumption and euthanasia. These three topics may be encompassed by the single purpose of constitutional relevance: autonomy of will. It is a purpose of constitutional relevance because Article 16 explicitly recognises the constitutional right to the free development of personality. However, autonomy of will clashes with another principle: Article 11 recognises that the right to life is inviolable. There is also a tension between precedents that safeguard the autonomy of individuals and the precedent that protects the life of the foetus over the will of the mother.

As discussed in chapter I, the Court had the opportunity to solve the conflict between these purposes in later cases regarding abortion but failed to carry out an explicit overruling. After the Court ruled in C-133-1994 that the Constitution commands that abortion be punished,[55] it then

[53] Harris, above n 7, 149, 151, 195-6.
[54] On the idea of legal doctrine in the common law see Emerson H. Tiller and Frank B. Cross, 'What is Legal Doctrine?' (2006) 100(1) *Northwestern University Law Review* 517; Grant Lamond, 'Do Precedents Create Rules?' [1] (2005) 11(1) *Legal Theory* 1, 21-3.
[55] C-133-1994, above n 42.

issued two incompatible judgments in C-647-2001 and C-355-2006 without any formal overruling. First, in C-647-2001 the Court upheld the constitutionality of a statute that allowed judges not to punish abortion with prison when there were mitigating circumstances.[56] Later, in C-355-2006 the Court ruled that the criminal code should be interpreted in such a way that abortion is not even prosecutable when the foetus threatens the physical or mental health of the mother.[57]

By recognising a right to abortion, but refusing to overrule prior decisions in an explicit manner, the Court missed the opportunity to justify the change of criteria. Why was abortion punishable with prison in all circumstances in 1994 but not even prosecutable in 2006? Women or physicians who may have been prosecuted or imprisoned for the crime of abortion before the ruling deserved an explanation. The same applies to pro-life groups that considered the foetus a human life worthy of constitutional protection given previous interpretations of the Court. Although the Court linked the new judgment to precedents safeguarding the right to the free development of personality,[58] and characterised its judgment as part of the national and international trend towards recognising discrimination against women,[59] it failed to justify the change from a precedential rule that prohibited abortion to one that allows it.

The Court should have tackled the issue directly by showing that allowing abortion cohered better with the relevant doctrine on the autonomy of individuals than its prohibition. That is, the Court did not meet the burden of argumentation in showing that applying the criterion of 1994 would be a mistake in 2006. The Court should have accepted that it was overruling a precedent, because the behaviour that was being regulated was the same as in 1994. Then it should have provided arguments and cited related precedents that supported the new ruling.

The new ruling becomes more plausible when it is seen in the light of decisions that have not only protected the general autonomy of will of individuals but particularly the autonomy of women. Article 43 protects women against gender discrimination and the second paragraph of Article 3 recognises the state's duty to achieve material equality. Although the Court had developed the connection between these rights in several judgments, it nevertheless failed to cite

[56] C-647-2001, Alfredo Beltrán Sierra, 20 January 2001.
[57] C-355-2006 Jaime Araújo Rentería and Clara Inés Vargas Hernández, 10 May 2006.
[58] Ibid recital VI, 8.2.
[59] Ibid recital VI, 7. See C-507-2004, Manuel José Cepeda Espinosa, 25 May 2004; C-722-2004, Rodrigo Escobar Gil, 3 August 2004.

them in the latest judgment on abortion to justify the change of criterion. In C-410-94[60] the Court upheld the constitutionality of affirmative action on superannuation rights, recognising the constitutionality of a lower retirement age for women in light of past discrimination. In C-371-2000[61] the Court insisted on the constitutionality of electoral gender quotas and admitted that material equality between men and women was still a goal to be achieved. Finally, in C-822-2005[62] the Court held that the right to personal autonomy protected individuals against state interference in private matters such as body searches or non-consensual surgical intervention.

The last two steps of Constitutional Reciprocity proposed in Chapter IV serve to clarify how the Court could have solved the tension between applying and overruling a precedent. According to the fourth step, participants expand the set of reasons in light of each other's claims. Thus, on the one hand, the precedents that commanded or permitted abortion are backed by the substantive principle of protection of life as well as the formal principles of equality and legal certainty. On the other hand, the right to abortion is supported by the substantive principle of material equality, the special protection of women, and women's right to autonomy against state intervention.

Then, in the last step, the Court needed to select the most coherent candidate for an ascribed norm in light of the postulate of analogy, the soundness of interconnections and the law of balancing, but also considering the institutional record. The Court needed to clarify whether the norm in C-133-1994 N^1 – 'The Constitution commands the punishment of abortion with prison under all circumstances' – was confined to a more specific factual scenario in light of C-647-2001 N^2: 'The Constitution permits that abortion not be punished with prison in cases of extreme circumstances such as non-consensual intercourse'. Or, alternatively, it needed to justify *abrogation* with a new norm N^3: The Constitution *prohibits* the punishment of abortion when (a) the foetus is non-viable, (b) pregnancy threatens the woman's health and (c) in cases of non-consensual intercourse.

First, the Court could have justified this change of criteria by appealing to the civil law conception of analogy *juris* discussed in previous chapters, and arguing that permitting abortion was more coherent with its doctrine on the autonomy of individuals than its prohibition.[63] As

[60] C-410-1994, Carlos Gaviria Díaz, 15 September 1994.
[61] C-371-2000, Carlos Gaviria Díaz, 29 March 2000. Especially at section VII, recital 22.
[62] C-822-2005, Manuel José Cepeda Espinosa, 10 August 2005. Especially at section VIII, recital 5.2.2.5.
[63] On analogy juris, see Giovanni Damele, 'Analogia Legis and Analogia Iuris: an Overview from a Rhetorical Perspective' in Henrique Jales Ribeiro (ed), *Systematic Approaches to Argument by Analogy* (Springer, 2014) 243;

previously discussed, the conventional approach to analogy is analogy *legis* that extends the consequences of *one rule* to an unanticipated case that shares features with a pre-existing rule. In contrast, legal participants use analogy *juris* to reconstruct a *set of rules* and infer *a single principle* that unifies them. The use of analogy is useful to show that a particular interpretation of the constitutional text is more coherent than its alternatives. In adjudication, analogy *juris* can be used as a repeated exercise of judging the similarity of rules that link a set of apparently unrelated precedents to a common purpose. Therefore, through analogy *juris*, and in light of the principles of autonomy of individuals and the special protection of women, granting permission for abortion becomes more coherent with pre-existing law than its prohibition.

In addition to analogy *juris,* the Court could have used the civil law canon of evolving interpretation (i*nterpretación evolutiva*). This canon requires judges to trace how past judges have interpreted the same provision across time, ascribing different meanings within the semantic boundaries of the provision as social or moral values change, technology evolves, or linguistic conventions vary.[64] Precedents are the sources that document how judges interpret each provision at different stages in time, ascribing new meanings to the same text. This approach differs, for instance, from David Strauss's common law constitutionalism, because the text is still a priority, but it is accepted that its meaning evolves through time. In contrast, according to Strauss, there is a priority of judicial doctrine over text.[65] Relevant to the perspective of Constitutional Reciprocity in particular, and coherentist theories of legal reasoning in general, is the fact that evolving interpretation allows identifying a 'coherent path of movement over time'[66]. That is, a precedential trend warns about progressive change in the law, even if it started as an inconsistency or in tension with settled precedents.[67] At T^1 a Court ascribed a meaning to a provision; later, subsequent judges started to ascribe a new meaning at T^2 compatible with the provision but incompatible with the interpretation at T^1, until the historical interpretation of T^1 was abrogated and substituted by a new meaning at T^3.

Norberto Bobbio, *L'analogia nella logica del diritto* (Dott. A. Giuffrè Editore, first published 1938, 2006) 83-4, 93-6, 182-4. See also Chapters III and IV.

[64] On evolving interpretation see e.g., Riccardo Guastini, *Estudios sobre la interpretación jurídica* (Marina Gascón and Miguel Carbonell trans, UNAM, 1999) 50-1; Damiano Canale, 'Teorías de la interpretación jurídica y teorías del significado' (2012)(11) *Discusiones* 135, 159-163.

[65] David A. Strauss, 'Common Law Constitutional Interpretation' (1996) 63(3) *University of Chicago Law Review* 877, 883.

[66] Kenn Kress, 'Coherence' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing, 2nd ed, 2010) 521, 528.

[67] On the path dependency of precedent see Oona A. Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2001) 86(2) *Iowa Law Review* 601, especially at 604;Michael J. Gerhardt, 'The Limited Path Dependency of Precedent' (2005) 7(4) *University of Pennsylvania Journal of Constitutional Law* 903.

In this way, combining analogy with evolving interpretation results in a sort of *evolving analogy* that permits inference to a principle or a new understanding of it from a set of precedential rules useful to re-establish coherence among ascribed norms by removing the now incoherent norm. As Peczenik noted, the law changes but not all its components change at the same time. Thus one precedent may stand still without being reiterated in later decisions, but rather questioned implicitly or explicitly in other judgments. One ascribed norm starts to become incoherent because a greater set of norms begins to develop tensions.

This evolving analogy serves to challenge one part of the institutional record that favoured the prohibition of abortion in light of more recent considerations that favour its permission. One legal participant challenges the previous understanding of the right to life as absolute or sacred, and opposes it with the idea of autonomy in light of the current understanding of gender equality, to propose the right to abortion. The new understanding suggests that the principle of the autonomy of women prevails over the protection of the life of the foetus, given the state of inequality of women.

Once the old ruling on abortion is seen in the light of subsequent precedents that first appeared to be unconnected, the new ruling becomes more plausible because of its coherence with personal autonomy and gender discrimination. It becomes evident that the absolute prohibition of abortion endangered the autonomy of women.

The example reminds us of two basic elements of diachronic coherence. The first is that the coherence between a claim or a judgment and a set of sources is gradual.[68] Normative coherence cannot be measured in an all-or-nothing way, but is instead a matter of degree. One claim or interpretation of the law is more or less coherent with relevant law than its alternatives. Thus the new ruling on abortion coheres with sources protecting autonomy and protecting women against discrimination. Yet it does not cohere with sources that were based on the interpretation that the life of the foetus prevails over women's autonomy. In the inter-subjective context of adjudication, the gradual nature of coherence means that a participant needs to show that a claim or a judgment is 'more' coherent with the relevant law than the old ruling. This change of

[68] See Chapter IV.

criterion can be rationally justified thanks to anomalous precedents which, even if they did not deal with the same legal question, gradually paved the way for revisiting a related issue.

The second element is that coherence is concerned with *substantive* purposes or principles among norms rather than with formal consistency. As MacCormick has noted, while consistency is a lack of formal contradiction among sources, normative coherence is the linkage between several sources because of a positive axiological compatibility.[69] Postema, on the other hand, rightly noted that MacCormick failed to consider the temporal dimension of normative coherence. However, Postema's idea that purposes 'unfold over time'[70] remained vague to apply to the task of overruling precedents.

In contrast to what Postema argued, substantive purposes not only unfold over time, but their ranking also fluctuates across time and it is the duty of courts to show that in case of conflict, one purpose generally prevails over the other. The conflict among variously ranked purposes indicates that the legal community is divided. Thus, the argument for coherence is used to show that a particular interpretation is 'more coherent' with the relevant law than its alternatives. Then, by overruling a precedent, the coherence of a particular doctrine is re-established, as now several common patterns of behaviour are treated in a similar way.

To summarise, the burden of argumentation in overruling, according to Constitutional Reciprocity, consists in showing that the new ruling improves the relevant doctrine by making it more coherent. The old ruling has become incoherent in light of later precedents that dealt with apparently unrelated cases, but that eventually affected the standing of the original precedent. In this scenario, courts need to connect a set of cases linked by a common substantive purpose that justifies the new ruling.

III. 2. Outweighing the Formal Principle of Legal Certainty

To recall what was argued in chapter II, once judges ascribe a norm to a constitutional provision through interpretation, grounded on the formal principles of authority, equality and certainty, it is expected that later judges will issue judgments compatible with such a norm. According to

[69] MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning*, above n 30, 231. See also at 95, 190-2, 202.
[70] Postema, 'Melody and Law's Mindfulness of Time', above n 33, 222.

Constitutional Reciprocity, the general rule is to apply ascribed norms in identical cases or to follow them in analogous cases. Yet, exceptionally, judges can modify ascribed norms through distinguishing when there are legally relevant differences.

Overruling is indeed a more radical and delicate revision than distinguishing, because it invalidates a norm altogether, even if the facts are identical to the ones analysed in a precedent. If subsequent judges could abrogate an ascribed norm every time they decided an identical case, under the argument that it was the result of an incorrect interpretation of the then relevant law, then using the excuse of settling the question correctly, judges would circumvent the precedent. This case-by-case approach would be a scenario of pure particular justice rather than adjudication in light of the relevant pre-existing law. Moreover, given the plurality of methods of interpretation, it is possible that later judges would argue either that the previous judge applied the canon of interpretation incorrectly or that the canon itself was inadequate.

Thus, in addition to the requirement of linking a set of precedents to a substantive purpose, Courts also need to show that it is preferable to change the law for the sake of coherence than to honour the formal principle of legal certainty that counts against disturbing settled law. Formal principles, of which legal certainty stands out, require that the law laid down by a competent authority must be respected regardless of whether later authorities agree with its content.[71] Thus, when the constitutional text is unclear, once courts settle the issue in a particular controversy, that interpretation becomes a precedent. In turn, independently of the substantive reasons that grounded the judgment, the precedent acquires autonomous existence. The precedent must be followed unless and until special circumstances arise that justify disturbing the law by overruling it and issuing a new precedent.

More precisely, the formal principle of legal certainty is marked by two positive elements. As noted by Robert Alexy, legal certainty requires that 'norms of a legal system be as determinate as possible *and* that they be observed to the maximum degree possible'[72]. A legal source is determinate when its interpretation is univocal and its application leads to a single result.[73] Thus,

[71] On formal principles see Chapters II and IV.
[72] Robert Alexy, 'Legal Certainty and Correctness' (2015) 28(4) *Ratio Juris* 441, 441. Emphasis added. See also ustav Radbruch, 'Legal Philosophy by Gustav Radbruch', *The Legal Philosophies of Lask, Radbruch, and Dabin* (Kurt Wilk trans, Harvard University Press, 1950) 107-11, 131.
[73] See Chapter II.

when the law is determinate there is no reason to alter the mainstream interpretation of a norm, and legal certainty urges that pre-existing law be followed.

Nonetheless, the principle of legal certainty allows exceptions when legal participants successfully challenge the assumed determinacy of sources. Sources can be relatively indeterminate, given the ambiguity and vagueness of ordinary language, which is susceptible to multiple interpretations. More important for the purposes of this chapter, legal sources can be less determinate when there are conflicting norms, with some arguing in favour of a particular outcome and others against it. [74] The indeterminacy of a particular precedent caused by a conflict of norms provides reasons to revisit the original interpretation ascribed to a source. [75] The case of incoherence in precedents is an instantiation of this last type of indeterminacy. In this way, overruling aims at ending this incoherence by issuing an interpretation of the constitutional text that is more coherent with other precedents.

In this way, a conflict of precedents can be used to challenge the element of determinacy of a particular precedent, which in turn provides a reason not or follow it. Then a court willing to overrule a precedent should point out a conflict of precedents. Although precedents may relate to different human behaviour, once they are seen as part of a broader doctrine, the tension appears and the Court aims at minimising this tension by overruling.

It is important to insist that legal certainty backs all legal sources, regardless of their content. That is, both kinds of precedent, those counting in favour and against a particular decision, are backed by legal certainty. Thus, the greater the set of precedents that supports overruling, the less weight the overruled precedent has. Once courts succeed in connecting a set of precedents that justify an overruling, the principle of legal certainty requires overruling, rather than following the old precedent.

Thus courts willing to overrule a precedent should show that its abrogation is required by legal certainty. While legal certainty weighs in favour of a particular precedent, a set of precedents linked by a common substantive purpose can also be supported by legal certainty. Thus, the set of

[74] On conflicts of norms as a source of indeterminacy see Hans Kelsen, *Introduction to The Problems of Legal Theory* (Stanley L. Paulson and Bonnie Litschewski Paulson trans, Clarendon Press, 1992) [trans of: *Reine Rechtslehr* (first published 1934)] 77-80.
[75] Ibid 80; Alexy, 'Legal Certainty and Correctness', above n 72, 447. On conflicts of statutory norms see Norberto Bobbio, *Teoria dell' ordinamento giuridico* (Giappichelli-editore, 1960) 69-124.

precedents supporting one outcome outweigh the requirement of following the old precedent, in order to reestablish coherence on a certain constitutional question.

IV. A Constrained approach to Constitutional Overruling

This chapter has shown how coherence in precedents can explain and justify constitutional overruling. It has connected the theoretical debate on conservatism and coherence with constitutional adjudication by focusing on the practice of overruling precedents. Courts can issue anomalous precedents that may trigger the revision of an old precedent. But anomalous precedents can also be rejected because they oppose a still rooted line of decisions. The key for a relatively successful overruling is to connect apparently unrelated precedents by a common substantive principle that now contradicts the old precedent and justifies the overruling. Thus, overruling is justified when abrogating the precedent reestablishes the coherence of a particular doctrine.

However, constitutional overruling is only possible because of transitory tensions, as evidenced by anomalous precedents. These are tensions between legal certainty and substantive purposes. An old precedent may have permitted some pattern of behaviour, while a new precedent prohibits a related behaviour pattern. These tensions may have passed unnoticed, but eventually affect the coherence of a particular doctrine. In such scenarios, courts should bear the burden of argumentation in showing that for the sake of coherence it is preferable to overrule the precedent than to follow it. Courts overcome this tension by showing that the old precedent no longer coheres with the law, and legal certainty actually requires overruling.

Showing that the old precedent no longer coheres achieves two goals. First, it re-establishes order in a doctrine that now is able to guide the behaviour of citizens in an intelligible and relatively predictable way. The Court shows that legal doctrine is formed not by a set of ad hoc judgments, but a set of precedents linked by a common purpose that sustains the whole doctrine.

The second and more important goal is that the process of reconstruction of sources is in itself a *constraint* against overruling. It is insufficient for Courts to overrule a precedent simply because it was a mistaken interpretation of the constitutional text. Courts need to reconstruct apparently unconnected sources and unify them as part of a coherent doctrine that regulates certain

behaviour linked by a common purpose. Hence, the constraint of coherence reduces the discretion of judges because they need to show a recent path of decisions that justify the new precedent.

Thus the criticism that conceptions that embrace coherentist elements such as Constitutional Reciprocity are conservative in nature is only partially accurate. They are conservative in the sense that judges need to provide special arguments to justify a change. However, this is only a moderate conservatism because the principle of legal certainty presumptively protects all precedents against overruling. This general presumption against overruling can be rebutted when a greater set of interconnected precedents count against the ancient precedent and justify its abrogation.

More practically, three reasons favour the adoption of overruling defended in this chapter. Firstly, the provision-norm distinction serves to reduce judicial discretion across time by imposing a particular burden of argumentation on overruling. Given the semantic indeterminacy of provisions and the plurality of methods of interpretation, it is insufficient for judges to justify an overruling based only on the supposed incorrectness of a past interpretation. Instead, the formal principle of legal certainty imposes a burden of argumentation when they seek to issue a judgement that directly contradicts a previously ascribed norm. Thus they should link the candidate for a newly ascribed norm with a set of precedents linked by a common principle that supports the abrogation of the previous norm.

Secondly, it serves to safeguard the right to equality across different periods of time. The conception of overruling defended in this chapter justifies an exception to the principle of treating cases alike not because of the difference between facts, as happens with the technique of distinguishing, but because of the different understanding that the legal community has attached to the same facts at distinct times. This chapter has insisted that judgments produce prima facie rules, but the understanding of the facts that form the antecedent or hypothesis of such rules may change across time. Judges can ascribe different norms to similar provisions across time, but more important is the consideration that the same facts may be perceived differently. Thus, overruling draws on the tension between subsuming the facts under a past category, on the one hand, and on the other, eliminating that category because the relevant law, as it currently stands, supports its invalidation. Precedential rules serve to monitor not only how judges interpret provisions across time, but how they treat citizens by subsuming their acts under an old rule or a new one inferred from other precedents.

Conclusion: An adequate Migration of the Doctrine of precedent to Civil law Constitutionalism

I. Constitutional Reciprocity as a Reconfiguration of the Common Law Doctrine of Precedent to Civil Law Constitutionalism

This thesis has answered the question: How should civil lawyers reconfigure the common law doctrine of precedent to achieve a reasonable degree of coherence in constitutional judgments?

The question was addressed through a comparative and legal theory analysis. The methodology focussed on how the concept of binding constitutional precedent, understood as a migration from the common to the civil law tradition, is working, and how it should be improved to minimise incoherence in precedents and safeguard litigants' right to equality before the law.

The constitutional courts in the civil law face endemic challenges to approximate the ideal of coherence in precedent. For instance, the overproduction of constitutional judgments and the fragmented structure of courts that work in Plenum and in Chambers may produce disparate precedents on the same legal question, making it difficult to develop a coherent body of precedents.

However, there are also civil law concepts and techniques that served to scrutinise judicial decision-making. For example, the civil law concept of an ascribed norm makes transparent the law-making role of judges when interpreting indeterminate provisions through any given canon of interpretation, and ascribing norms within their semantic boundaries. This interpretative tool helps to scrutinise how subsequent judges should apply such a norm in similar scenarios, or justify its modification or abrogation in later cases. Thus the thesis has taken a context-sensitive

approach using the under-examined jurisdictions of Colombia and Mexico as case studies, and analysing the use of constitutional precedents from a civil law perspective.

Chapter I identified concrete violations to the right to equality before courts of law as evidenced by the case study on abortion in Colombia and constitutional review on constitutional amendments in Mexico. This unequal treatment of citizens, in turn, creates incoherence in constitutional law, as there are incompatible legal solutions to similar factual scenarios without reasonable and transparent justification. On occasion, the violation of the right to equality is caused because precedents are not even discussed, or when discussed, are not treated as authentic rules of law but as persuasive guidelines, allowing the reinterpretation of the constitutional text without further justification. One possible cause of this unequal treatment is the old civil law conception of *jurisprudence constante*, which considered a reiterated set of precedents as an auxiliary rather than a binding source, and thus allowed judges to treat similar cases differently under the argument that they were bound to legislation, not to judgments.

Thus, as analysed in Chapter II, one possible solution to the problem of incoherence among precedent is to consider ascribed norms as universal and fixed rules, i.e., general standards applicable to all future similar scenarios by subsumption. This approach to precedents would limit the role of subsequent judges to identifying the binding rule and simply applying it to all similar scenarios. In fact, the Colombian, and particularly the Mexican, courts follow a rule-oriented approach, explicitly identifying the ratio decidendi in abstract and impersonal terms. However, while precedents may work as static rules, the dynamic and plural character of society makes them revisable in light of unanticipated circumstances. Also, applying norms does not exhaust the legitimate operations regarding precedents. Judges can also extend the scope of norms through analogy, modifying them through distinguishing and even abrogating through overruling. Hence, as discussed in Chapter III, subsequent judges may modify general or abstract preexisting rules in light of particular circumstances. Nevertheless, if judges can modify the rules every time they decide a case, then the law would not only be unstable but unintelligible. There have to be some preexisting constraints that limit judges in the law-making role of modifying precedents at the same time as applying them.

Thus both chapters identified the puzzle of whether ascribed norms are to be conceived as universal and fixed rules that favour stability in precedents or as mere guidelines that can be revised in light of the particular circumstances of the case. On the one hand, treating rationes

decidendi as universal rules has the advantage of constraining subsequent judges when interpreting the constitution, thereby reducing the possibility of ideological biases. Nevertheless, this makes precedents static, indifferent to social change, inadequate for coping with the plurality of legally relevant circumstances that the constitutional law must regulate, and may impede the correction of past interpretations of the constitutional text under the argument of respecting precedent. On the other hand, considering precedents as mere guidelines allows judges to modify general rules in light of particular circumstances. However, this minimises the role of constitutional precedents as legal sources because judges can always reinterpret the constitutional text with no further constraint.

To solve the puzzle between stability and flexibility, in Chapter IV the thesis endorsed Constitutional Reciprocity as a method that treats precedents as prima facie rules – that is, rules that, in exceptional cases, judges can modify at the same time that they apply them, provided they meet the corresponding burden of argumentation. In order to avoid ad hoc judgments, judges bear the burden of argumentation in showing that a potential judgment is more coherent with a set of relevant norms than alternatives raised by other participants. Constitutional Reciprocity is useful for achieving three basic functions of precedent. It helps judges to systematise ascribed norms to show that a potential judgment would cohere with it; it helps to identify a broad norm that should be modified in light of relevant facts unanticipated by the previous court but relevant in light of other constitutional principles, and it helps to identify tensions in precedents that justify overruling a decision in light of surrounding precedents.

In this manner, legal participants can use Constitutional Reciprocity to find a balance between the stability and flexibility of precedents, given the conservative and dynamic elements of coherence. Legal theories with coherentist elements have a conservative aspect to the extent that today's judgments must be compatible with past decisions, but they also have a dynamic aspect that allows modification of a particular set to restore coherence. These elements parallel the conservative operations or techniques of precedent (i.e., apply or follow a precedent) and the dynamic ones (i.e., distinguish or overrule a precedent). On occasion a potential judgment needs to cohere or fit with pre-existing sources, but on other occasions the judgment triggers the revision of a part of the relevant law.

Furthermore, Constitutional Reciprocity stresses the intersubjective element of adjudication in the process of achieving coherence between a potential judgment and a set of sources. Coherence

is an intersubjective matter not only in the sense that the decision of a judge today must be compatible with a set of past decisions taken by prior individuals. In addition, it is intersubjective in the sense that a coherent interpretation of the law presupposes an exercise of reconstruction of sources carried out by an individual to support a particular claim before fellow legal participants who raise competing claims based on alternative reconstructions. Thus the scope or comprehensiveness of the enquiry depends on the interaction of participants who can expand the set of source to refute counterclaims.

Finally, Constitutional Reciprocity is preferable to doctrines or theories of *jurisprudence constante* because it affords a *dynamic* enforcement of the right to equality before courts of law. *Jurisprudence constante* treated judgments as complementary guidelines that clarify the meaning of the constitutional text, relevant only when they are reiterated in a line of cases. In contrast, insisting that even non-reiterated precedents produce prima facie rules provides a broader protection of equality.

The stress on abstract rules does not seek to minimise the role of concrete facts or revert to a kind of legal formalism that reduces the task of judges to mere appliers of law. Rather, the emphasis on rules serves to highlight that judges identify or create dynamic categories when interpreting the constitution. The hypothesis or antecedents of rules explicitly define, almost graphically, that all the individuals who engage in a certain pattern of behaviour form a single category, and thus they will receive the same legal judgment. Once judges ascribe a norm, later litigants have a prima facie right to be treated alike, subsuming their behaviour in the category that was identified or created in the precedent. While these categories are revisable, subsequent judges bear the burden of argumentation when they seek to dissociate categories through the technique of distinguishing precedents, as analysed in Chapter V, or when they abrogate such categories through the technique of overruling, as discussed in Chapter VI. The modification allows distinct treatment among individuals in light of different facts that are legally relevant in light of another constitutional principle. The abrogation requires an identity of facts between cases but a difference in the way the legal community has come to understand these facts.

Thus the emphasis on rules serves to identify how judges categorise individuals in any of the four following ways: (a) when judges apply an ascribed norm they subsume the facts – and the individuals who engage in such behaviour – under the category. Similarly, (b) when judges extend the ratio of a precedent through analogy, they expand the scope of the category and

subsume under it individuals who were previously not included. In contrast, (c) when judges distinguish cases, either they imply that the individuals are part of another category and divide it into more specific subcategories according to the facts of the case. Finally, (d) when judges abrogate a precedent, they imply that a category developed by previous judges has become out-dated, intolerable or incompatible with the current understanding and hierarchy of principles, as evidenced by a competing set of precedents, and hence that it must be eliminated altogether.

In this way, Constitutional Reciprocity links the understanding of coherence as a static property of the system of precedents and coherence as an argument for making a case.[1] Judges aspire to develop precedents as a coherent system of rules that later interpreter must apply. However, precedents do not systematise themselves but require a legal participant to detect and reconstruct them to justify a claim in light of the facts of the case, where the main intention is to reduce judicial discretion. Ultimately, today's winning argument about the correct interpretation of the constitution will become an autonomous source of law, part of a subset of precedents that regulate behaviour. At the same time, subsequent legal participants will re-interpret the source, extending, narrowing or eliminating its scope of application.

II. Two Additional Reasons for Adopting Constitutional Reciprocity as a Method to Adjudicate Cases With Precedents

In addition to the reasonable reduction of incoherence among precedents and the protection of equality, there are two further reasons for adopting Constitutional Reciprocity. First, by taking an intersubjective approach to adjudication, it stresses that coherence in precedents matters not only as an interesting theoretical ideal but as *a practical tool* accessible to lawyers for reducing judicial discretion. Triggered by their self-interest, lawyers invoke previous interpretations of the text to reduce the vast power that judges enjoy when interpreting indeterminate provisions – particularly in jurisdictions with generous bills of rights, such as Mexico or Colombia.

In a context in which Supreme and Constitutional Courts are becoming increasingly visible political actors, coherence with precedents is a tool to put pressure on judges to decide cases in a

[1] See Leonor Moral Soriano, 'A Modest Notion of Coherence in Legal Reasoning: A Model for the European Court of Justice' [296] (2003) 16(3) *Ratio Juris* 296, 296-7.

certain way, or at least to demand a burden of argumentation when they depart from precedent. It is only in this intersubjective sense that coherence as a constraint acquires its true meaning. Coherence between a judgment and set of precedents is not self-imposed or the outcome of the good faith of judges, but the result of the interaction of fellow legal participants who require individual judges to follow a certain degree of institutional continuity between their personal opinions and the collective development of the law.

Second, as a by-product, coherence in precedents indirectly enhances the *political legitimacy* of Constitutional Courts. Judges act as self-interested individuals driven by their own ideologies to favour a particular principle or policy when adjudicating cases. However, coherence in precedents serves to achieve a kind of institutional legitimacy that would be impossible had the ideology of the court changed as new members arrived or old members changed their minds. Even if political or axiological changes occurs or variations in other branches of power press for abrupt changes in judicial decision-making, a relatively coherent body of precedent limits them. Any change in precedent would need to be justified by appealing to other precedents that justify the modification of a precedent. Unlike the more radical development of law by legislators or constitutional framers, the progressive growth of ascribed norms limits tomorrows decision-making by what was decided today. The denser and more interconnected a body of precedents, the harder it is for subsequent judges to issue biased judgments.

III. Limitations, and a Program for Future Research

As indicated in the introduction and chapter IV, this thesis has not defended a general theory of legal reasoning or adjudication but only a particular methodology for adjudicating with precedents to reduce judicial discretion. Given the indeterminacy of constitutional provisions, the variety of canons of interpretation, and the plurality of normative theories about the nature of constitutions, theories of interpretation are insufficient to constrain judges. Thus precedents are useful to reduce judicial discretion by requiring respect not only for the constitutional text but also for previous judicial interpretations of it.

However, it must be admitted that, in some circumstances, a conception of precedent can also be insufficient to reduce judicial discretion in a meaningful way. In some cases there are no previous interpretations of a constitutional provision because the jurisdiction has enacted a new

constitution (as happened in Colombia in 1991, or as may occur in the near future in Mexico[2]). In such cases, when framers have amended a particular provision, or there are many precedents that have been interpreted, but in a conflicting way, it is impossible to impose coherence where there are only inconsistencies, and judges enjoy discretion. Precedent, at least in its backward-looking dimension, obviously does not constrain judges. In such scenarios there is no right answer.[3] Given the situation that judicial practice has not developed a line of precedents that identify how most members of the legal community understands a given provision at a particular time, judges enjoy discretion and can ascribe a rule according to their personal view of the constitution.

In these scenarios, only the forward-looking dimension of precedent can constrain judges. That is, only by anticipating that a judgment today will become a rule that controls future cases, can judges be constrained. In this sense, the process of identifying the ratio decidendi in abstract and impersonal terms, as analysed in Chapter II, serves to constrain judges even in the case of a lack of precedent, because they commit to applying or follow a rule that they themselves drafted. Nevertheless, judges still enjoy a degree of discretion. In these scenarios, judges act almost as legislators and can impose their will via judicial interpretation. Thus the specific constraints of a theory of precedent yield to a broader theory of practical reasoning. When the boundaries of law end and the general dimension of political morality begins, judges can appeal on good faith to theories of justice so as the to enforce their best understanding of the constitutional provisions.

In addition to the inherent limitations of a conception of precedent, there are other areas of research that must be pursued to enhance an adequate use and understanding of judgments as sources of law in the civil law. This thesis has stressed the intersubjective feature of adjudication, emphasising the adversarial interaction of judges and lawyers. However, there is still more work to be done in order finally to abandon the idea that the 'judge', an isolated individual or demigod, decides the case abstracted from any interaction with other participants. Deciding a case, i.e., laying down a precedent, is an intersubjective task both in the decision-making procedure as well as in the drafting of the written judgment. It is still a matter for future research in the civil law to analyse how the interaction of a judge-rapporteur of constitutional courts with fellow members of the court affects the interpretation and creation of precedents.[4] Moreover, in multimember courts,

[2] On the debate regarding the need of a new Constitution for Mexico see Jorge Carpizo, '¿Se necesita una nueva Constitución en México?' (2011) 24 *Cuestiones Constitucionales* 141.
[3] See Ronald Dworkin, 'No Right Answer?' in P.M.S Hacker and Joseph Raz (eds), *Law, Morality and Society: Essays in Honour of H. L. A Hart* (Oxford University Press, 1977) 58.
[4] Mathilde Cohen has researched the deliberating process of superior civil and common law courts to solve cases. However, yet she has not analysed the topic of creation and interpretation of precedent as an intersubjectivee task

clerks assist judges. In fact, some clerks at civil law courts have the special task of monitoring how a judge has voted in similar cases to avoid contradicting himself, thereby developing a record of the votes and opinions of the judge. It would be useful to identify how the assistance of clerks might influence not the personal congruence of a judge, but the institutional coherence of the court. The clerk could suggest to a judge that she should vote with the majority for the sake of institutional coherence despite her previous votes, or by suggesting that she dissent because the majority has neglected a set of precedents.

Another challenge for future research is the overproduction of constitutional precedent. This thesis has proposed a holistic approach to constitutional precedents that suggest that precedents should be interpreted and reconstructed as part of a whole, rather than as isolated propositions. The reconstruction of precedents is facilitated by the existence of databases that systematise precedents dealing with a similar question of law that may be arranged in light of landmark cases. However, it must be admitted that this task remains challenging for legal practitioners. One possible solution to the overproduction of precedents is to redesign constitutional courts to work as 'courts of precedent' [5], as suggested by Michele Taruffo. This would require modifying the way constitutional courts select cases to review to drastically reduce their workload so they can explicitly direct their energy to produce few, but exhaustively deliberated and well-drafted judgments to guide lower judges and other officials. Nevertheless, this redesign of civil law courts for the sake of efficiency in the production of precedents needs to be balanced with the access to justice. Making harder for officials or citizens to activate a constitutional court, as a single, supreme and specialised organ, makes constitutional cases less visible and reduces the possibility for superior courts to revise decisions of lower judges.

IV. Implementing Constitutional Reciprocity

The main aim of this research was to propose a framework to reduce incoherence among constitutional precedents to better protect the right to equality before the law. The suggestions developed throughout the chapters can be applied by two mechanisms: either by changes in judicial practice and judicial doctrines of precedent, as has happened hitherto in Colombia, or via

akin to legislative deliberation of statutes. See Mathilde Cohen, 'Ex Ante Versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort' (2014) 62(4) *American Journal of Comparative Law* 951.

[5] Michele Taruffo, 'Precedente y jurisprudencia' (2007) *Precedente* 85, 98-9.

a formal amendment of the constitution or the relevant legislation, as has happened in Mexico, given its legislative doctrine of precedent.

The framework could be implemented in practice by considering the three temporal dimensions of precedent. First, regarding past decisions, it is pivotal to remind superior court judges that they are not just deciding a case but ascribing a norm that should cohere with a broader set of previously ascribed norms. While this more comprehensive analysis does not guarantee correctness, it does reduce judicial discretion by forcing judges to consider previous decisions and to provide arguments when a new ascribed norm would be at odds with previous decisions. Second, regarding today's decisions, legal participants argue as if the law were coherent, but only according to their individual reconstructions, and they propose norms to solve cases at hand according to their claims. Thus judges need to ask which potential judgment is more coherent with other sources – that is, which candidate for an ascribed norm is backed by a greater number of ascribed norms linked by common principles? They should also ask, in the case of a conflict between principles, which candidate is backed by higher principles as documented by precedents? Third, regarding the future, judges can adapt precedents in order to avoid a mismatch between static rules and a dynamic society. They can modify rules when additional facts are legally relevant in light of constitutional principles inferred from constitutional provisions or sets of precedents. Likewise, judges can abrogate a particular norm when a greater set of competing precedents offers a new understanding or hierarchy of principles that justifies the invalidation of a particular rule.

In this way the framework could be applied in practice to advance the ideal of coherence in precedents. This is an ideal which, although not fully achievable, is worthy of being pursued to reduce the chances of arbitrariness in constitutional adjudication. At the end of the day, the process of the reconstruction of precedents to form coherent wholes is in itself a constraint on constitutional judges.

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