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**Changing Hearts and Minds in Mexico:
a Cognitive-Jurisprudential Approach to Legal
Education Reform in a Legal System in Transition**

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Abstract

The starting assumption of this thesis is that to fully understand legal practices – including legal reasoning – we need to get a grasp of the complex body of knowledge into which they are immersed. Legal studies have often assumed that legal knowledge can be reduced to the knowledge of legal rules. This research departs from this perspective and argues for an understanding of legal knowledge that includes the complex set of conceptual, procedural and affective considerations which shape legal practices in general, and legal reasoning in particular. Herein we argue that not only legal knowledge is wider than the knowledge of rules, but that there are also some aspects of legal practice that cannot be properly addressed by explicitly drafted legal rules.

We purport to build such an account upon epistemologically-informed comparative legal perspectives and insights of the cognitive sciences, by way of discussing a particular factual problem. The case to be studied in this thesis is the apparent loss of certainty in Mexican legal practice, when legal professionals engage in precedent-based reasoning. The situation, which was first reported in 2006, has remained broadly unexplored, and by default has been reputed as a problem concerning the set of explicit rules that regulate the system of legal precedents in that national context. We argue that the situation cannot be fully comprehended and remedied if we exclusively focus on the dimension of legal rules, but that it would be better understood if we direct our attention to the deeper knowledge structures in which that practice is immersed.

This thesis builds a case for a broadened approach to legal knowledge by unveiling the historically built knowledge structures in which the Mexican understanding of precedents is embedded. As we shall see, this particular framework has acted as a deterrent to precedent-based reasoning, as accounted by a set of theories of law and legal reasoning. By focusing on the several processes of legal change and the collateral epistemic revisions that Mexican legal professionals seem to be experiencing for the past decades, this thesis argues that changing deeply embedded knowledge structures is a difficult task that needs to be supported by revising the processes of knowledge construction, and most importantly legal education.

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I would like to dedicate this thesis to Nicholas, who has been the best companion I could have wished for this adventure. It is also dedicate it to my parents, Christos and Angelina, and my brother, Georgios, who blindly trusted and supported me in any way possible.

Novelty can signal danger, a new problem that demands a solution before it is too late. If a primitive hunter is surprised by an unfamiliar large animal in the forest, or the leader of a modern democracy is confronted by the rise of a threatening dictator abroad, action cannot wait for the gradual accumulation of knowledge over hundreds of similar occurrences. In such situations we want a rapid understanding of the situation that brings with it some idea about what to do.

Keith Holyoak and Paul Thagard *Mental Leaps*.

Introduction

“A large part of what has been asserted concerning the necessity of absolutely uniform and immutable antecedent rules of law is in effect an attempt to evade the really important issue of finding and employing rules of law, substantive and procedural, which will actually secure to the members of the community a reasonable measure of practical certainty of expectation in framing their courses of conduct.”

John Dewey, Logical Method and Law

1. The Problem of Legal Precedents in Mexico

This thesis has been motivated by a reported problem of the Mexican legal community:¹ law professionals seem to be experiencing difficulties when encountering legal precedents in practice. In 2006 the Supreme Court of Justice published the results of a three years national inquiry about the problems concerning

¹ In this thesis the term legal community will be used to refer to the internal legal community, i.e. the group of legal professionals formed under the same framework, which engages into a somehow homogeneous legal practice, and holds a shared outlook of that practice (that is, a common knowledge framework). For us, the internal legal community consists of legal practitioners - that is, lawyers (courtroom advocates and solicitors), judges, prosecutor and even legal scholars. We understand this community as opposing an external legal community of citizens that hold a set of lay understandings about the law and do not engage into the legal practice as participants, although they might tangentially interact with the legal world. Using the language of community is, however, full complexities. Communities of practice, epistemic communities and interpretative communities have been often understood as groups sharing highly consistent clusters of knowledge that engage into equally consistent practices. Nevertheless, it does not seem the case that communities integrate individuals with identical schemata – outlooks as well as practices are in reality not as homogeneous. For example, within the members of the so called internal legal community we might find judges, lawyers and prosecutors, some of them dedicated to civil matters and others to criminal or tax law. In this respect, civil judges, e.g., might have a somehow different viewpoint from tax lawyers – these smaller groups should be understood as sub-communities that share more extensive knowledge features, but there is still a wider dimension that they all are participants of. In this thesis we do not claim that all members of a legal community possess exactly the same webs of meaning or that they engage into absolutely consistent practices, but that there is a shared baseline that that gives cohesion to a group of individuals and their practices. For a similar perspective on legal communities see: Brian Tamanaha, ‘The Internal/External Distinction and the Notion of a "Practice" in Legal Theory and Sociological Studies’ (1996) 30 Law & Society Review 163-204.

the administration of justice in Mexico. This was an open investigation that aimed to collect information regarding any problem related to the administration of justice in Mexico from any citizen, either lay or legally trained. A large part of participants, mainly active members of the legal community, reported some concerns connected to the increasing numbers of judicial precedents being used in daily practice. Others indicated that the lack of clear and explicit rules for the ‘application’ of judicial precedents has produced confusion in practice. Thus, they raised questions on how to account for past judicial resolutions, and some of them asked for the promulgation of clearer rules of validity for such legal features. Additionally, legal professionals expressed their confusion when dealing with (what in their view is) a vast amount of precedents that sometimes seemed to be repetitive and others to contradict each other; with this in mind, they requested a more efficient institutional mechanism to unify the criteria prevailing in the legal system. In a similar consultation performed in 2007 by the Senate of the Republic, participants raised similar concerns and offered analogous suggestions. Later communications have also shown the persistence of the problem. Generally, then, this information reveals that practitioners in the Mexican context seem to be experiencing specific problems when dealing with judicial precedents: they appear to face confusion when attempting to account for past cases and use them in practice; they sense that the current use of precedents is inconsistent and has lessened the possibility of predicting legal outcomes; and, as a consequence, the legal community has asked for some institutional measures that put a remedy to the current state of uncertainty.

The concerns reported by the local legal community are fairly relevant and need to be properly addressed. The problem apparently caused by legal precedents in this context is actually one that has the potential of harming one of law’s core aims: that of securing legal predictability or certainty. It has been frequently argued that one of the law’s main purposes is that of securing human expectations. The law creates this sense of certainty by providing a more or less clear categorisation of human conduct according to the ‘lawful – unlawful’ divide. Knowing in advance what is considered to be lawful or unlawful allows us to make plans and, most importantly, to engage

into human relationships based on trust.² Thus, failure to guarantee certainty might be interpreted as a major problem for a legal system. The inability to orient human action due to the lack of clear indications of what is legal or illegal is a highway to legal failure.³ In this way, it is important that we take seriously the concerns raised by the legal community and try to offer a suitable solution. The fact that the Mexican legal system is usually reputed to present a number of important anomalies is not a reason to ignore the existence of apparently milder problems affecting legal practice.⁴ Legal deficiencies are accumulative, and they could dangerously distance a particular legal system from what is considered to be a (working) system of law.⁵ In this sense, relevant problems ought to be addressed and not allowed to build up.

In the case of the Mexican legal system, the reported difficulties to consistently account for precedents and identify clear legal patterns translate into problems to identify what is considered lawful or unlawful in this legal system, which might detriment legal certainty not only in legal practice, but also in all sort of law-based interactions. If legal practitioners, which presumably possess the most developed legal knowledge, are not able to read clear indications of what is legal or illegal according to information contained in precedents, the sense of unpredictability is likely to expand beyond the confines of legal practice. Precedents are means used to understand a wide range of legal scopes (such as, criminal law, family law, commercial law, and so on). Thus, the fact that legal precedents are perceived as unsettling in themselves is particularly worrying, as any area of law where precedents are taken into account can potentially report increasing unpredictability. For the above described reasons the concerns of the legal community deserve our

² According to MacCormick values like legal certainty or legal security are of moral value because of the form of life they provide to citizens. See: Neil MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning* (Oxford University Press 2005) 12.

³ See: Lon Fuller, *The Morality of Law* (first published 1964, Yale University Press 1969) 33-70.

⁴ Some of the most compelling problems seem to be the widespread corruption among officials and the high levels impunity. These institutional problems, among others, and the exacerbation of criminal activity led to some voices announcing that Mexico was a 'failed state'. See: United Nations Economic and Social Council, *Civil and Political Rights Including Questions of Independence of the Judiciary, Administration of Justice, and Impunity. Report on the Mission to Mexico* (E/CN.4/2002/72/Add.1, 2002); Joel Kurtzman, 'Mexico's Instability Is a Real Problem. Don't Discount the Possibility of a Failed State Next' *The Wall Street Journal* (New York, 16 January 2009) <<http://online.wsj.com/news/articles/SB123206674721488169>> accessed 15 November 2013

⁵ Fuller reminds us that 'legality' (or in more contemporary terms the 'rule of law') remains an aspiration. In his view, 'infringements of legal morality tend to be cumulative' distancing a system from its aspirational target. Fuller (n 3) 92.

attention. The problem has, however, not yet been comprehensively analysed. Our intention therefore is to fill this analyses gap by providing an insightful look into the issue, diagnosing its causes and suggesting possible solutions.

Despite the lack of studies accounting for the noted problem with precedents, several proposals on how to get out of it have been submitted in response to enquiries by the Mexican Supreme Court - most notably, a consultation by the legal community, and the official line of action articulated by a group of researchers appointed by the Court. Most of these advise for the promulgation of statutory rules, indicating the scopes of validity of precedents and the creation of institutional agencies that unify the precedents' form and substance. Such solutions follow a top-down approach that depends on institutional reforms to vertically control the production and use of the body of precedents. Moreover, the documents submitted by the legal community show an almost blind reliance on the power of statutory-rules and institutional reform to put an end to the problem experienced with legal precedents. This thesis argues that the proposed actions above mentioned are built upon a defective understanding of the problem and that they do not address its core causes, for which these remedies are likely to be insufficient and to present further complications in the long run.

On the one hand, the as proposed solutions seem unaware of the historically-built cognitive cargo that directs the expectations regarding precedent-based reasoning of the Mexican legal community. Additionally, the measures they suggest fail to take on board the knowledge demands which emerge from a context that has been deeply challenged by extensive legal changes on different levels; that is the current dynamics of knowledge change that were triggered by the persistent rule of law reformation efforts of the past years, and that call for a different style in facing particular practical matters. Also, they crucially seem to overlook core insights about the function and operation of legal precedents, found in comparative, theoretical, computational and historical analyses; on the contrary, these solutions implicitly reflect an alternative model of precedents that lacks functionality, especially in the current scenario. All of these shortcomings mirror a deficient understanding of the wide framework of legal knowledge that shapes legal practices. They denote an overreliance on the power of rules to guide all practical aspects (including matters

related to legal reasoning) and a tendency to overlook other important knowledge features that act normatively over practice. The focus of the solutions seems to ignore the limitations of explicit rules in building competence in how to do certain things, especially how to reason.

In recent years there have been some developments in respect of implementing the as noted solutions. In April of 2013 a new Amparo Act was enacted, to create a new judicial organ in charge of the unification of precedents. The new instance started functioning in June of 2013. Additionally, the Act included a new set of explicit rules, expanding further the already complex system of rules that regulates Mexican precedents, with the intention to make case-law a more homogeneous body. It is still too early to see the results of these reforms, but we believe that they are likely to eventually prove insufficient. The reforms do not address the actual problem of the Mexican legal community when handling legal precedents; instead, they just offer temporary relief to the increasing complexity that precedents are introducing in this legal system. In this respect, legal practitioners will remain equally unable to handle complexity and construct orderly maps of the law from previous cases. The proliferation of judicial precedents is no more than a reflection of the important change of view regarding the function and operation of the law and certain legal institutions in that context; a situation that is unlikely to be reversed in the immediate future. In this sense, the solutions already implemented might serve as palliative measures for some time, as long as complexity does not overpass the unification efforts of the new courts. However, as these measures do not offer the deep solutions that the problem at hand substantially requires, this will probably re-emerge in the near future. Thus, this thesis aims to give an alternative reading of the issue, over which we might build long-lasting and more conscious of the circumstances at play solutions.

2. A Problem of Knowledge

What we mainly argue is that the problem that Mexican legal practitioners are experiencing is more than anything else a problem of knowledge; and that as such it must be solved by addressing the legal community's deep cognitive-affective

structures. In fact, the complaints and suggestions formulated by the legal community mirror expectations of legal performance based on a particular understanding of the legal enterprise. These sets of structures, which have been in operation within the resident context for some time, now appear to be somehow defective under Mexico's changing economic, socio-political and – in response – legal circumstances. Mexico has tightened relationships with its northern neighbour by means of different agreements (such as NAFTA or Merida Initiative), but also has become a full global participant and has subscribed to widespread ideas such as that of the rule of law (as understood by aiding programs). These interactions have, eventually, involved discursive changes, which at the same time call for cognitive reconfigurations.

The traditional Mexican approach to the law has been characterised by an atypical rigidity, which permeated different areas of practice, including the use of precedents. Nevertheless, in recent years the Mexican legal system has suffered important modifications that aim at introducing a more flexible and dynamic form of law. This intensive reformation effort has given rise to crucial knowledge incompatibilities, and thus calls for a modification of the prevailing deep-knowledge structures. Legal practitioners in Mexico seem to be experiencing conflicts transiting from their former knowledge and the requirements of a new framework. In this transition, understanding legal precedents has been particularly complex for Mexican practitioners.

According to certain jurisprudential insights, along with comparative and computational legal perspectives, legal precedents are flexible and dynamic legal resources that cannot be easily comprehended according to non-scalar concepts such as bindingness, validity and applicability.⁶ In the Mexican context, however, legal practitioners seem to be experiencing problems with understanding precedents under this flexible form of operation. Thus, they request a series of modifications that reproduce the type of certainties created by a strict system of rules of legislative origin. Practitioners ask for rigid rules declaring the scopes of validity of legal precedents that allow them to clear contradictions and apply them to concrete cases.

⁶ Neil Duxbury, *The Nature and Authority of Precedents* (Cambridge University Press 2008) 23.

Mexican legal practitioners seemingly experience confusion when facing more diffused and flexible resources. They seem to feel overloaded and in this sense to experience difficulties in trying to find more or less clear patterns in what is still a fairly small number of precedents. This raises concerns not only about the legal community's conceptual understandings of precedents, but also regarding their (lack of) related procedural knowledge. As we shall see, 'the problem of precedents' in the Mexican context can only be accounted for and solved if we direct our attention to the whole body of knowledge in which that practice is immersed, in opposition to the body of knowledge that this practice is calling for.

In this way, this thesis forms an investigation into legal knowledge. It explores what constitutes legal knowledge, how this arises, develops, changes and affects legal practices. It does not do so, however, in an abstract way, but as a necessary reflection surrounding the factual case that we are to study. Herein, we understand knowledge in a fairly wide manner, comprising declarative and procedural, explicit and tacit cognitive features, and informed by affective inclinations.⁷ These features all together form the knowledge framework in which legal practices are circumscribed. Our objective will therefore be to explore a frequently neglected subject in legal research: that of the cognitive-affective structures and methods held by legal practitioners and that guide them in their professional affairs. In this respect, in examining the case of Mexico we are in reality discussing the broader paradigm of developing legal knowledge and practices.

3. A Cognitive-Jurisprudential Approach to the Problem of Precedents

Following that, this thesis brings together comparative law, legal theory, legal pedagogy and legal Artificial Intelligence (AI) in new, and we hope useful, ways. The aim is twofold: the first is to gain a better understanding of legal systems in transition; more particularly, transition that is not determined by a radical turning point (e.g. change of regime) but occurs in the course of fast-paced changes within

⁷ We follow Paul Thagard's approach to cognition. Accordingly, cognition can be seen as a collection of concepts, beliefs and other representations, associated to emotional attitudes and correlative procedures. See: Paul Thagard, 'How Cognition Meets Emotion: Beliefs, Desires, and Feelings as Neural Activity' in Georg Brun, Ulvi Doguoglu and Dominique Kuenzle (eds), *Epistemology and emotions* (Ashgate 2008) 167-84.

the contemporary global setting. The second is to develop concrete solutions and a new approach to help with this transition and to address some of the concerns raised by those caught up in the process.

Transitions like this have been discussed in the past. Prominent discussions have taken place with the background of legal harmonisation in the European Union. While valuable lessons can be learned from that debate, the institutional set-up and the particular the institutional setting make it problematic to generalise the results and ideas that it created. This study focuses on legal developments in Mexico, a country that has subscribed to some characteristics of the civilian tradition with particular strength and that currently experiences a ‘pull’ towards a different style of practice and knowledge. Unlike Europe, these processes are not mediated by a specific legal framework and an overarching institutional system that can similarly allow a process of mutually trading legal concepts.

Despite these caveats, the debate regarding legal harmonisation in Europe has made valuable contributions to the theory of legal change, which are also relevant in our discussion. In particular, we can observe something that could be called a ‘cognitive turn’ in legal theory and comparative law. If law were nothing else but a system of rules, as the positivist and formalist tradition assumed, legal change should be unproblematic; a mere question of replacing some rules by new ones. For lawyers working in these systems, experiencing this change should not be much more disruptive than, say, learning a new bus timetable, and adjust one’s travel to work accordingly. This is however not what we observe in reality, where the impact of these changes runs much deeper and is much more contested. We rather face changes here that affect the deep level of human cognition and a change in their very identity as lawyers of a specific legal community. The cognitive turn in comparative law has over the last few decades increasingly pointed out the importance of these ‘deep structures’ when analysing legal change. It has however also let some comparatists to conclude that radical, and in particular revolutionary change, is impossible. As discussed above, even those who do not share this conclusion typically require some institutional set up to manage these changes and mitigate their fallout. But for the

Mexican situation, neither position is tenable: change is happening and its impact on 'legal minds' is measurable.

We argue that the missing element that helps us to understand the process of legal change, and also to understand its problems, is mainly legal education. Comparative law and legal theory both focus on the notion of a legal system that presupposes a cognitive or interpretative community. We find this in the comparative work of Legrand as much as in the legal theories of Fish or Dworkin. But here is also a problem: if being a Scottish, French or Mexican lawyer means by definition to be part of a certain cognitive or interpretative community, then anything that changes the identity of this community also threatens the identity of its constituent parts: the individual lawyers. By reifying legal culture or legal community, we take away its dynamic aspect and with this its openness for change. Common (civilian) lawyers are not born; they are made, within a culture and specific educational setting. Similarly, legal theory assumes too often that there is already a mature legal system in place that simply shapes lawyers to join the interpretative and cognitive habitus of that community. What we do not find in the theories of, for example, Dworkin or Fish is attention to the very processes that turn young pupils into lawyers in the first place, and with that the mode of cultural transmission of legal knowledge through the generations. Or put differently, we cannot participate in a Dworkinian chain novel if nobody taught us first how to write literature.

Bankowski uses the image of the journey to understand the process of European integration. In this account, the journey is the never finished process of becoming of the EU.⁸ When we travel, we absorb parts of our environment and change as a result, but we also leave parts of ourselves behind, have an impact on the people we meet, and so change the landscape through which we travel. We may think of legal education as that kind of journey. Where it is most successful, it is not a mere passive reception of legal rules by a student, but a process that changes his cognitive attitude. Legal communities emerge through the network of interaction between students in an educational setting horizontally, and vertically through the interaction with the

⁸ Zenon Bankowski, 'The Journey of the European Ideal' in Andrew Morton and Jim Francis (eds) *A Europe of Neighbours? Religious Social Thought and the Reshaping of a Pluralist Europe* (Centre for Theology and Public Issues 1999).

educators. And, of course, this journey also never truly ends. We cannot rightly understand key themes in modern theory of law and comparative law if we are blind to the formative years of a legal mind.

The interaction, however, works also in the other direction: once we put legal education at the centre of a cognitive theory of legal reasoning, we can get traction to facilitate the change that legal systems are experiencing due to outside pressures. This is the more practical part of this thesis that claims that the best way for Mexico to manage the measurable anxiety that results from current legal changes is to revisit the way it forms legal minds at the law school. Here, legal theory plays an important role: just as we cannot understand legal theory without also looking at legal education, so we cannot reform legal education without reflecting on legal theory. In later parts of this thesis, we therefore propose a new approach to legal education that is informed by comparative and jurisprudential reflection.

We noted that the cognitive turn in legal theory allowed us to think of law as something more than a mere system of positive rules; they are rather rules embedded in a cognitive framework. One of the most important results of this approach in recent years was the idea that in understanding legal education and legal reasoning, we have to ‘go beyond text’. The outcome of this reorientation was a rising interest in legal visualisation, an interest that in particular has also influenced the artificial intelligence and law community. However, unlike visualisation in computer science more generally, where it also gained much of its recent impetus through our need to interpret and make sense of larger amounts of data, visualisation in law and legal AI has so far focused mainly on visualising legal arguments; with that it remained in its imagery mainly indebted to the text-based paradigm. After analysing the specific needs of the Mexican legal profession, we suggest a much more radical new approach to legal visualisation: one that preserves the dynamic of an adversarial legal trial and evokes not just the intellectual notion of logical argument relations, but also the power relations and other environmental information that we can retrieve from geographical maps.

To summarise, the thesis develops around reported difficulties with understanding legal precedents and with engaging in a consistent manner with precedent-based reasoning. Our project can be described, first, as an observation of the use of precedents within the Mexican practice, in the light of the local (traditional) framework of knowledge and in times of a strong knowledge change; second, as a responding attempt to facilitate the construction of functional cognitive-affective structures. Therefore, a large part of it is dedicated to illuminating the typical legal knowledge structures in the indicated context and the ways in which these latter influences precedent-based reasoning. But, moreover, this work sets out to discover how such knowledge structures can be challenged and restructured in view of legal change and proper reform, calling in the process for new concepts, beliefs and ways of doing things.

4. Structure of the Thesis

The discussion will unfold in six chapters. Chapter 1 introduces our perspective on legal knowledge. It provides an overview on how legal knowledge has been approached by legal theoretical accounts. It argues that legal theoretical portraits usually have taken for granted the epistemic considerations over which legal practices are built. In our view, even those socio-legal studies that draw heavily on a shared cultural load do not provide a full and clear enough analysis of the cognitive dimension; that is, they forget that legal knowledge is something that happens in the minds and hearts of legal practitioners. In this way, the chapter presents an account of legal knowledge that is informed in the cognitive sciences and that throws light on some overlooked matters regarding legal cognition.

Chapter 2 takes a leap into the legal history of Mexico. The aim is by no means to make a historical contribution, but to gain understanding regarding the cognitive load that Mexican legal practitioners possess and with which they face tasks such as precedent based reasoning. The chapter analyses how some legal ideas, concepts, beliefs, values and ways of doing things became popular in the past, finding support in cultural and socio-political facts and ideas, and turned into the traditional model of law; that is the shared framework within which legal practitioners were formed for

several generation. Moreover, it analyses how this mental establishment has led to particular expectations, understandings and practical engagement with regards to legal precedents.

Chapter 3 discusses the transition of the Mexican legal community from the traditional model of law towards one that emphasises the openness of the legal enterprise and the active role of the courts in the construction and development of the law. It provides an account of cognitive change derived from legal change that draws on insights of comparative legal studies and the cognitive sciences. This theoretical framework serves to discuss the process of reformation undertaken in Mexico in order to commit with the global ‘rule of law’ ideal and that detonated major discursive and cognitive reconfigurations. The rule of law ideal, as understood by the major aid agencies entailed the ‘germs’ of a different form of law, which eventually spread globally in the form of concrete reform packages and abstract ill-defined ideas. The chapter will explain how these reforms activated discursive, but most importantly, cognitive reconfigurations in the Mexican context, eventually leading to some problems mastering the new knowledge. In this way, this chapter discusses ‘the problem of precedents’ in light of the intensive cognitive reconfigurations legal practitioners are experiencing and, consequently, identifies it as a problem of knowledge.

Chapter 2 and 3 take an interpretative approach. They build an image of the Mexican traditional legal (cognitive) load and of the challenges experienced nowadays, which are based on the analysis of relevant texts, the reviews of, mainly, secondary literature and, less often, primary sources. The reader will find several transcriptions that illustrate the argument, many of which were originally in Spanish. The translations are ours, unless the contrary is explicitly stated.

Chapter 4 aims to provide an external picture of precedents and the process of precedent-based reasoning over which Mexican legal practitioner can take some lessons. This chapter offers some of the main theoretical perspectives that give an account of precedents. It focuses on understanding precedents as argumentative tools

rather than as sources of law in the strict sense.⁹ Nevertheless, in awareness of some explanatory limitations of legal theories, we look towards a widened perspective that reflects better the nature of precedents and precedent-based reasoning. Therefore, the chapter presents a brief historical account of the use of precedents in the common law and civil law tradition that allows us to understand precedents beyond typical descriptions. Moreover, it recurs to the developments of the legal artificial intelligence community in the scope of precedent-based reasoning as a form to expand our insights on the matter. Our main aim is to identify the relevant knowledge that needs to be developed by Mexican legal practitioners in order to become experts in precedent-based reasoning.

Chapter 5 reflects on the role of legal education in creating the professional traits that distinguish a specific legal community. It argues that the forms of seeing, thinking and engaging in legal activities are the product of relevant communications, from which the process of legal education is the most relevant. In this form, the discussion turns to the question of how to create meaningful educational experiences for both fully formed legal practitioners and law students in the Mexican context that would allow them to master precedents in practice. The chapter aims to offer an educational platform to help developing the required knowledge needed by Mexican legal practitioners so as to become competent precedent-based reasoners. Following the broader narrative of this thesis, the platform is offered as means to help remedying the problem of precedents currently being experienced in the Mexican context, which, since it is a problem of knowledge, requires solutions that attend to the deep knowledge structures of the local community.

Chapter 6 is the final and conclusive chapter. It reflects on the practical and theoretical implications of this thesis.

⁹ For this reason we will usually refer to precedents as legal ‘(re)sources’ rather than sources.

1. Addressing the Hearts and Minds of Legal Practitioners

“I shall consider human knowledge by starting from the fact that we can know more than we can tell. This fact seems obvious enough; but it is not easy to say exactly what it means.”

Michael Polanyi, The Tacit Dimension

1.1 Introduction

Legal practices are grounded on much more than a set of legal rules. To understand fully legal practices we must address what is in the heart and minds of legal practitioners. Arguably, legal communities are shaped by a set of cognitive-affective features, over which they develop certain competencies. Legal practitioners generally hold sets of ideas, concepts, beliefs, values, methods, and affective inclinations (that we will generally refer to as ‘knowledge features’), which contribute to the formation of a determined legal style. Becoming a legal practitioner, involves the acquisition of a conceptual framework, some emotional predispositions, and a set of methods and procedures; in other words, it involves the acquisition of the local knowledge framework over which legal practice has been founded and performs.

The relevance of these broad schemata, however, has been often neglected in legal studies. Generally, legal scholars have focused intensively on legal rules, but little has been said on the knowledge structures that allow legal practitioners to carry on legal operations with and beyond legal rules. As a consequence, this has led to the assumption that the knowledge of legal practitioners can be somehow reduced to the knowledge of rules; which, in turn, has led to overlooking the wider spectrum of knowledge features that lies behind legal practices. In this respect, Geoffrey Samuel has argued that ‘the assumption that knowledge of the law consists of knowledge of rules – that is, normative propositions capable of being expressed in symbolic

language (natural and mathematical language – is inadequate.’¹ Legal professionals display on a day-to-day basis a complex knowledge framework that gives them direction when engaging with legal practice. Legal practices cannot be explained exclusively on the platform of legal rules, but most importantly through a set of intertwining theories, concepts, beliefs, methods and emotions, which in some cases are impossible to communicate expressly. In this respect, legal knowledge is not only greater than the knowledge of rules, but legal rules alone will often prove to be insufficient in order to build practical competence. As Samuel pointed out, ‘[t]his is not to deny that law can be seen in terms of texts, that is to say normative propositions stated in natural language. In fact the very existence of statutory texts and law reports settling out applicable rules indicates that it would be idle to deny the existence of linguistic propositions. The point to be made, however, is that there is more to legal knowledge than just rules, in the same way that there is more to the natural and social sciences than just rules.’²

In order to understand legal practices in the correct light it is necessary to see them as deriving from a greater set of assumptions and inclinations. In this chapter we aim to provide a framework for understanding the broader dimensions of legal knowledge, those over which legal practice is actually built. First, we will study some legal theoretical perspectives approaching the matter of legal knowledge: those that emphasise text-based rules as the core of legal knowledge, and a set of socio-legal insights that observe legal practices as happening within a fuzzy socially built cognitive framework. However, these legal perspectives have not fully developed the scope for understanding legal knowledge, and still entail some problematic comprehensions. We will attempt to enrich these perspectives and overcome some of their main problems by introducing insights from cognitive sciences. These studies have developed important understandings regarding human cognition that can help us build a more accurate image of legal knowledge.

¹ As Samuel notes, knowledge of the law has been typically reduced to knowing the rules. See: Geoffrey Samuel, *Epistemology and Method in Law* (Ashgate 2003).

² *ibid.*

1.2 Knowledge of Text-Based Legal Rules

Legal rules are probably the most easily recognisable legal features; but even if those rules are important sources of legal knowledge that we shall not ignore, they should be understood as constituting only a small portion of the wider framework. In legal theory, the discussion that the law is more than rules is, actually, nothing new. However, certain theories approach the law as an enterprise having to do with barely more than (text-based) propositions, which tends to reduce legal knowledge to the knowledge of rules.³ Rule-based accounts of law, however, are built over several knowledge assumptions; for example, they presume the existence of legal subjects with certain understandings, which allow for making sense of texts when the text itself is insufficient.

Interpretative theories of law presuppose that there are subjects capable of making consistent decisions regarding textual sources. In fact, at the core of interpretative perspectives lies the image of an interpretative community. The community of interpreters, according to Stanley Fish, possesses a common conventional point of view from which it constructs the meaning of texts.⁴ Despite generally differing to this account, Dworkin's theoretical project also presupposes the existence of an interpretative community that participates in a set of shared understandings on different levels: from certain interpretative solutions to (most importantly) procedural grounds that indicate how to handle legal sources. Dworkin notes that '[c]ertain interpretive solutions, including views about the nature and force of legislation and precedent, are very popular for a time, and their popularity, aided by normal intellectual inertia, encourages judges to take them as settled for all practical purposes. They are the paradigms and quasi-paradigms of their day.'⁵ However, for Dworkin agreement, and particularly on certain procedural grounds or the law seems to be a basic precondition for legal practice. He notes that '[l]aw cannot flourish as an interpretive enterprise in any community unless there is enough initial agreement about what practices are legal practices so that lawyers argue about the best

³ See e.g.: Andrei Marmor, 'Pragmatics of Legal Language' (2008) 21 Ratio Juris.

⁴ Stanley Fish, *Is There a Text in This Class: The Authority of Interpretative Communities* (Harvard University Press 1980).

⁵ Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 89.

interpretation of roughly the same data.’⁶ Despite the importance of this set of knowledge, Dworkin seems to take it for granted and does not provide further analysis.

There are many more theories, and several of them elaborate in more detail the different operations that legal practitioners perform when engaging with legal rules.⁷ Nevertheless, they tend to overlook the fact that performing these procedures presupposes the existence of particular knowledge structures. Therefore, legal perspectives of this sort are of limited utility when trying to understand the cognitive-affective framework surrounding these practices. As these schemata are usually taken at face value, the theories omit any reflection on the broader dimension of knowledge, and, most importantly, on how they happen to develop and become shared starting points. In this manner, they can only show us fully formed practices as if they had emerged spontaneously.

1.3 Knowledge of Fuzzy Socially Constructed Features

Socio-legal perspectives have highlighted the importance of a common set of implicit dispositions, understandings, habits, customs, skills, abilities and so on in shaping a particular way of thinking about and practicing law. In this respect, Sacco has argued that a legal system comprises ‘[a] combination of both spoken and mute elements.’⁸ This mute aspect of law refers to the normative commitments that surpass linguistic formulation. He also notes, however, that ‘lawyers are primarily interested in spoken sources and acts and feel uneasy with mute sources and acts.’⁹ Nevertheless, such bias seems unable to erase the mute or unspoken dimension of law, that is, the practical understandings that go without saying.

Martin Krygier has also reminded us that having knowledge of the law is more than having learned a set of rules. Building over Michael Polanyi’s ideas, he observes that

⁶ *ibid* 90-91.

⁷ For example, MacCormick notes various problems endemic to rule-application, which he calls problems of ‘relevancy’, ‘interpretation’ and ‘classification’, which involve certain legal reasoning operations to be performed by legal practitioners. See: Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press 1978).

⁸ Rodolfo Sacco, ‘Mute Law’ (1995) 43 *The American Journal of Comparative Law* 464.

⁹ Nevertheless Sacco seems to think that having spoken law is just a matter of choice or style. See: *ibid* 465.

there is a tacit dimension of knowledge underlying legal competence.¹⁰ In Krygier's view, this knowledge is built and transferred as a matter of tradition. Thus, '[l]egal traditions provide substance, models, exemplars and a *language* in which to speak within and about law.'¹¹ A tradition 'shapes, forms and in part envelops the thought of those who speak and think through it'¹² and they, in turn, determine what constitutes the 'obvious' or 'natural' for that legal community.¹³ For Krygier, legal practices surrounding posited texts, such as statutes, are also deeply embedded in tradition. Posited rules presuppose the existence of an underlying 'invisible discourse' that makes possible and understandable any 'visible discourse'.¹⁴ Patrick Glenn, who also highlights the traditional character of law, argues that working within a tradition provides a set of common (epistemic) factors.¹⁵ For Glenn, traditions are composed by information – i.e. ideas – which imposes an epistemic structure in the community. For him, information shared by the tradition-bound epistemic community is far broader than a set of legal rules; it may include concepts, beliefs, values, stories and so forth.¹⁶ Nevertheless, Glenn's understanding of 'tradition as shared information' is certainly narrower than Krygier's perspective of tradition, which might actually generate some problems when using Glenn's ideas to account for a 'tacit' and more 'hands-on' dimension of legal knowledge.

Certain socio-legal perspectives have recurred to even broader concepts, such as culture, to account for the set of shared understanding and consistent patterns of action. For David Nelken legal culture is 'one way of describing relatively stable patterns of legally oriented social behaviour and attitudes.'¹⁷ In his view, the elements of legal culture range from facts about institutions, to forms of behaviour, and other 'nebulous aspects' such as ideas, values, aspirations and mentalities.¹⁸ Similarly, Jeremy Webber notes that culture provides individuals with a shared

¹⁰ Martin Krygier, 'Law as Tradition' (1986) 5 *Law and Philosophy* 246-47.

¹¹ *ibid* 244.

¹² *ibid*.

¹³ *ibid* 246.

¹⁴ Martin Krygier, 'The Traditionality of Statutes' (1988) 1 *Ratio Juris*.

¹⁵ Patrick Glenn, *Legal Traditions of the World: Sustainable diversity of law* (Oxford University Press 2000)

¹⁶ William Twining, 'Glenn on Tradition: An Overview' (2005) 1 *Journal of Comparative Law* 113.

¹⁷ David Nelken, 'Using the Concept of Legal Culture' (2004) 29 *Australian Journal of Legal Philosophy* 1.

¹⁸ *ibid*.

language, beliefs, concepts and phases that help them to make sense of the world. This ‘intersubjective dimension of human understanding [...] derives not just from the body of articulated concepts and beliefs one inherits, but also from the patterns of interaction existing in any society, even when these have not been articulated in conceptual terms or when they remain the subject of only partial and pragmatic articulation.’¹⁹ For Webber, social interaction of certain intensity allows subjects to share a broad set of understandings; e.g. a sense of what is considered important, a set of points of reference, styles of reasoning, interpretations, vocabulary and implicit norms.²⁰ Culture, thus, provides a broad framework from which explicit features – such as institutional structure, form and content of enactments, etc. – can be explained in relation to a whole order.²¹ Also, according to John Bell ‘[t]he law is something more than simply a system of rules or legal standards. Those rules operate in a context of institutions, professions and values that form together a “legal culture.”’²² In his view, legal actors are only able to understand and join the practice if they share this broad cultural background. In fact, for Bell these cultural understandings are constitutive of the (institutional) practice; i.e. they are prerequisites without which the practice would not have any meaning.²³

Culture, however, is a very broad concept. In this respect, Cotterrell has noted that the term legal culture is overly vague and groups together ‘extremely diverse elements’ to be a useful explanatory resource.²⁴ He, thus, has proposed compartmentalising it. According to Cotterrell ‘culture [...] typically embraces traditions (a sense of shared cultural inheritance of some kind) and values or beliefs (a sense of convergence or commonality in ways of thinking, commitments, outlooks, or attitudes in a population). Overlaying these components of culture are often affective (emotional) elements that colour shared traditions, value-commitments, attitudes, or outlook.’²⁵ Communities share diverse cultural elements:

¹⁹ Jeremy Webber, ‘Culture, Legal Culture, and Legal Reasoning: A Comment on Nelken’ (2004) 29 *Australian Journal of Legal Philosophy* 30.

²⁰ *ibid* 30-31.

²¹ *ibid* 36.

²² John Bell, *Judiciaries within Europe: A comparative Review* (Cambridge University Press 2006) 6.

²³ *ibid*.

²⁴ Roger Cotterrell, ‘Invoking Legal Culture: Debates and Dissents: The Concept of Legal Culture’ in David Nelken (ed) *Comparing Legal Cultures* (Darmouth 1997).

²⁵ Roger Cotterrell, ‘Law in Culture’ (2004) 17 *Ratio Juris* 6.

culture might be a matter of tradition based on common geographical and historical experience, shared beliefs and values, or emotional bonds. Therefore, in his view, it becomes important to distinguish between communities of belief or values, traditional communities, affective communities and instrumental communities.²⁶ Cotterrell is right in that some groups are majorly connected by affective ties and, thus, share emotional elements, while others are majorly connected through their shared beliefs. However, segmentation of culture is not of much help to account for the knowledge frameworks that the legal communities possess. As we shall see, beliefs and concepts ('cold cognition') and emotional elements ('hot thought') are not necessarily disconnected, making it difficult to do classifications according to Cotterrell's criteria.

The focus on culture and tradition has led to an increasing interest in the knowledge frameworks that affect legal practices. Focusing on questions over the broad set of knowledge features held by legal practitioners seems to be more and more common in legal comparative studies. John Bell points out that this is because legal comparativists 'rather than focusing simply on the rules and institutions of different legal systems and asking about their functional equivalence, [...] are concerned to understand what these features signify in terms of deep differences which exist between legal systems.'²⁷ Some comparativists have realised that meaningful comparison between legal systems or legal traditions need to go beyond legal rules and other propositions.²⁸ Comparative lawyers have noted that focusing on legal rules alone might sometimes give an incomplete outlook of legal practice. In this way, it is possible to observe in some comparative works an effort to uncover the broader epistemological considerations that make a legal family, tradition or system what it is. According to Geoffrey Samuel, legal comparativists are growing more aware of the fact that 'the foundation of their enterprise is essentially epistemological.'²⁹ As noted by Samuel, 'comparing legal cultures raises a host of

²⁶ *ibid.*

²⁷ John Bell, 'Review: Comparing Legal Cultures' (1998) 47 *International and Comparative Law Quarterly* 246.

²⁸ Pierre Legrand, 'Antiquis Juris Civilis Fabulas' (1995) 45 *University of Toronto Law Journal* 311-62.

²⁹ Samuel (n 1) 6.

questions about the paradigms, concepts, schemes of intelligibility, processes of explanations and so on.³⁰

Pierre Legrand is possibly the most representative (and fierce) advocate of the epistemologically-informed comparative legal approach, and for this his particular account deserves a more extensive analysis. Building upon a set of sociological perspectives, Legrand concludes that the law is much more than a set of rules. He argues that each legal community possesses particular epistemic inclinations through which rules are 'filtered'. The model of cognition forged by cultural processes provides the legal community with a particular legal outlook that determines legal practice. These are deeply embedded structures residing at the core of the legal system, making it what it is and what it is not; that is, giving it its particular identity. Thus, the cognitive and emotional inclinations held within a legal system are of extreme importance to wholly understand the legal enterprise. In Legrand's view a meaningful account of legal systems must be performed at the level of *mentalité* (mentality) – which he alternatively calls worldview, *weltanschauungen*, viewpoint, outlook, episteme, epistemological clusters or mindset.³¹ A mentality is a set of 'factors which, although usually intervening in the realm of the unconscious, mould the structures of thought legal actors use to interpret and understand the social world around them and their own location within it.'³² Mentalities, thus, can be understood as states of mind, ways of seeing the world, modes of understanding reality, or mappings of the world constructed under the influx of culture.³³ They fulfil a normative role, as they control and direct legal practices.³⁴ Legal mentalities give form, for example, to the way the community conceives the role of law, what they consider to be relevant for the law, what is the place of certain legal features and what are the characteristics of a particular legal practice. This collection of tendencies, inclinations or propensities is the receptacle of legal developments, legal

³⁰ Geoffrey Samuel 'Epistemology and Comparative law: Contributions from the Sciences and Social Sciences' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004).

³¹ Legrand does not seem to be concerned about his terminological pluralism, and although we will try to approach the matter with more precision, we will sometimes we will follow the same fuzzy approach.

³² Legrand, 'Antiquis Juris Civilis Fabulas' (n 28).

³³ Pierre Legrand, *Fragments on Law-as-Culture* (W.E.J. Tjeenk Willink 1999) 11.

³⁴ *ibid.*

precepts and the starting point when engaging in legal practices, including legal reasoning. For Legrand, mentalities seem to be deep layers of assumptions, or ‘a framework of intangibles’ shared almost unconsciously by legal communities, and which limit the possibilities of experience.

Legrand has also reflected on the origins of a particular legal mentality. For him mentalities seem to be built by internal legal socialisation and external influences.³⁵ Legrand argues that legal professionals are socialised human beings, or individuals educated in a specific cultural environment, and as such they are the participants of particular socially-shared understandings that provide them with versions of the legal world, a set of values, beliefs, attitudes or a general outlook; that is, a legal mentality that is not possible to isolate from its broader cultural heritage.³⁶ In his view, the law participates of an ‘inherent worldliness’, which means that legal viewpoints are ‘haunted [...] by discursive formations – historical, political, economic, social, psychological, linguistic [...]’.³⁷ In a similar way, Robert Gordon (whose work Legrand acknowledges) finds that law is something that happens within society – i.e. that law is irremediably attached to a broader set of social interactions. In his view, it would be hard to understand the law as the product of a culturally isolated tribe of beings. Thus, as legal professionals are participants of a culture, legal practices are ‘simple dialectics of [that] parent speech’.³⁸ In this way, ‘a legal system [...] is unlikely to depart drastically from the common stock of understanding in the surrounding culture, in the methods it uses to categorise social realities, the

³⁵ Legrand’s claims about the relevance of extra-legal factors in the formation of the legal mind have to be distinguished from certain socio-legal approaches that understand the law as a mirror of society. For example, Friedman argues that ‘Legal systems do not float in some cultural void, free of space and time and social context: necessarily, they reflect what is happening in their own societies. In the long run, they assume the shape of those societies, like a glove moulds itself to the shape of a person’s hand.’ See: Lawrence Friedman, ‘Borders: On the Emerging Sociology of Transnational Law’ (1996) 32 *Stanford Journal of International Law*, 72. Legrand’s perspective does not have to do with the actual connection between social or political happenings and the form of legal features. His account is mainly epistemological, which means that he does not pronounce about the actual contribution of the social, political and economical context in the shaping of the law; instead, he sees the influence of the wider context in the legal community’s mindset.

³⁶ Pierre Legrand ‘The Same and the Different’ in Pierre Legrand and Roderick Munday, *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003).

³⁷ Pierre Legrand, ‘On the singularity of Law’ (2006) 47 *Harvard International Law Journal*, 524.

³⁸ Robert W Gordon, ‘Critical Legal Histories’ (1984) 36 *Stanford Law Review* 90.

arguments about facts and values that it recognizes as relevant and persuasive and the justifications it gives for its exercises of power.’³⁹

Legrand’s approach is important as it focuses on the legal knowledge structures of legal professionals. It reminds us that legal experts do not approach daily life in a blank slate, but with a baggage of assumptions about how the world is, how it works, how they should deal with it and, even, how they should feel about it. In other words, it points out that legal communities share a framework of knowledge that gives place to certain legal practices, and restrains others; that they share a map that provides some cohesion to community performance, giving it an identity, style, or general sense of what being a professional means in a specific legal system or legal tradition. In this sense, this epistemic turn unveils a set of considerations (beyond the dimension of rules) that guide legal practices, and that usually remain hidden. This perspective, however, inherits some ambiguities from its theoretical subscriptions, which we would like to avoid. Here we will attempt to bypass some of these shortcomings by introducing certain insights developed by cognitive sciences and by adopting a multilevel approach.

Looking therefore at Legrand’s account, one main problem is detected in the core idea of mentalities, that being overly vague and diffused.⁴⁰ Legal mentality emerges as a fairly ambiguous concept, denoting a very broad knowledge structure that includes both tacit and explicit knowledge about the law.⁴¹ Knowledge structures indeed involve a broad range of features: declarative, procedural, conceptual, emotional, tacit or explicit. A broad or catch-all term such as mentality can be a useful communicative resource (and this thesis will often recur to it to facilitate its narrative), but it equally falls short of encompassing a better grasp of how this knowledge is articulated and related. Nevertheless, we consider that certain insights and methods of cognitive sciences could help us get a neater image of the knowledge

³⁹ *ibid.*

⁴⁰ Geoffrey Lloyd, *Demystifying Mentalities* (Cambridge University Press 1990).

⁴¹ He understands that legal systems and traditions involve ‘cognitive, intuitive and emotional approaches to law, legal knowledge, the role of law in society, the way law is or should be learned, the place assumed by legislation in the community, the function of the judge and so forth.’ See: Pierre Legrand, ‘Structuring European Community Law: How Tacit Knowledge Matters’ (1998) *Hastings International and Comparative Law Review* 873.

held by legal practitioners. For cognitive sciences there is no novelty in the fact that human practices are related to knowledge structures; thus, it comes as no surprise that they have more developed accounts and methods to represent knowledge. In this respect, taking on board the insights of cognitive sciences on how mental structures are integrated might help us advance towards a better understanding of legal knowledge. Additionally, using cognitive-affective maps (that is, visual graphs that include information about the positive and negative emotional values related to conceptual structures) could help us put some order to at least part of the confusing reality of legal knowledge.⁴²

Another problem with Legrand's account is that despite the fact that he aims to focus on the epistemic aspects of the law, he does not focus much on individual minds. In fact, his standpoint leads to an over-emphasis on the social dimension of knowledge. Legrand does distinguish between the individual and the social dimension, as he recognises that the anthropomorphisation of communities as entities capable of thought and remembrance is not always a useful resource.⁴³ However, his focus on the analysis of social discourses tends to leave behind the individual. As the individual becomes forgotten, socially constructed discourses seem taking distance from human reality; without a human 'repository' to hold them they become an abstraction, an almost mystical entity navigating across the skies.⁴⁴ The problem with this distribution of the individual and the social is not only that it involves an unnecessary fiction, but it also leads to some mistaken conclusions regarding the

⁴² Paul Thagard, 'EMPATHICA: A Computer Support System with Visual Representations for Cognitive-Affective Mapping' K McGregor (ed), *Proceedings of the Workshop on Visual Reasoning and Representation* (AAAI Press 2010).

⁴³ Samuel's work is an important contribution to the epistemological understanding of law. In his view legal knowledge involves a set of concepts and categories, and methodologies which determine the way in which legal professionals build legal facts. For him, legal experts not only apply rules to facts as is commonly thought, but they construct and establish connections between legal categories and relevant factual features. These categories, taxonomies and methods of thinking are constructed through historical processes, and consequently they result in a particular style. See: Samuel (n 1).

⁴⁴ It has been noted that '[t]he chief limitation of the mentalities approach – and of the whole Durkheimian complex of which it is a part – lies in its reductionist tendencies: analogues and homologies are discerned or posited between social structures and systems of thought, with the latter "explained" as functional emanations of the former. Much of this work is undoubtedly informative and at times brilliantly suggestive, but typically lacking is any clear account of process or mediation and specified forms of human agency.' See: Joseph M. Bryant, 'Review: Demystifying Mentalities by G. E. R. Lloyd' (1992) 46 *Phoenix* 278.

possibilities of changing legal knowledge, as human minds may be more malleable than social discourses.

Also, for Legrand mentalities are local or contextual products. Nevertheless, the way he understands this contextual character is somehow problematic when attempting to account for legal change. For him the local outlook seems to be only receptive of local happenings, but impervious to foreign disruptions or influences. This appreciation has led him to conclude that there cannot be legal transplants in a meaningful way,⁴⁵ as the local will always impose itself over the foreign or external. In this sense, legal mentalities become self-referential or characterised by some sort of closure, similar to that of autopoietic systems.⁴⁶ This leads to a wrong impression regarding the interaction of understandings held within a native legal system and those of foreign origin, as well as regarding the possibilities of experiencing a meaningful change of mind and heart. We will return to this matter in Chapter 3 where we present an alternative account of legal change and (derivative) cognitive change, consonant to the insights of cognitive sciences as examined below in section 1.4.

First, however, we should point to one final problem in Legrand's take on legal knowledge, where the relationship between social interactions and knowledge structures is not always clearly sketched. For example, Legrand often asserts that mentalities are historically and culturally constructed, but he does not deeply analyse which (and how) enculturation processes deliver cognitive traits. He frequently affirms that legal viewpoints are the consequence of social, political and economic considerations. He therefore seems to emphasise the role of extra-legal considerations in shaping legal mentalities. Other times he highlights the schooling processes in which students become professionally educated, stressing the role of internal to law narratives in the formation of the professional outlook. In all this, Legrand does not analyse how internal and external understandings interact in different contexts to form the local legal mentality. In this respect, the argument that

⁴⁵ Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law*.

⁴⁶ Gunther Teubner, 'How the Law Thinks: Toward a Constructivist Epistemology of Law' (1989) 23 *Law and Society Review*.

legal mentalities are culturally or socially constructed appears somehow empty, if not backed by a deeper understanding of the role and interaction between such constructive processes in the relevant context.

Looking back at the examined socio-legal perspectives, we find them not only steps further into recognising the relationship between legal knowledge and legal practice, but engaging intensively with it. However, even Legrand's account of legal mentalities, the most advanced of these approaches in dealing specifically with the minds of lawyers, seems one way or the other incomplete. A possible way forward can be then considered in the work of Geoffrey Samuel, a frequent collaborator of Legrand in recent years. Samuel offers a historical account on the epistemology and methods used by legal professionals in different European legal systems and at different times, providing for a more accurate view of the 'situated' processes of construction of legal knowledge.⁴⁷ His approach seems more fruitful, as it may be taken to suggest that in order to understand the cognitive cargo of the legal community we must perform a contextual analysis of the particularities of the legal system in question. In this thesis we argue that such an analysis is necessary for avoiding the impasses of aprioristic generalisations, like those noted in Legrand's work. Next we will show how the scope of a contextual analysis of this calibre would be enriched with insights from the field of cognitive sciences.

1.4 Knowledge according to Cognitive Sciences

In order to get a better grasp of the knowledge features that form legal minds we can take into account developments in the cognitive sciences, especially in the work of Paul Thagard. Cognitive sciences can help us find a more balanced interplay between the social and the individual dimensions of knowledge. Additionally, the cognitive sciences' research can aid us in getting a deeper understanding of the types of knowledge that are generally included in the ambiguous terminology of culture, traditions or mentalities. Actually, some methods used by cognitive scientists, such as cognitive-affective mapping, can be of use for acquiring a clearer idea about sets of relevant knowledge features and how they interconnect between them. Here we

⁴⁷ See: Samuel (n 1).

will examine four of these insights and methods as more relevant to the development of our discussion.

1.4.1 A Multilevel Approach to Knowledge

According to Thagard, one should not fall for the holistic view that reality is just the product of social construction (which makes us forget about the role of the individual); but at the same time should also avoid the other extreme, that is the individualistic perspective which reduces social events to actions of individual people as determined by self-interest. In his view, the key to a middle point is the recognition that life happens on multiple levels. We ought to understand that ‘the actions of groups result from the actions of individuals who think of themselves as members of groups.’⁴⁸ A social group is tied together by social bonds, which are largely psychological. Social groups are formed by individuals that share mental structures, and through which they become members of that group. Different sorts of social interaction derive in cognitive-affective frameworks by which individuals become members of a group.⁴⁹

Based on this interconnection between the social and the psychological dimensions Thagard uses a multilevel approach. This method takes into account that parts (from the smallest to the biggest) constitute wholes at different levels of organisation.⁵⁰ He argues that the self is understood as a system that operates at the social, individual, and even lower levels. The social level consists of individual persons that are influenced by an environment; particularly, by their social and communications interactions. At a lower level we find individuals with particular mental representations (such as concepts and beliefs) and behaviours.⁵¹

⁴⁸ Paul Thagard, ‘Mapping Minds Across Cultures’ in Ron Sun (ed), *Grounding Social Science in The Cognitive Sciences* (MIT Press 2012) 36.

⁴⁹ *ibid.*

⁵⁰ Scott D. Findlay and Paul Thagard, ‘How Parts make up Wholes: The Dynamics of Composition and Emergence’ (2012) 3 *Frontiers in Physiology* 1-10.

⁵¹ For Thagard there are two more levels: a third level that is integrated by the interconnections between neurons; and a forth level formed by the molecular mechanisms that give place to the neural and psychological aspects of the self. Nevertheless, these will not be discussed in this thesis. Thagard, ‘Mapping Minds Across Cultures’ (n 45) 39.

In this sense, socially shared knowledge structures can be said to be the ‘product of interaction between networks of mental representations at the individual level and networks of social communication at the group level.’⁵² At the individual level we observe ideas, beliefs and values that give rise to a person’s understanding and, thus, behaviour. At a social level we find individual minds that by means of their interactions and communications give rise to collective mentalities and action. These two levels are somehow interconnected insofar as changes in an individual’s mental structures might trigger changes to the social communications, but also since social exchanges might trigger the reformulation of individual mental schemata. Nevertheless, we must not forget that ultimately social groups do not have brains, and thus cognition takes place in the minds of individuals. The concepts, beliefs and values that represent the group are embedded in the individual, who develops a ‘group self’.⁵³

Being aware of the fact that the mental representations, which people need to function as a group are to a large extent psychological, permits us to demystify perspectives which present socially shared knowledge as a discourse disconnected from individuals. This distinction between knowledge as social discourse and as psychological structures delivers eventually significant practical consequences. For example, it helps us realise that some social experiences or communications might be more powerful than others in psychological terms as a means to build knowledge structures. Most importantly, it allows seeing that changing socially-shared knowledge goes beyond the macro-sociological dimension; it is not only a matter of changing discourses, but also involves changing people’s minds.

The shared knowledge framework that is forged through relevant social interactions and which constitutes the background to certain practices (but also to certain practical failures) will be extensively discussed in other parts of this thesis; it features

⁵² Thomas Homer-Dixon and others, ‘A Complex Systems Approach to the Study of Ideology: Cognitive-Affective Structures and the Dynamics of Belief Systems’ (2013) 1 *Journal of Social and Political Psychology* 343.

⁵³ *ibid* 346.

heavily in the contextual analysis of particularities of legal systems that, as previously stated, our overarching discussion has set to engage with.⁵⁴

Sociological studies of knowledge, cognitive anthropology and the history of ideas are domains that have been particularly interested in reporting on different forms of socially shared knowledge. In the scope of the law, certain comparative, historical and sociological legal studies might provide us with insights about the knowledge features shared by a legal community. Sometimes such accounts are based on the personal views of members of legal communities; others on studies of legal doctrines, rules or theories, on external descriptions of non-members of the epistemic community, and so forth. As we shall later see, these studies could serve in indicating the knowledge framework which operates behind a specific legal community, as well as the reasons for its particular development.

1.4.2 Knowledge Acquisition

Individuals acquire knowledge through their interactions with the environment and society. Learning through social interactions and communications is a process that can arise spontaneously but in many occasions it is the result of deliberate socialisation. According to Dewey '[s]ociety exists through a process of transmission' and that '[t]his transmission occurs by means of communication of habits of doing, thinking, and feeling from the older to the younger.'⁵⁵ He notes that communities emerge due to the communication of shared aims, aspirations, beliefs and knowledge, i.e. a 'common understanding' or 'like-mindedness'.⁵⁶ In other words, different socialisation processes result in shared mental representations that tie people together in communities.

⁵⁴ Our interest in this work will turn on the set of knowledge structures shared by the members of the legal community due to their belonging to that social group, as opposed to individual mental representations or structures deriving from different social interactions. We aim to analyse the structures that provide what John Bell has referred to as the 'institutional perspective'— that is, those beliefs, concepts and values shared by the legal community and that give grounds to their style of practice. See: John Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge University Press 2006) 2-10.

⁵⁵ John Dewey, *Democracy and Education* (Penn University 2001) 7.

⁵⁶ *ibid* 8.

The main processes of socialisation vary depending on the type of community being studied. In complex societies formal education is necessary to transmit knowledge that would not be developed otherwise. Therefore, professional education is usually developed within the setting of formal education. In this way, legal professionals – as we know them nowadays in the Western world – are largely a product of formal education. The law school experience is the most important one with regards to the formation of legal professionals: it is the event where a set of knowledge features are communicated to students in order to help them become members of the legal community. In the law school students acquire concepts; they learn rules and, most importantly, how to ‘think like a lawyer’.⁵⁷ The most basic knowledge structures that distinguish a member of the legal community from someone not belonging to it are acquired through formal legal education. For this reason, when analysing the knowledge framework of legal practitioners one should pay special attention to what is transferred through the process of schooling.

However, we should not forget that legal practitioners are not living in a vacuum: they are situated in a specific context and are participants of many different social communications characteristic to it. In the way noted by Legrand and Gordon, legal practitioners are participants of the wider social, political, economical and cultural understandings, and in that way their broader knowledge features might find their way into their legal minds.

⁵⁷ Frederick Schauer has noted that: ‘[s]tudying law is not primarily about learning a bunch of legal rules, the law schools insist, for law has far more rules than can be taught in three years of legal education. Besides, many of the legal rules that might be learned in law school will have been changed by the time the students enter legal practice. Nor is legal education about being instructed in where to stand in the courtroom or how to write a will, for many of these skills are better learned once in practice than at a university. Now it is true that both knowing some legal rules and acquiring the skills of lawyering are important to success in the practice of law. And it is also true that some of this knowledge is usefully gained in law school. But what really distinguishes lawyers from other sorts of folk, so it is said, is mastery of an array of talents in argument and decision-making that are often collectively described as *legal reasoning*. So even though law schools do teach some legal rules and some practical professional skills, the law schools also maintain that their most important mission is to train students in the arts of legal argument, legal decision-making, and legal reasoning – in thinking like a lawyer. Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press 2009) 1.

1.4.3 Accounting for Different Knowledge Features

Many theories of learning and cognition have distinguished between propositional knowledge and procedural knowledge.⁵⁸ Both types of knowledge appear to be essential for performing in complex environments. Propositional knowledge – which is also known as ‘conceptual knowledge’, ‘declarative knowledge’, ‘theoretical knowledge’, ‘factual knowledge’ or ‘knowledge that something is the case’ – is integrated by theories, beliefs, concepts and so on. Nevertheless, the different propositional features are entangled with values associated to them; and these values are emotional in character.⁵⁹ In this sense, propositional knowledge involves not only a form of ‘cold cognition’ but it also represents some sort of ‘hot thought’.

Procedural knowledge – i.e. ‘know how’ – is knowledge of the way to do certain things. Procedures might be expressed in a set of steps; however, common procedural knowledge is quite difficult to capture fully when made explicit. In other words, procedural knowledge might be put in denotative language, but it generally will surpass any effort to be made explicit. This brings in mind Michael Polanyi’s assertion that ‘we can know more than we can tell’ – or in other words that there is a tacit dimension of knowledge.⁶⁰ Polanyi recognises that an important part of our knowledge of how to do things cannot be put into words. In fact, many tasks require knowledge that cannot be made explicit, as e.g. when we try to account how we recognise a face or how we keep balance on a bicycle.⁶¹ According to Eraut, tacit knowledge is knowledge ready to be used, while explicit knowledge may still be too abstract to be used without further learning.⁶²

⁵⁸ For a brief account on the subject see: Paul Thagard, ‘How to Collaborate: Procedural Knowledge in the Cooperative Development of Science’ (2006) XLIV *The Southern Journal of Philosophy*.

⁵⁹ Thagard notes that ‘[t]he mind does not just have concepts and beliefs, but also attaches values to them.’ Paul Thagard, *The Brain and the Meaning of Life* (Princeton University Press 2010).

⁶⁰ Michael Polanyi, *The Tacit Dimension* (University of Chicago Press 1966) 4.

⁶¹ Polanyi argues that ‘tacit knowing contains also an actual knowledge that is indeterminate, in the sense that its content cannot be explicitly stated.’ Michael Polanyi, ‘The Logic of Tacit Inference’ (1966) 41 *Philosophy* 4.

⁶² Michael Eraut, ‘Non-Formal Learning and Tacit Knowledge’ (2000) 70 *British Journal of Educational Psychology* 118.

For Thagard tacit knowledge entails a quick and effortless intuitive recognition of relevant patterns for making a decision or acting appropriately.⁶³ In a way, tacit knowledge involves identifying relevant features and seeing fine connections between them. This knowledge is difficult to be communicated with words, but it can be developed through experience; that is through a more or less prolonged interaction with the particular environment. The enhanced ability to find complex patterns is actually part of what we account as competence or expertise. Experts in different areas are capable of seeing relationships that novices are unable to detect. These complex operations are usually observed by experts as flowing or arising naturally; as being intuitive. This happens, in a sense, due to the fact that the intuitive identification of patterns is largely dependent on sensorial experience.⁶⁴ Intuition involves ‘having a feeling’ which is largely an emotional reaction. Therefore, intuition and emotions are deeply connected.⁶⁵

Attaining competence or expertise in practical matters involves holding a broad spectrum of knowledge, both tacit and explicit, which will surface according to the task at hand. In this fashion, the required knowledge for building competence will come forward in accordance with the necessities of each environment. Nevertheless, not all of this knowledge can be explicitly learned, as some (tacit) knowledge has to be learned implicitly. The acquisition of tacit knowledge features, however, and that of explicit are arguably interrelated. Tacit knowledge might not easily develop in an environment where adverse ideas are held. For example, it would be difficult to believe that a legal system where most of court communications are made in writing would be a fertile ground for creating legal experts with the necessary tacit knowledge about how to argue orally in trials. If an idea, such as ‘legal communications are made in writing’ has such value and acceptance in a social environment, we might assume that the educational efforts will be consistent with this idea and that the local community of practitioners will develop tacit knowledge associated with how to make written legal communications. Nevertheless, there could be some mismatches between ‘espoused theories’ and ‘theories in use’ which

⁶³ Baljinder Sahdra and Paul Thagard, ‘Procedural Knowledge in Molecular Biology’ (2003) 16 *Philosophical Psychology* 490-491.

⁶⁴ *ibid.*

⁶⁵ *ibid* 489.

could eventually lead to the development of knowledge that is not explicitly supported.⁶⁶ In this sense explicit knowledge does not need to precede tacit knowledge.⁶⁷ Tacit knowledge can be developed independently of learning explicit considerations as long as there is the required practical engagement. However, introducing some explicit understandings may form the supporting ground in the acquisition of tacit knowledge.⁶⁸

1.4.4 Mapping Knowledge Structures

Some of the knowledge features integrating cognitive schemata may be better appreciated if visually observed. A wide range of research areas – from psychology, education, computer sciences, politics, management, to history – have used cognitive mapping or visual representations of mental models to gain a better understanding of the cognitive load associated to a determinate society, group, corporation or individual at a specific moment. Mental maps are graphical tools for providing an organised representation of knowledge.⁶⁹ They usually indicate a set of propositional knowledge features (mainly concepts and beliefs) and the relationships between them. Cognitive maps have been used to represent the sets of concepts and beliefs guiding human action; however, they have usually failed to represent the affective dimension – i.e. the web of emotions and motivations that guide thinking. Thagard

⁶⁶ Espoused theories are usually developed in professional contexts. They portray professional as they like to see themselves and present themselves publically. Theories in use are developed in relation to practical needs and even if they remain hidden from the explicit discourse. Michael Eraut, *Developing Professional Knowledge and Competence* (Falmer Press 1994).

⁶⁷ Certain cognitive psychologists have claimed that ‘individuals may learn complex skills without first obtaining a large amount of explicit declarative knowledge [...] because subjects can learn to perform the task without being provided a priori declarative knowledge and without being able to verbalize the rules they use to perform the task.’ This indicates that propositional or declarative knowledge is not always necessary to deliver competence, and that the development of experiential procedural knowledge might sometimes serve better the purpose. Ron Sun, Edward Merrill, Todd Peterson, ‘From Implicit Skills to Explicit Knowledge: a Bottom-Up Model of Skill Learning’ (2001) 25 *Cognitive Science* 207.

⁶⁸ The relationship between propositional and procedural knowledge is bi-directional and iterative. This means that the acquisition of one type of knowledge will help eventually developing the other type. Propositional knowledge may aid understanding and carrying on certain procedures, and, at the same time performing certain procedures may help understanding concepts. Thus, both types of knowledge are usually intertwined and become integrated through practice, even if they might become dissociated at some point. Bethany Rittle-Johnson and Michael Schneider, ‘Developing Conceptual and Procedural Knowledge of Mathematics’ (2013) in Roi Cohen Kadosh and Ann Dowker (eds), *The Oxford Handbook of Numerical Cognition* (forthcoming).

⁶⁹ Joseph Novak and Alberto Cañas, ‘The Theory Underlying Concept Maps and How to Construct Them’ (2006) Technical Report IHMC CmapTools 2006-01, Florida Institute for Human and Machine Cognition.

has argued that mapping should also represent the affective values attached to particular concepts and beliefs. The cognitive-affective maps he proposes are not only visual representations of interconnected concepts, but also of the values that a group or individuals assign to them.⁷⁰ The maps show the relationships between concepts and beliefs that are mutually supportive or conflicting.

Thagard suggests a method to generate cognitive-affective representations. First, we must identify the concepts, beliefs, goals, and emotions of a person or shared by a group. Second, we must classify them as emotionally positive or negative. Third, we should identify the relationships between concepts, beliefs and goals, and moreover whether they are mutually supportive or conflicting. Fourth, we ought to make sure that the representation map captures the understanding of the individual or group of people. In order to transform the information into representations, he suggests a set of conventions that can be summarised in the following way:

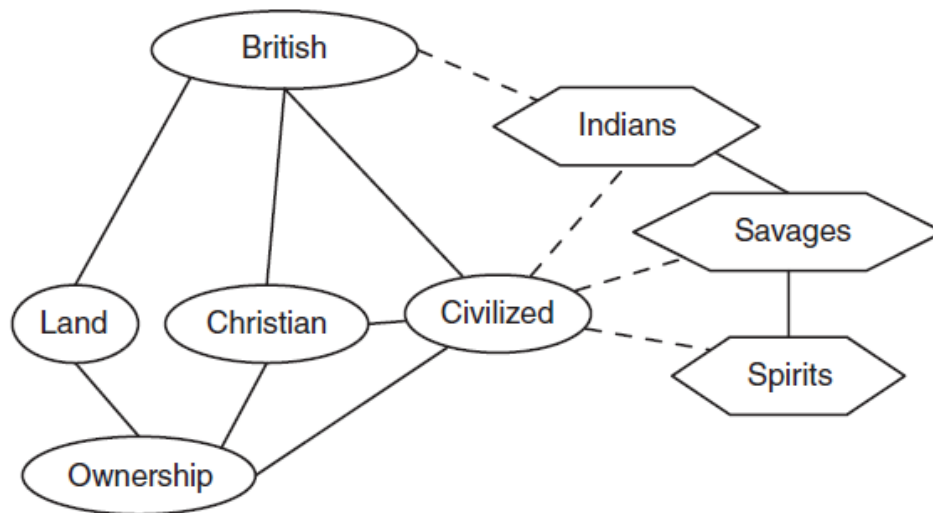
1. Emotionally positive elements should be represented as ovals.
2. Emotionally negative elements should be represented as hexagons.
3. Neutral elements should be represented as rectangles.
4. Ambivalent emotional associations (triggering both positive and negative emotions) should be represented as a superimposed oval and hexagon.
5. The thickness of the contour of the elements should be used to represent the strength of the value associated to them.
6. Solid lines should be used to connect mutually supportive elements.
7. Dashed lines should be used to connect elements incompatible with each other.
8. The thickness of the connecting lines should be used to represent the strength of the positive or negative relation.

The method and semantic convention to create cognitive-affective maps has been used to perform various representations,⁷¹ proving to be a quite useful tool in gaining

⁷⁰ Thagard, EMPATHICA (n 42) 79.

⁷¹ For example, they have been used to represent the British view of themselves and indigenous peoples, the appeal of suicide to aboriginal Canadians, Mennonites motivations to migrate, the Anishinabe view of the world, emotional changes in the negotiations between Egypt and Israel, etcetera. See: Thagard, 'Mapping Minds Across Cultures' (n 48); Scott Findlay and Paul Thagard,

better perspective over individual and socially shared knowledge. Such representations invest their explanatory strength in visualising diagrammatically certain practices, the existence of conflict between different schemas and the changes in knowledge through time. For example, according to Thagard the concepts, beliefs and attitudes of the British with respect to themselves and the native tribes of the new world might be represented as follows:



1.1 Cognitive-Affective map of the British view of themselves and indigenous peoples⁷²

Cognitive-affective maps can also help us map the knowledge framework that makes a ‘group-self’. This socially shared knowledge can be unveiled by using different data, from interviews, surveys, to literature analysis.⁷³ In the next chapter we will analyse a broad range of similar resources in building cognitive-affective maps of the traditional knowledge structures shared by the Mexican legal community; that is the structures which underlie the practice of precedents in that context. Later on we will compare those representation maps against the set of ideas that have been permeating the Mexican context in the past years due to the rule of law reform efforts.

‘Emotional Change in International Negotiation: Analyzing the Camp David Accords Using Cognitive-Affective Maps’ (2011) *Group Decision and Negotiation*.

⁷² Thagard, ‘Mapping Minds Across Cultures’ (n 48) 45.

⁷³ Homer-Dixon (n 52) 348-49; Steven Mock, ‘Cognitive-Affective Mapping (CAM) in the Study of National Identity’ Working Paper 2012,

<http://issuu.com/waterloo_institute_complexity/docs/cognitive-affective_mapping_nationalidentity> accessed 23 January 2014.

In general, cognitive-affective maps should be understood as an interpretative means towards grasping the broad body of knowledge held by an individual or a group of individuals. Mental representations do not only assist us to observe knowledge in a specific moment (as if taking a picture of the cognitive-affective schema). They furthermore help us to take note of cognitive changes that occur during epistemic revisions of different magnitudes, as well as to identify compatibilities and incompatibilities between different psychological schemata (i.e. of individuals or groups). Nevertheless, there are some limitations to maps that one should be aware of. First of all, a cognitive map does not entail an exact replica of what is to be found in a legal practitioner's mind. Another important limitation of not only maps but also of explicit representations in general is that they only capture conceptual or propositional knowledge and glimpses of the emotional cargo attached to it. Finally, procedural knowledge, especially that which operates implicitly, is not one that can be mapped. Note, though, that despite this limitation, knowledge maps can still help us in understanding procedural knowledge in as much as it exists in connection to conceptual structures.

1.5 Final Remarks

Understanding legal practices as deriving from a broad cluster of cognitive-affective features takes us steps further beyond the legal theoretical input, which sees legal knowledge as barely more than the knowledge of rules, and the socio-legal perspectives, which address legal knowledge as fuzzy cognitive traits of social origin; it enriches those approaches, and bears some important consequences when attempting to fathom actual practices. Therefore, we must acknowledge that fruitful practices, but also problematic ones, are founded on a complex interplay of knowledge features that goes beyond legal rules. Legal rules might add on the bulk of knowledge or even be a reflection of broader knowledge structures; however, they barely stand on their own as grounds for legal practices. Thus, a comprehensive understanding of legal practices must aspire to unveil the complex cognitive-affective framework over which they are built.

Additionally, an examination from this vantage point into the knowledge structures of legal communities can significantly reshape the way we perceive change, including legal change. Change might involve the revision of epistemic systems; that is, modifying conceptual categories or building new procedural knowledge. Legal change is change in a similar fashion, of certain magnitude and in relation to characteristic knowledge structures. Since not all legal changes are of the same kind (for example, some might involve authentic revolutions), some cognitive-affective reconfigurations can be more complex than others, and lead to asynchronies. As we shall see, some legal changes identify, in fact, with deep changes across the cognitive-affective structures of legal practitioners.

The insights we therefore extract about the cognitive-affective dimensions of legal practices link directly with the approach we are adopting in building the discussion of this thesis. In the following steps of this study we will work on framing an understanding over the Mexican way of thinking about and of reasoning with legal precedents. With this aim in mind, we will pursue to bring out the deep cognitive-affective framework over which the practice of using legal precedents takes shape in that context. We argue that some of the problems that legal precedents involve therein are connected to the deep layer of assumptions about their role and function, and to the procedural knowledge that has been developed under that particular framework. In other words, we argue that the problem of precedents in the Mexican context is deeply connected to what (still) lies in the hearts and minds of legal practitioners at a moment where legal change is calling for important knowledge reformulations.

2. The Mexican Legal Mind and the System of Precedents

*"I want to die a slave to principles. Not to men."
Emiliano Zapata*

2.1 Introduction

Legal practice across legal systems may vary in many ways. For example, in some legal systems practitioners formulate their arguments in written form, while in others they do so orally. Alternatively, some legal professionals tend to be more acquainted with using certain legal features, such as precedents while others seem more inclined to using codes and statutes. As discussed in the previous chapter, these differences in practice cannot be explained exclusively as emanating from the variety of explicit legal rules. These different 'styles' reflect deep knowledge structures (i.e. concepts, beliefs, ways of doing things, and affective cargo) shared by a particular legal community.

These established frameworks are built through time, that is, historically. In this respect Martin Krygier has noted that '[i]n every established legal system, the legal past is central to the legal present.'¹ The complex set of beliefs, concepts, values and forms of doing things are developed, preserved and transmitted over generations. In this manner the past makes its way into the present.² However, that does not mean that the past is fully transmitted to the present. Only some fragments or sediments survive and become part of the establishment while others face oblivion. Bengoetxea uses a metaphor to explain how in our present we find sediments of the past: in his view these are like 'fragments of an old mosaic or a mural painting that one struggles

¹ Martin Krygier, 'Law as Tradition' (1986) 5 *Law and Philosophy* 241.

² Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity of Law* (Oxford University Press Oxford 2000) 12.

to reconstruct, or to a Venetian Murano vase that falls into the ground and breaks into many fragments, themselves further breaking into even more fragments.³

In this sense, many of the traits present in current legal styles are the product of the past. This, however, does not mean that legal professionals are fully aware of the historical past that influences them. Reconstructing the segments of the past is a useful activity when attempting to understand the present concepts, beliefs, values and ways of engaging in practice. Therefore, many clues and explanations about a current state of affairs can only be collected if we take a deeper look into the legal past. Going back to previous times casts our present under a different light. Remembering the decisions of previous actors and the circumstances that surrounded the construction of what now is considered a firm and established framework is a way of acquiring a different, somehow wider, perspective regarding our ways of thinking and engaging in practice, but also about our current problems and faults. A look into the past, might reveal the way certain beliefs, inclinations and ways of doing things (still reflected in our days) developed and became entrenched, while others did not survive, suffered radical transformations or distortions. In other words, unveiling the mental structures present in our days may be more easily attained if we focus on how they came to exist. In this way, legal history helps us gain a clearer understanding of the way relevant knowledge features are organised in the present.

This chapter looks back into the past of the Mexican legal system aiming to provide an overview of the process formation and consolidation of what can be said to be the local knowledge establishment held by the legal community. Special emphasis is given to those features that explain the current (problematic) approach to legal precedents. Herein these knowledge structures will be analysed parallel to the legal and extra-legal scenarios that allowed them to emerge and be perpetuated. The historical narrative will necessarily draw on relevant social and political facts occurred during the turbulent early years of independent life of the Mexican State, as they to a certain extent influenced a number of beliefs and inclinations regarding the law and the dynamics of legal practices. This analysis will cast light on the legal

³ Joxerramon Bengoetxea, 'Fragments and Sediments, System and Tradition, A Venetian Tribute to Kaarlo Tuori' (2008) 5 *No Foundations, Journal of Extreme Legal Positivism* 155.

(re)sources available, relevant legal doctrines and legal ideas circulating within the system, and their interaction with other beliefs. It will indicate how this particular cognitive-affective framework has been further transferred through the process of legal education and has led to the promotion of certain ways of doing things, that is, a determined procedural knowledge. One of the aims in this particular chapter will be to give a historically informed account of the cognitive structures shared by the members of the local legal community, and that lead to a particular approach to legal precedents in that context. Additionally, we aim to understand how these structures unfold into specific ways of performing legal activities within that legal system, specifically with respect to the manner of reasoning with legal precedents, and the forms these have consolidated.

This account has been performed mainly with the aid of secondary sources about the Mexican political, social, economic and legal history, although sometimes, in the absence of secondary bibliography, we have resorted to some primary sources, such as former codes, statutes, legal doctrinal books and periodic legal publications. This is mainly due to the fact that some parts of the history of law in Mexico are still underexplored. It has now been recognised that Mexican legal historiography faced, until recent years, underdevelopment.⁴ It was not until the mid-1990s that a change could be perceived in the long-standing ‘historical legalism’ that for long condemned the history of the law to the exegesis of statutes and codes. As new focuses and methodologies are being introduced, they have been casting light over a set of ignored historical happenings, which constitute what Pablo Mijangos has called ‘a new Mexican legal past.’⁵ This thesis has benefited from this new wave of studies and the many new insights about the emergence of legal institutions and practices. Nevertheless, we have often faced a shortage of information, especially regarding the history of the local legal ideas and methods. Our aim herein is not to provide an original contribution regarding Mexican legal history. Nevertheless, this account hopefully aids connecting some previously unlinked historical ‘nodes’, which

⁴ Pablo Mijangos, *El Nuevo Pasado Jurídico Mexicano. Una Revisión a la Historiografía Jurídica Mexicana Durante los Últimos 20 Años* (Dykinison 2011).

⁵ *ibid.*

contribute to the overall understanding of the Mexican legal mind and local viewpoint regarding precedents.

Our narrative will start from the independent era of Mexico (traditionally dated in 1810), which coincides with the formative period of the nation-state and the consequent development of state-based legal structures. As we shall see the first years of independence are marked by the intensive disturbance and (re)definition of the social, political, economic and juridical order, which constitute a point of diversion from the previous colonial past. Thus, the first years of this period will be rich of decisive facts that directly or indirectly determine the shape of legal values, concepts, beliefs, attitudes and ways of performing legal tasks, which altogether have characterised the Mexican legal style. As we move through time (especially after the first 60 years of independence) we will start to find more settledness and continuity; that is a period of normality.⁶ Our historical overview will end in the period of extensive reformation of the Mexican state of the early 1990s, which brought important legal changes with the aim of harmonising the local structures with the global tendencies. These changes, which will be explained in the following chapter, have represented important challenges to the establishment that we have presented along this historical overview.

2.2 Towards a Lasting Establishment

2.2.1 Embracing the Ideas of Nation-State, Constitutional Order and Codification

After eleven years of war, the former colony of the New Spain (now Mexico) achieved its independence from Spain officially in 1821. It has often been argued that after independence a new nation-state emerged from the rupture with the colonial past. However, it was in response to the massive structural crisis aggravated by the independence that the Mexicans had to invent Mexico and not before.⁷

⁶ The idea of a period of normality in legal practice is based over Kuhn's concept of normal science, which refers to the period of time where scientists engage into typical tasks under a more or less settled framework or paradigm. In Kuhn's own words 'normal science means research firmly based upon one or more past scientific achievements, that some particular scientific community acknowledges for a time as supplying the foundation for its further practice.' See: Thomas Kuhn, *The Structure of Scientific Revolutions* (3rd edn, University of Chicago Press 1996) 10.

⁷ Timothy E Anna, *Forging Mexico 1821-1835* (University of Nebraska Press 1998).

Essentially, one of the main problems during the first five decades was making all the relevant decisions regarding the emerging political, social, economic, and legal organisation. Moreover, this process of founding the Mexican state underwent a long turbulent period of intermittent internal wars, regional separatist movements,⁸ and foreign invasions attracted by its weak embryonic shape.⁹ This stage of turbulence lasted until the late 1860s, a time during which Mexico was giving the picture of a place where ‘there is no power [...] It is not a nation. It is not a state. It is not a government at all.’¹⁰

The long transitional period was marked by the continuing struggle between factions holding contending ideas about the structure of the post-colonial world: fundamentally, maintaining of the colonial tradition was contrasted against embracing diverse forward looking ideals that prescribed a different interaction between the main social, political, and economic actors. This diversion of opinions was evident in the political sphere. As Agustin de Iturbide, the man who led the first Mexican monarchical government after the independence, wrote in his memoirs, ‘the [people of the American continent] wished independence, but did not agree upon the method of acquiring it, nor upon the system of government that ought to be adopted [...] There were votes for absolute monarchy modified with the Spanish constitution, for a federal republic, etc. Every system had its partisans.’¹¹ However, none of the political projects seemed to endure the hardships of the first years of independence. Thus, the period from 1821 to 1867 is one of conflict and discontinuity, in which

⁸ It is important to note that the territory of the new state remained for a long time uncertain and constituted a matter of ongoing conflict. Some of the provinces that integrated the territory of the colony of the ‘New Spain’ tried to abandon the project of forming part of a Mexican state, which caused armed conflicts between local and central forces. The provinces of Guatemala, Nicaragua, El Salvador, Honduras, and Costa Rica withdrew from the Mexican Empire short after the independence; the province of Chiapas withdrew but rejoined later the Mexican Republic; Yucatan attempted withdrawal several times; the province of Texas repetitively tried to withdraw and was finally annexed to the United States along with Nuevo Mexico, Alta California and other border territories. There were further separatist movements from the Northern provinces of Nuevo Leon, Coahuila and Tamaulipas, which tried unsuccessfully to form an independent republic in different moments.

⁹ In 1838 diplomatic problems between France and Mexico led to the invasion of Mexican territory by French troops. In 1846 the increasing tensions with the United States gave rise to the Mexican-American war where Mexico lost around half of its initial territory. Between 1862 and 1867 French troops invaded Mexico once again, which led to the instauration of a short-lasting monarchical regime headed by the member of the Austrian Royal House Maximilian’s of Hapsburg as emperor of Mexico.

¹⁰ *The Economist* of London, 1861. See: Anna (n 7) 14.

¹¹ Agustin de Iturbide. See: *ibid.*

Mexico alternated between monarchy and republic, centralism and federalism, liberalism and conservatism. The outcome of these facts was: numerous ephemeral congresses, executives, constitutions¹² and a very confusing body of law.

Despite the serious substantive disagreements, all different factions agreed upon pursuing certain modern forms, such as the nation-state, constitutionalism and codification. These features had in general a very positive reception, as they were usually seen as the necessary path that the new country had to follow in order to join the modern world and attain development. There prevailed the belief that these features would help solving most of the social and political problems of the former colony. Nevertheless, embracing these features often meant ignoring or adapting their broader ideological background to a large extent to fit the ideas of different local factions. In this way, for example, there were advocates of a nation state that aimed to preserve the feudal system distinctive of the colonial days, even if these two models involved important contradictions.

Although the colony had remained foreign to constitutionalism for the largest part of its history, the brief experience of the Constitution of Cadiz in 1812 strongly marked the legal developments of the 19th century. The constitutional experience opened the door to receiving a great deal of the liberal ideas about legal institutions. By 1820 the idea of constitutionalism had spread deeply its roots and all political factions aimed to imprint their agenda in a constitutional text, even those that pled for the conservation of the immanent socio-political order and the *de jure* perpetuation of class privileges.¹³ During this phase of ‘constitutional euphoria’ constitutions became an ideal expected to magically solve all the problems of the new nation-state.¹⁴ By the 1830s the proliferation of unsuccessful constitutions had declined the faith in

¹² As noted by Luis Medina Peña, between 1821 and 1857 there were 23 congresses and 52 executives. From the total of congresses, eight were constituent, and produced 6 constitutions (of which all were operative at a certain point); four of these congresses corresponded to a monarchical regime, thirteen to a federal republic, and six to a centralist republic. Luis Medina Peña, *Invencción del Sistema Político Mexicano. Forma de Gobierno y Gobernabilidad en México en el Siglo XIX* (FCE 2004) 36.

¹³ Jesús Reyes Heróles, *El Liberalismo Mexicano II: La Sociedad Fluctuante* (first published 1957, FCE 1974) 227.

¹⁴ Jesús Reyes Heróles, *El Liberalismo Mexicano I: Los Orígenes* (first published 1958, FCE 1974) 38.

constitutionalism,¹⁵ yet it did not lead to its withdrawal as one can see with the many further constitutional attempts. During the first half of the 19th century all congressional efforts were directed towards the establishment of a constitutional legal order, although in absence of long lasting decisions in so many substantial aspects there was little possibility for developing the state-based legal system any further.

Since the very early days of independence, most governments had made efforts towards attaining another welcomed feature of modernity: legal codes. The idea of codifying the law had already been circulating in the colony for some time, following the reception of French liberal ideas in Spain, but it could actually flourish only when it reached maturity and found a fertile ground. By the last third of the 19th century codification was an idea widely embraced by the legal community, regardless of political affiliations: legislators and jurists from a liberal or conservative background agreed that the code ‘was the best that could happen to a society’, and the only point contention was whether the codes should be general or federal.¹⁶

Several commissions were appointed to draft the codes; however, even modest results were difficult to attain where governments in power would constantly change and payments to drafters would frequently be suspended due to various reasons. It thus became impossible to enact efficient and enduring codes and statutes to replace substantially the colonial laws. The delays in enacting the codes created a system full

¹⁵ The faith in the magic of constitutions prevailed from the independence until 1827. Thereafter this optimism started to decay. See: Charles A Hale, *Mexican Liberalism in the Age of Mora 1821-1853* (Yale University Press 1968) 78-9. In relation to the ‘constitutionalist deception’ Rabasa wrote: ‘The American people has consummated the complete evolution of its government within the same written Constitution, rigid and fixed, on the contrary we (the Mexicans) haven’t been able to modify the real system that operates, no matter all the Constitutions invented to change it. We have expected everything from the written law and the written law has demonstrated its incurable impotence.’ He added: ‘For the people tired of promises, Constitutional Congresses and Constitutions without application, what could a new one mean? The whole history of the national institutions, lived by the generation of 1857, rose in its memory to incline them towards receiving that promise of regeneration at least with indifference and scepticism.’ See: Emilio Rabasa, *La Constitución y la Dictadura* (Porrúa 1912) 8, 27.

¹⁶ José Narváez, ‘La Crisis de la Codificación y la Historia del Derecho’ (2003) *Anuario Mexicano de Historia del Derecho* 214; María González, *Estudios sobre la Historia del Derecho Civil en México en el Siglo XIX* (UNAM 1994) 77.

of gaps and contradictions, aggravating legal practice in the process.¹⁷ For example, the Supreme Court of Justice was paralysed in 1825 when it could not appoint members due to the lack of procedural rules,¹⁸ and later in 1848 and 1853 when it could not decide on petitions because there had been no response procedures in place.¹⁹ Several statutes and codes were never finished or enacted, or they just lasted for a short period of time, immediately followed by contradicting rules that created, suppressed, or modified legal procedures and authorities. As a result, not only it was not possible to break completely with the colonial law but, on the contrary, there was a constant recurrence to it as a subsidiary legal source,²⁰ delivering legal practitioners in extremely complex scenarios. Some of the difficulties experienced by the legal community at that time were expressed in 1839 by the distinguished jurist Juan N. Rodríguez de San Miguel:

Ours [the law], after almost 30 years of revolution, not only of weapons, but of habits, government and State, mourns and resents more than any other the compilation, the diversity and uncertainty of the legislation. The monarchic [laws] of several centuries [...] mixed with Spanish constitutions, compiled and not compiled laws of the Indias, the federal and the central ones, ones partly in force, partly modified, partly adapted; with nomenclatures of authorities, corporations and causes that have disappeared, as viceroy, chief magistrates, intendants, consulates, etc., and whose functions have been distributed, according to their nature, between the legislative, executive or judicial power, all create a sinister chaos, delay the administration of justice, obstruct the function of authorities, and impede the instruction, being necessary to make a considerable expenditure in order to obtain the essential codes [...]²¹

Consequently, most of the early Mexican production of legal literature was primarily dedicated to compiling, commenting on and systematising the various (legal) orders

¹⁷ Maria del Refugio González, 'La Presencia del Derecho Indiano en México a través de las Fuentes Legales del Diccionario Razonado de Legislación y Jurisprudencia de Escriche, Anotadas por Juan Rodríguez de San Miguel' in III, *Jornadas de Historia del Derecho* (UNAM 1998) 241.

¹⁸ Linda Arnold, *Política y Justicia. La Suprema Corte Mexicana (1824-1855)* (UNAM 1996) 39.

¹⁹ *ibid* 149-50.

²⁰ Article 211 of the constitutional decree of Apatzingan of 1822 established that '[w]hile the sovereign nation forms the body of laws that are to substitute the old ones, they will continue to be in force, except for those derogated by this or other decrees, and those derogated later on.' This rule was followed during the entire 19th century until the colonial rules were replaced by new statutes and codes. See: González (n 17) 241-42.

²¹ *ibid* 243.

so as to help legal practice and education.²² However, this particular literary enterprise was not free from the influence of ideological underpinnings and it often led to disparities in the recognition of normative orders as legal by the various contributing authors. One of the most contested issues was the positioning of the canonical laws in the legal order. On the one hand, legal professionals of a conservative background viewed the canonical order as actual law and rejected e.g. the provisions regarding freedom of religion and the expropriation of the clerical property, while those who held the liberal agenda pled for a strict separation between the church and the state.²³ The unsettledness of the environment reflected in the way new legal practitioners were educated. The university could not provide its students with definitive legal perspectives in the middle of so much uncertainty.²⁴ All this facts only increased the longing for the arrival of the awaited permanent constitution, the codes and, in general, a lasting framework.

2.2.2 Challenging the Colonial Legal Mind

The triumph of the liberal project in 1867 and the reestablishment of the Federal Constitution of 1857 (which had been suspended largely due to the armed conflicts that dominated the 1860s) gave the (temporal) stability necessary to construct the national legal order and to finally leave behind the subsidiary colonial law. Consequently, the decade of the 1870s is the one in which important legal developments, such as the codification of the law, took place. The codification movement was finally consolidated in 1870, when Justo Sierra's project of civil code was finally enacted as the Civil Code for the Federal District and the territory of Baja California. The code was based on the French Civil Code to a great extent, but also on dispositions of the Spanish project of Garcia Goyena (based also on the French one), making a few adaptations to the local circumstance. But the Civil Code was only the starting point of a wave of codifications; thus, new substantial and

²² One of the most famous compilations was the 'Pandectas hispano-mejicanas' authored by Rodriguez de San Miguel and published in 1852. But also works such as 'Febrero Mejicano', which aimed to report and analyse the laws that operated in the forum in the light of the institutions of the old regime.

²³ González (n 17) 243.

²⁴ In fact the university and, with it, the law school suffered some disruptions due to repetitive closures.

procedural codes on different legal areas were drafted and enacted in the following years both at the federal and local level.

However, the constitution and codes were new legal features, carrying with them novel ideas and different dynamics. Therefore, the transition from a colonial structure to an independent modern state meant the introduction of new concepts and beliefs about the law, as well as the introduction of a set of related legal practices, which generated new doubts and challenges for legal professionals. All of these features aimed to reduce the complexities of the law by introducing a rational order. The model of nation-state aimed to erase from the map the overwhelming pluralism of the colonial world. The constitution looked towards securing the primacy of the state, as well as unifying the legal status of a mass of subjects that were formerly organised according to a system of casts and privileges, through the recognition of universal rights. The codes aimed to reduce the plurality of laws to simple systematised abstract prescriptions, which would comprise all subjective relationships, and that would be applied to particular instances by the method of deduction.²⁵

In this sense, the new legal forms involved abandoning the casuistry of the colonial law, so as to build upon the Enlightenment's ideals of universalism and rationalism reflected in these features. Until that time, the law ruling in the colony, known as 'Law of the Indies', had a different structure than the one that came to replace it. The legal system was built upon the principle of inequality based on the differences regarding social position. Therefore, the law was a collection of precepts of diverse origin, nature and scope, which were cited and applied with consideration of the particular cases and situations, that is, in accordance to the subject, the peoples, the times and the circumstances of each case.²⁶ This law was 'deeply dynamic, subject to

²⁵ The local codification contained the germs of the European 'codification mentality' which Goldman points out. This mentality submitted the complexities existing by custom, history and culture to a mathematical logic. See: David Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (Cambridge University Press 2008) 185-86.

²⁶ Víctor Tau Anzoátegui, *El Poder de la Costumbre: Estudios sobre el Derecho Consuetudinario en América Hispana hasta la Emancipación* (Instituto de Investigaciones de Historia del Derecho 2001) 22.

compressions, expansions and distortions.’²⁷ It operated in a segmented society, with plurality of powers and independent agents, in which even if there was a strong central organ there was also certain autonomy around the periphery. Thus, central laws did not apply to the entirety of that complex structure, giving rise to various customs as means to give stability to the local orders and bring equilibrium between the diverse social and political powers.²⁸

The colonial lawyers and judges were formed in the universities and courts to perform in that particular scenario. They studied Roman and Canonical law, and additionally, they were introduced to the royal (Spanish) and colonial laws. Nevertheless, most practitioners opted for the study of the canons as the church was often a better employer than the civil service. The methods used in the university were the meticulous reading of a text or fragment of a book aided by explanations, and the so called ‘disputes’, in which the student held an opinion with regards to a controversial matter while other students argued in favour or against that conclusion.²⁹ The objective of the classes was not to retain specific rules or concepts, but to develop competence in dialectic arguing, even though being able to retain in memory segments of texts was highly praised.³⁰ Also, the formation of lawyers and judges was not exclusively legal; they were prepared to understand and engaged with the complexities of life reproduced in the law.³¹ The practice for which they were prepared was far from being legalistic.³²

As we can see, new features called for unification, which was definitely a challenge for the pronounced legal pluralism of the New Spain, in the sense that this transition aimed to exclude the various normative orders and create a monolithic state law. State law claimed exclusivity in the scope of the legal, leaving behind other contending (social) orders recognised as law in previous times. The new law,

²⁷ Fernando de Trazegnies, *Ciríaco de Urtecho: Litigante por Amor: Reflexiones sobre la Polivalencia Táctica del Razonamiento Jurídico* (Pontificia Universidad Católica del Perú 1981) in *ibid.*

²⁸ Tau Anzoátegui (n 26).

²⁹ Rogelio Pérez Perdomo, ‘Los Abogados Americanos de la Monarquía Española’ (2003) *Anuario Mexicano de Historia del Derecho* XV.

³⁰ Carlos Tormo, ‘La Abogacía en Transición: Continuidad y Cambios del Virreinato al México Independiente’ (2011) *Estudios de Historia Novohispana* 86.

³¹ Alejandro Mayagoitia, ‘Los Abogados y Jueces en la Nueva España Vistos a Través de Sermones y Elogios Fúnebres’ (2002) 256 *Anales de Jurisprudencia*.

³² Pérez Perdomo (n 29).

however, not only cancelled other forms of legal order, but attempted to create an abstract rational order that notoriously contradicted the previous casuistic law. These modifications entailed not only a set of epistemological changes for those practicing law, but also important methodological shifts – in other words the arrival of the constitutions and codes asked for a renovated legal knowledge, both propositional and procedural.

The transition from one form of law to the other represented a series of challenges for the legal community of the time. They had to restructure the profession to fit the new imperatives. Also, they had to become acquainted with novel institutions, embrace the new framework and become experts in the use of codes and the deductive method. Nevertheless, this task was by no means easy. Legal practitioners, however, not only had to relearn their science, but they also had to accommodate a set of legal ideas that contrasted to a large extent with the society they were supposed to rule.

The magnitude of the transition was a matter of worry among the legal practitioners of the time. This can be perceived from the assertions published in the popular legal periodical ‘El Derecho’ in 1871 that we transcribe herein. According to the legal community

[t]he immediate effect of these new legislations is easy to predict. The rules that during three centuries and until today have served as norm to the social relationships will disappear; the most serious transition will operate: the last traditions of the Colony will be erased, and before the voice of the new law is heard; before its precept incarnates in the customs and even if it is understood in the scope of speculation, serious confusion and disturbance will overcome and, with them, one of these crises that can only be dominated with the faith in the future [...]³³

2.2.3 Accommodating a New Form of Law

As we have just mentioned, the legal transition had important consequences affecting the legal community. The line of developments presupposed a different way of

³³ ‘El Derecho’ 1871 in María del Refugio González, *El Derecho Civil en México 1821-1871: Apuntes para su Estudio* (UNAM 1988) 119.

conceiving e.g. the administration of justice, the legal profession and legal education. The structure of legal education and professionalisation underwent important changes, gradually allowing in the liberal features. This was mirrored in different aspects of the academic life, for example, the contents reviewed in the law school started moving away from the traditional roman-canonical law and progressively introducing national constitutional, civil and criminal law.³⁴

Besides, the increasing demand of trained lawyers led to an increase in the number of students choosing for legal studies, opting for secular law instead of the previously popular canonical law.³⁵ Also the organisation of the legal profession underwent several changes. On the one hand, the professional College of Lawyers faced the necessity to adapt to the liberal ideas, which meant the abandonment of its structure as corporation of privileges, in order to become an organisation of citizens with intellectual aims.³⁶ Thus, indications of the former structure, such as the proof of cleanliness of blood, were overruled, establishing the free access to the exercise of the legal profession.³⁷ The new legal institutions required of technically instructed professionals to take over the work that was previously done by lay persons, but even professionals were not acquainted with the new law and the methodology behind grounding petitions and decisions according to legal texts. Understandably, legal practice (especially judicial decision making) during the first years of transition lacked cohesion. Therefore, several initiatives to bring back unity in practice were carried out, such as the creation of the institutions of *amparo* and *jurisprudencia* that will be discussed later on.³⁸

However, the most difficult part for the transition seems to have been accommodating the new liberal imperatives in a somehow incompatible socio-political ground. This process of adaptation imprinted on legal practitioners certain beliefs about the law and the way it performs. The ideas interconnected to the new

³⁴ Tormo (n 30) 120.

³⁵ *ibid* 90-1.

³⁶ Alejandro Mayagoitia, 'De Real a Nacional: el Ilustre Colegio de Abogados de México' in *Cuadernos del Instituto de Investigaciones Jurídicas: La Supervivencia del Derecho Español en Hispanoamérica durante la Época Independiente* (UNAM 1998) 427-31.

³⁷ Tormo (n 30) 108.

³⁸ María del Refugio González, 'Derecho de Transición. (1821-1871)' *Memorias del IV Congreso de Historia del Derecho Mexicano* (UNAM 1988).

legal features were in tension with the pre-existent socio-political order inherited from the colonial times. These legal features were, however, perceived as the righteous pattern to which reality had to adhere, but in fact that reality was so foreign and often opposite that risked the efficacy of the new structures.³⁹

In this respect, it has often been argued that the Constitution of 1857 was highly aspirational.⁴⁰ This meant that it looked into a future state of affairs, to a 'where we want to be' rather than to the past or the present identity, posing an irresolvable conflict between the liberal aspirations and the social and political legacy.⁴¹ Also, the codes reflected the influence of the European ideas of modernity; they presupposed the monopoly of the law by the state, emphasised equality and individual freedom, which poorly mirrored the actual operating arrangements. The facts were truly different. The state struggled to achieve predominance in a non-secular, corporatist society full of intermediaries, which often kept on operating behind the official legal system. Likewise, equality was far from being a fact; the social fabric was still multiform and subject to different de facto orders, which were left outside the scope of law for the sake of accuracy to the institutional design.⁴²

There existed a mismatch between a framework that was faithfully adopted and a reality that had not achieved the expected development by means of the features of the new legal regime. This led to a sense of disappointment and to intellectual reformulations. The chaos inherited by half a decade of conflicts and the difficulties adopting the liberal model gave rise to a claim for order. In this way, philosophical positivism (which held the motto 'liberty, order and progress') became an influential ideology.⁴³ With the arrival of the positivists there was an attempt to abandon

³⁹ Fernando Escalante, *Ciudadanos Imaginarios* (El Colegio de México 1992) 100.

⁴⁰ As argued by Rabasa, 'the Constitution was by no means spontaneous, but imposed; it neither contained conquered rights, nor the recognition of old arbitrariness, but ideal forms, charged with good intentions' Martín Díaz, *Emilio Rabasa: Teórico de la Dictadura Necesaria* (Porrúa 1991) in *ibid.*

⁴¹ According to Stevens 'the roots of post-independence political conflicts lie in the contradiction between political liberalism and the traditional social structure developed in the colonial period.' Donald Stevens, *Origins of Instability in Early Republican Mexico* (Duke University Press 1991) 115.

⁴² In fact, vulnerable indigenous groups passed from a protected status to one of absolute equality, which actually has been now seen as measure causing them more harm than good. See: Manuel Ferrer and Maria Bono, *Pueblos Indígenas y Estado Nacional en México en el Siglo XIX* (UNAM 1998).

⁴³ According to Robert Buffington the influential positivist ideas of the time were 'an eclectic mixture of Comtean scientism and Spencer's social Darwinism'. They aimed to provide a justification for the

aprioristic ideals and, instead, to embrace empirical realities. As positivism was set to the service of a political group of influence and to the achievement of specific political aims, it was distorted. Soon the importance of liberty would be forgotten to remain only the idea of order, which was used to support scientifically the 30 years long dictatorship of Porfirio Diaz and its guiding principles: ‘order and progress’.⁴⁴ The group of Mexican positivists, known as ‘Scientifics’, started building upon evolutionist premises that allowed the existence of institutional inequality on natural grounds. For them progress would irremediably create, in the manner of the evolution of the species, a fortunate class of more talented people possessing the right to exploit the other classes. Thus, the Scientifics frequently expressed that certain classes, especially the indigenous groups and the working class constituted an irredeemable caste.⁴⁵

The positivist shift turned into an attack towards the liberal legal institutions. Nevertheless, liberal features, such as the constitution, kept on ruling during the dictatorship of Diaz without substantial nominal changes. This is the start of a complicated relationship between the law and factual order in the Mexican context. Buffington has explained that during this historical period the liberal revolution was perceived a premature attempt to change social forms, but that social modernisation would happen slowly as long as order and progress was not affected.⁴⁶ The features of the legal liberal revolution had become fixed in the Mexican landscape, at least nominally. In this respect, it is possible to observe several legal advancements, along the lines of liberalism during the dictatorship of Diaz. Nevertheless, these developments were double edged: on the one hand, secondary legal institutions with an administrative or procedural function developed, new codes and regulations were enacted and helped bringing over regularity and certainty; but on the other hand, the

oligarchy ruling in the nominally liberal context. See: Robert Buffington, *Looking Forward, Looking Back: Judicial Discretion and State Legitimation in Modern Mexico* (1998) 2 Crime History and Societies.

⁴⁴ Leopoldo Zea, *Positivismo en México: Nacimiento, Apogeo y Decadencia* (FCE 1960) 50-1.

⁴⁵ *ibid* 31-2.

⁴⁶ Buffington (n 43).

legal institutions with political overtones or getting on the way of the factual order were unable to materialise.⁴⁷

The three decades of dictatorship, also known as ‘porfiriato’, were central in the building the Mexican political system that operated until the end of the twentieth century. Also, these were very relevant years for the building of a long lasting legal establishment. The dictatorship’s acceptance of factual orders and inequalities, parallel to the (virtual) operation of certain legal features consolidated a particular relationship between law the law and society, which is said to exist until these days. Law’s isolation from society was, in part, made possible by embracing the scientific stand prescribed by the positivist wave. This perspective confined the law to the exegesis of texts, and especially to the following of rigorous procedures, which eventually was reflected in the form and substance of legal education.

2.2.4 Developing the New Framework

The dictatorship finally came to an end with the revolutionary movement of 1910. However, the revolution had again brought about economic instability and political division. Certain areas of country were now ruled by de facto power groups of regional *caudillos* that had fought in the revolutionary movement and that now claimed institutional positions. Thus, the law of the State was not generally respected and the law of the strongest still predominated.⁴⁸ The political division was only stabilised by organising the different de facto forces in highly inclusive political party (with authoritarian, presidentialist overtones) that served to arbitrate the pacific distribution of quotas of national and local political power. The plurality of social groups was absorbed by internal committees, and the conflicts between them were decided by the political institutional framework of the party, which excluded the operation of law when solving essentially political or politically related conflicts in a manner that deeply resembled the dictatorship of Diaz.⁴⁹ In fact, the law appeared to exist in a state of significative subordination to the political will, and this was

⁴⁷ Daniel Cosío Villegas, ‘El Porfiriato, Era de Consolidación’ (1963) 13 *Historia Mexicana* 82-6.

⁴⁸ SEDENA ‘La Constitución de 1917 y la Consolidación de las Instituciones’ in *Momentos Estelares del Ejército Mexicano* VII, 13.

⁴⁹ See generally: Medina (n 12)

reflected in the frequent additions, suppressions and modifications to the constitution and legislation, and the debilitation of the party. The government applied or rejected the application of laws with unrestricted freedom and arbitrarily. This was the status quo prevailing during most of the twentieth century and that constituted the framework providing order and certainty to social interaction, which in different ways resembled the structure of the porfirian system but now using an institutionalised corporative form.

The success of the revolution led to the enactment of the constitution of 1917 and new civil, criminal and procedural codes. The new constitution and laws aimed to expand the scope of the law to social areas that had been excluded by the former schemas and recognise a different set of (social) rights for vulnerable groups. The ‘socialisation’ of the law restructured the relationship of the State and certain areas of the social world, but in a sense the approach to the law was not radically changed. In a sense, the law continued to be highly aspirational; once again: ‘it was the depiction of a nation that imagined itself, than a faithful copy of reality’,⁵⁰ with all the problems that this represented.

The core structure of the legal system, however, was not deeply affected and many aspects of the pre-revolutionary legal ideas and practices became entrenched. In this sense, this political revolution did not entail an authentic legal revolution. In fact during the early decades of the twentieth century Mexican law continued to develop following descriptions that pictured it as an enterprise isolated from socio-political matters. Nevertheless, intellectuals of the time tried to embrace milder positions instead of the philosophical positivism that dominated until the first decade of the twentieth century. In this sense, there were some efforts to attend to sociological circumstances in which legal orders were incorporated, but they did not manage to permeate some fundamental legal ideas and methodologies.⁵¹ Thus, it is possible to observe some continuity with the former emphasis on the textual character of the law and the deductive method.

⁵⁰ Sergio López Ayllón, *Las Transformaciones del Sistema Jurídico y los Significados Sociales del Derecho en México. La Encrucijada entre Tradición y Modernidad* (UNAM 1997) 255-56.

⁵¹ Lucio Mendieta, a legally trained member of the University was the major advocate of sociological trends, which lead to the foundation of sociology in Mexico. See: Margarita Olvera, ‘La Primera Socialización Intelectual de Lucio Mendieta y Nuñez’ (1999) 39 Sociológica.

In this form, during the first half of the twentieth century, some legal positivist works became extremely appealing in the Mexican context, such as the ‘Pure Theory of Law’ of Hans Kelsen. The main exponent of the ideas of Kelsen in Mexico was legal philosopher Eduardo García Maynez. He translated Kelsen’s ‘General Theory of Law and State’ and wrote books on the linguistic dimension of law and deontic logic that somehow build over the Austrian philosopher’s ideas. He approached the question of the limits of law with regards to morality, as well as that of the difference between law and facts. His books are written with methodological carefulness, they are full of distinctions and classifications, which seemingly attempt to some sort of schematic exactitude. Maynez aimed to show that the law had a scientific character by introducing some logical principles (or ‘truths of reason’) ruling all legal systems, independent of the will of the legislator.⁵² The impact of García Maynez in the current legal mind is so obvious that sometimes is overlooked.⁵³ For the past seventy years the first approximation to the law of first years students has been the theoretical ‘Introduction to the Study of Law’ written by García Maynez with the aim of offering a general legal perspective to first year students and introducing them to the legal method.⁵⁴ In the book, Maynez provides an image of the law as a static, logically ordered system of written norms recognised by the authority. In this respect, the aim of the book is to help students by identifying authoritative texts and arrange them logically according to the different scopes of validity, so as to cancel any possible contradiction. The author’s approach to the subject of interpretation can be said to be legalist: he emphasises the primacy of the text of the law and proposes the use of a set of rational principles to fill the legal gaps left by the legislator. This form of understanding and practicing law, arguably consonant with ‘dogmatic formalism’, has been reflected in other core texts used to form legal professionals in that context.⁵⁵ Jorge Witker has, in this respect, has argued that:

⁵² Jorge Carpizo, ‘Prefacio u Homenaje al Maestro Eduardo García Máynez en Ocasión de la Quincuagésima Edición de esta Obra’ in Eduardo García Máynez, *Introducción al Estudio del Derecho* (51th edn, Porrúa 1940).

⁵³ Jesús A Fernández, *La Filosofía Jurídica de Eduardo García Máynez* (Universidad de Oviedo 1991).

⁵⁴ See: García Máynez (n 52).

⁵⁵ For an more comprehensive analysis of the continuity of legal conceptions and methods across core legal texts in Mexico see: Alejandro Madrazo, ‘¿Qué?, ¿Cómo? y ¿Para qué? Análisis y Crítica al

The model of traditional legal education presupposes the Law as a *set of norms* that regulate the conduct of men in society. Therefore, these are the starting point for the learning of the law. The norms prefigure the desirable reality and the former must adjust to it. In this form, the Law is reduced to self-sufficient norms that integrate a system and that design a duty that ought not to be confused with the [factual] being. A neutral dualism, a-historical, that separates sharply forms and content.⁵⁶

Additionally, the legal education has been characterised by the method of magisterial class in which the lecturer provides a series of contents that can oscillate from doctrines to the exegesis of legal rules. The student plays a passive role, where he is the recipient of knowledge and there is no effort to engage the learner into the development of critical and argumentative skills. This form of pedagogy may actually contribute to a practice where legal practitioners seldom engage in the construction of new interpretations and substantive arguments. This educational approach, validated by a set of historically built ideas and facts, facilitates the consolidation of a general legal establishment, which as we shall see has led to a peculiar approach regarding legal precedents.

2.3 Developing the Judiciary and the System of Precedents

The discussion of how law in Mexico has developed and what constitutes the general establishment is key to an analysis of what is considered as legal precedent in this context. Herein we will explain the emergence and historical development of an official system of precedents legal precedents, aiming to unveil the circumstances that shaped their contextual operation. However, Mexican precedents have an intrinsic connection with the organisation and operation of federal courts, especially that of the Supreme Court, as well as with the action of *amparo*. Thus, herein we will present a brief historical account on these matters, in connection to the set of broader circumstances and understandings about the law that we have previously introduced, and that altogether shaped a particular viewpoint regarding legal precedents in this context.

Modelo Tradicional de Enseñanza del Derecho en México' (2006) 4 Academia. Revista sobre Enseñanza del Derecho.

⁵⁶ Jorge Witker, 'Docencia Crítica y Formación Jurídica' in *Antología de Estudios sobre la Enseñanza del Derecho* (UNAM 1995) 226.

2.3.1 The Emergence of the Federal Judiciary

Before the independence there were *audiencias* that mixed judicial and executive functions. It was not until the constitution of Cadiz that the idea of separation the judiciary as an independent power emerged, however it was not possible to consolidate it due to the problematic circumstances of the time. Since the last days of the Spanish colonial regime there was big confusion about the laws, and the organs in charge of their application. The colonial *audiencias* subsisted after the independence and until the federal judiciary was established, but the fact that a wave of colonial officials decided to leave Mexico and others decided not to collaborate in the independent institutions, left the offices with reduced functional capacity. The new institutions were still under debate, thus it was not possible to appoint new officials, but also there was not enough money to pay them. Around 1823 the administration of justice was deplorable, additionally to the absence of codes and unified laws, there was no Supreme Court, there were only two second instance tribunals and there were really few and poorly paid learned judges.⁵⁷ The federal constitution of 1824 established a Supreme Court of Justice with certain exclusive functions but also operating as a court of third instance for the cases solved by district judges and collegiate tribunals, following the Spanish model of administration of justice.⁵⁸ Since its creation, the Court was devoted to establish the system of administration of justice by trying to organise the district courts and tribunals, and providing opinions to unify decision making. During its first days (1825-1847) the Court was cautious not to get involved in political conflicts, although it often had frictions with the executive. However, the Court protested strongly against the ‘orders foreign to the (legal) system by which the Nation is governed’ coming from the executive⁵⁹ and the arbitrary acts of the legislative.⁶⁰ Despite the conflictive situation, the Court was a relatively stable and autonomous organisation: the justices generally lasted for long periods of time and they were

⁵⁷ Lucio Cabrera, *La Suprema Corte de Justicia. Sus Orígenes y Primeros Años 1808-1847* (UNAM 1986) 40.

⁵⁸ *ibid* 41.

⁵⁹ *ibid* 66.

⁶⁰ *ibid* 77.

respected in their positions regardless of their decisions.⁶¹ Even the change of regime from federalism to centralism in 1835, which destabilised the organisation of the federal district courts and circuit tribunals, barely affected the Supreme Court.

During these early times the professional knowledge of the judges of the Court could be basically identified with the Spanish heritage. At the time the influence of the North American system and the resolutions of that Supreme Court were barely relevant for its Mexican counterpart. It was after 1840 that the works of Tocqueville started to be widely known within the Mexican political and legal community, thus reviewing and quoting legal literature coming from North America became more frequent.⁶² As mentioned by the historian of Supreme Court, Lucio Cabrera, the judges of that time had a vast culture and flexibility reflected in using multiple sources in their reasoning: ‘either quoting Hamilton or [the Spanish legislation of] Las Partidas.’⁶³ In the political discussion the influence of the American judicial organisation starts becoming more apparent, as the model of Supreme Court of the northern republic was frequently used to present the idea of strengthening the constitutional attributions of the Mexican Court.⁶⁴ The Court was going through a time of prosperity, which reflected into the attributions in was conferred.

2.3.2 The Introduction of the Writ of *Amparo*

The development of the institution of precedents in Mexico is closely connected to the evolution of the constitutional thought and the writ of *amparo* created to protect civil rights and the division of powers. The exhaustion of the constitutional models tried by different regimes in Mexico lead to a permanent search for legal and political models proved elsewhere – developing in the second half of the nineteenth century a special sympathy for the institutional structures of the United States. The group of liberals and federalists often looked to the institutional development of North America, a neighbouring former colony embracing the same liberal values and

⁶¹ *ibid.*

⁶² *ibid* 79.

⁶³ *ibid* 81.

⁶⁴ *ibid* 79-80.

which federal structure helped devising the Mexican federation.⁶⁵ The filiations of certain aspects of the triumphing Mexican constitutional and political organisation led to a constant study of its parental model so as to understand how problems were solved in that jurisdiction. Thus, further American-inspired ideas and legal institutions penetrated the Mexican system, giving rise to a Supreme Court more active in the vigilance of constitutionality and in the construction of the constitutional doctrine, by means of a system of judicial review: *amparo*.⁶⁶

The institution of *amparo* was first drafted in 1841 in the local constitution of the state of Yucatan as means to review the constitutionality of statutory laws and acts of the executive, granting judicial protection to the affected party. It later became a federal action incorporated in the provisional Act of Constitutional Reforms of 1847 following the intervention of Mariano Otero, who pleaded for ‘elevating to a high status the federal judicial power, giving it the faculty to protect all habitants of the Republic in the enjoyment of the rights stated in the Constitution [...] against the attacks of the executive or legislative [...]’ as in North-America ‘where this saviour power came from the Constitution and has produced the best effects.’⁶⁷ However, Otero introduced an important clarification, which constitutes one of the main characteristics of *amparo* until our days: the resolutions granting *amparo* against statutory law do not constitute a general declaration about its constitutionality; instead they benefited exclusively the claimant.

The *amparo*, as envisaged by Otero, was finally included in the federal constitution of 1857. However, bringing into life the institution of *amparo* represented a challenge for Mexican jurists as it was foreign to the traditional line of legal ideas.

⁶⁵ The federal system was one of the first American legal-political forms introduced in Mexico. Between 1821 and 1835 federalism penetrated in Mexico with the idea of avoiding the possible dismemberment of the former provinces. This was motivated to a certain extent, by the acquaintance with works such as the Federalist, the books of Thomas Payne, the Constitution of 1787 and other American constitutional documents. Lucio Cabrera, *La Suprema Corte de Justicia. La República y el Imperio* (Suprema Corte de Justicia de la Nación 1988) 39.

⁶⁶ It has been argued that the *amparo* was based on Spanish legal institutions, such as the appeal for the viceroy’s protection; however, more directly it was taken from the American model of judicial review. See: José A Arroyo M, ‘El origen del juicio de amparo’ in Margarita Moreno-Bonett and María del Refugio González, *La Génesis de los Derechos Humanos en México* (UNAM 2006); Cabrera (n 65). However, the complex institution of *amparo* was also inspired in the different Anglo-American institution of *habeas corpus*, giving it its mixed procedural nature. Héctor Fix-Zamudio, *Ensayos sobre el Derecho de Amparo* (UNAM 1993) 23.

⁶⁷ Mariano Otero, *Voto Particular* (1847) 137.

Therefore, the first Amparo Act of 1861 that pretended to give practical existence to the revision of the constitutionality of statutes and acts of authority by federal courts emerged from an intense reflection regarding the role of the federal judiciary and the effect of its resolutions. During one of the sessions held by the Federal Congress to discuss 1861 project of Amparo Act, (distinguished jurist and politician) Ignacio Mariscal expressed the difficulties that the legislative commission was experiencing while attempting to regulate a matter alien to that context and the importance of understanding and finding guidance in the similar institution of judicial review of the United States, he commented that:

The main difficulty that the commission has found is that of leading with an entirely new subject without antecedents. It is only in the United States where a thought similar to that of our current Constitution is held. For a long time we had looked with eagerness for the statutes that regulate the proceedings on this subject, until we were convinced that there existed no general statute regulating further their constitutional thought. This might appear strange for those not acquainted with English and American customs, where a judicial decision has the same force as statutory law and from which their deeply embedded legal costumes arise.⁶⁸

The new institution also found opposition by certain members of the parliament for considering that the judicial review had nothing to do with Mexican legal tradition and that it would create chaos and confusion in the legal system.⁶⁹ Nevertheless, the legislative did not have the option of withdrawing the discussion of *amparo* since it was a constitutional command entrusted by the constitutive assembly, therefore the view of Mariscal made its way through the final Amparo Act of 1861.

In general, the legislative discussions of the act of 1861 mirrored the twofold influences of the Mexican legal mentality.⁷⁰ On the one hand, the weight of the European doctrines (especially French) prescribing a strict division of powers, the supremacy of the statutory law, codification and a passive judicial function, which

⁶⁸ Opinions of Ignacio Mariscal expressed in the Congress session of 19 of September of 1861 held to discuss the first *amparo* statute.

⁶⁹ Opinions of Couto in the Congress session of 19 of September of 1861 held to discuss the project of the first *amparo* statute.

⁷⁰ On the ambivalent influences in the making of the Mexican legal tradition see: Charles Hale 'The Civil Law Tradition and Constitutionalism in Twentieth-Century Mexico: the Legacy of Emilio Rabasa' (2000) 2 Law and History Review 257-79.

had actually permeated during the last years of the colony. On the other, the appeal of the American constitutionalism and judicial review derived from their acquaintance with foreign newspapers, judicial resolutions, the works of Justice Joseph Story and second-hand descriptions of the American judicial system, remarkably Tocqueville's 'Democracy in America', even if they seemed more distant from the prevailing legal ideas.⁷¹ One and the other have been present in the initial and developmental stages of various legal institutions such as *amparo*, causing an interesting phenomenon of 'hybridisation' in the attempt to attain the best of both worlds.

2.3.3 First Judicial Precedents

One of the issues that concerned most of Mexican jurists was that of the effects of the *amparo* resolutions. In fact it was a very delicate matter because it was thought that if resolutions had general force similar to statutes and a single judicial decision could invalidate legislative acts, this could risk the equilibrium of powers, political stability and, consequently, the subsistence of the writ of *amparo* in the long run. Therefore, the effects of *amparo* resolutions were consigned to the particular case, that is, judicial decisions were the law only for the parties intervening in the constitutional proceeding without implying any general pronouncement about the statute law *in abstracto*. In this manner, the doctrine stating the relativity of *amparo* resolutions, known as 'formula of Otero', became a self-understood pillar of *amparo*; a doctrine that is said to have avoided rough confrontation of the federal judiciary with the other federal and local powers and secured the survival of the institution even in years of higher political turbulence.⁷² However, even if unconstitutional provisions remained legally untouched, there was an expectation that this would create a politico-moral deed motivating their legislative reform or derogation. The institution of *amparo* was expected to function just as the frequently quoted representation of the American system of Tocqueville, where unconstitutional rules fell by 'the repeated hits of judicial decisions',⁷³ though in a more subtle way than

⁷¹ Arroyo(n 66); Cabrera (n 65) 39-40.

⁷² José A Arroyo M, 'La Fórmula de Otero y el Amparo contra Leyes' (1990) 20 *Jurídica*. Anuario del Departamento de Derecho de la Universidad Iberoamericana.

⁷³ Alexis de Tocqueville, *Democracy in America* (KPC 1969) 102-03.

derogation. In this subject Supreme Court's justice Ignacio Vallarta mentioned that 'the legislator has a duty to [revoke a statute] when the judicial power has declared its unconstitutionality in several resolutions, because the legislator ought to respect the decisions of the supreme interpreter of the constitution when he issues statutes and he would rebel against this code if he insists in issuing or supporting statutes declared unconstitutional; but this is different from forcing the legislator to derogate his acts [...]'⁷⁴

Nevertheless, in the idea of *amparo* as a means to build a constitutional doctrine and a way to influence the legislator's acts it was implicit that *amparo* resolutions could not just be confined to the private parties of the trial, but that they had to achieve publicity and, in a sense, that they could have wider effects than those consigned by the formula of Otero. Accordingly, Vallarta, following Ignacio Mariscal, these resolutions had two aims, one direct and another indirect. The first one consisted in solving a case and the second one in the establishment of public and constitutional law.⁷⁵ Therefore, since the beginning of the writ of *amparo* relevant resolutions were unofficially published in order to develop the constitutional doctrine, to settle some controversies regarding the use of *amparo* and to keep the unity of decisions. The increasing availability of judicial resolutions and the recognition of their role in building legal doctrine gave rise to an early unofficial system of precedents.

The first Amparo Act of 1861 on the one hand helped the diffusion of legal resolutions as it ordered their publication in newspapers, but on the other denied the character of precedents to court decisions and prohibited its use as reasons for disregarding statutes.⁷⁶ The Amparo Act of 1869 also denied the character of precedents to *amparo* resolutions, but as the publicity of judicial decisions increased, the practice of quoting resolutions as interpretative guides became widely popular. In 1870 Supreme Court's president Jose Maria Iglesias established an official means for

⁷⁴ Ignacio Vallarta, *El Juicio de Amparo y El Writ of Habeas Corpus* (F Díaz de León 1881) 301-02.

⁷⁵ *ibid* 321.

⁷⁶ Article 30 of the Amparo Act of 1861 stated: 'Legal decisions rendered in trials of this nature are only applicable to those who were parties to the dispute. Therefore, no person shall be allowed to invoke them in order to avoid complying with the statute law on which they are grounded' quoted in José M Serna 'The Concept of *Jurisprudencia* in Mexican Law' (2009) 1 *Mexican Law Review* 133 (Translation of José M Serna).

publishing federal judicial resolutions, recognising the ‘need of systematically publishing the resolutions of federal tribunals [...] with the purpose of unifying the criteria of all tribunals in the Republic, giving “certain authority” to the legal interpretations contained in these resolutions.’⁷⁷ During its first years (1871-1885) the publication did not achieve the practical success that it looked for, since the resolutions were not well systematised and it was difficult to revise them – but, it actually helped acknowledging the importance of having access to precedents and creating the habit of reading them.⁷⁸

Thus, legal resolutions became relevant for practice, they were frequently quoted by judges and lawyers to support their reasoning in new cases and they were recognised as *de facto* binding.⁷⁹ Between 1875 and 1880 – due to the temporal suspension of the official publication of judicial resolutions – important *amparo* decisions were published in ‘El Derecho’ and ‘El Foro’ (nonofficial newspapers of law and jurisprudence). Eventually this practice extended to the publication and analysis of previous cases from both federal and local courts, following the idea that the law of the books was only developed in practice which is clearly outlined in the following statement published in El Foro:

[...] it is true that judicial resolutions are not legal truth but only in their dispositions and for the parties of the trial; but it is also true that resolutions motivated and founded in legal principles and deductions [...], have the character of reasoned and rightful legal interpretations, they concretise our understandings of statute-law, they execute the theoretical speculations of legal science in the sphere of practical facts.- There is a common background of juridical truths, of solutions adopted, that are traditionally preserved in the forum, and that can only be studied in judicial resolutions. The good judgment, the right choice, the precaution to manage the cases, to select the actions, recourses, to reveal in advance the results, what would come from this or the other

⁷⁷ José M Iglesias quoted in Lucio Cabrera ‘La Jurisprudencia’ in Suprema Corte de Justicia de la Nación, *La Suprema Corte y el Pensamiento Jurídico* (Suprema Corte de Justicia de la Nación 1995) 227.

⁷⁸ Ezequiel Guerrero and Luis F Santamaria ‘La Publicidad de la Jurisprudencia de la Suprema Corte de Justicia en el Periodo 1877-1882’ in Lucio Cabrera, *La Suprema Corte de Justicia en el Primer Periodo del Porfiriato 1877-1882* (Suprema Corte de Justicia de la Nación 1990) 985.

⁷⁹ However judicial precedents sometimes appeared to be more than *de facto* binding as the Supreme Court used the available administrative controls (such as suspending judges) to secure that judges followed its precedents. See: *ibid* 44-6.

mean, all this cannot be studied neither from statutes nor from books, but only and exclusively from the applications contained in judicial decisions.⁸⁰

The publicity of legal resolutions was indeed considered of real importance for a legal development upon experience. Thus, one of the 1879 issues of *El Foro* contained a call to all magistrates and judges exhorting them ‘to send copy of the resolutions that in their opinion are of positive interest’ just for ‘their love to [legal] science’.⁸¹ However, one of the major contributions to the publicity of the *amparo* resolutions was that of Judge Ignacio Vallarta, who improved the systematisation of resolutions in the Official Judicial Periodical and introduced clear explanations of the reasoning behind of the resolutions. Additionally, Vallarta published his decisions as president of the Supreme Court of Justice in 1879, 1980, 1982 and 1985, giving detailed explanation of the reasons leading to the conclusions, with the deliberate intention to create a system of precedents.

2.3.4 Early Problems of the System of Precedents: Handling Contradictions

The increasing availability of *amparo* resolutions made evident that there were contradictory interpretations on the same legal subjects. Contradictory resolutions were perceived as a major problem that had to be solved. Therefore, creating a system free of contradictions was the main concern addressed by the project of Amparo Act of 1869 proposed by Ignacio Mariscal, who considered that contradictory judicial interpretations had left legal questions without a clear answer and that this would lessen the constitution and the institution of *amparo*. He expressed concern regarding the fact that:

[...] neither repetition [nullifying certain cases] could occur, nor the uniformity of constitutional understandings, if their interpretation corresponds to isolated tribunals, such as district and circuit courts. It is natural that they disagree in several points as differences of opinion [...] However, a political charter of which interpretation is

⁸⁰ ‘Jurisprudencia de los Tribunales’ *El Foro* (1 July 1879) 2.

⁸¹ ‘Necesidad de publicar las sentencias’ *El Foro* (Mexico City, 2 abril 1879) 243.

variable, uncertain and mutable, according to places and times, hardly deserves the name of constitution [...]⁸²

Mariscal concluded that to avoid contradictions district judges should just prepare the *amparo* trial and all final resolutions should be emitted by the Supreme Court – ‘this way, judicial resolutions will achieve not only respectability, but also the uniformity of spirit that, as it has been shown, is so essential for the public good.’⁸³ These suggestions were taken into account, but it was decided that this would overload the Court and that other alternatives should be found. Finally, article 3 of the Act gave district judges the power to pursue the trial and provisionally suspend the execution of the alleged unconstitutional acts. Article 13 authorised them to pronounce definitive resolution on the *amparo* matter, but ordered the remission of the files to the Supreme Court of Justice for its revision.⁸⁴ This way, the Amparo Act of 1869 made the Supreme Court of Justice the definitive interpreter of the constitution, avoiding the dispersion and contradictions that the legal system was experiencing.

However, the contradictions subsisted even after the new statute. The comments made in 1877 by the famous lawyer Jacinto Pallares illustrate the perception of this problem:

The Constitution of 1857 has been, in the hands of the Supreme Court, the same as sacred books are for sects, that is, an arsenal of ideological disputes. [...] The national Supreme Court that until now has not known how to create a *jurisprudencia* (so big is the number of resolutions in contradiction), has completely discredited this source of law that is formed from the custom of the forum [...] In a short time, this Babel tower called ‘constitutional law’, will turn an inexplicable labyrinth.⁸⁵

Therefore, the desire to avoid contradictory resolutions remained present in the treatment of judicial precedents (i.e. the so called *jurisprudencia*). For example, this can be seen at a later stage in the discussions of the unapproved project of Amparo Act presented by Protasio Tagle in 1877, where he argued:

⁸² Mariscal in Cabrera (n 65) 172.

⁸³ *ibid.*

⁸⁴ *ibid* 174.

⁸⁵ Jacinto Pallares in Cabrera (n 78) 47.

[...] it is proposed that it [the Supreme Court of Justice] is divided in chambers [...] the second and third chambers will each have three magistrates and are of *amparo* [...] But it is necessary to avoid the inconvenient of a contradictory constitutional *jurisprudencia*, because being both chambers in charge of solving *amparo* recourses, this could happen [...] This is why it is proposed a cassation that does for constitutional *jurisprudencia* the same as it does for civil *jurisprudencia*, that is: to establish the uniformity of the interpretations of our political code, to form the precedents that set up a solid and reasoned constitutional *jurisprudencia*, and to avoid that the constitutional prescriptions become a chaos of unintelligible sophisms.⁸⁶

The project was objected precisely because the division of the Court would inevitably lead to contradictions. Correspondingly, senator Couto argued that *amparo* aimed ‘to uniform the understanding of [constitutional] articles, [...] and this is only achieved giving jurisdiction to the full Court for solving *amparo* actions; because there are more probabilities that the constitutional *jurisprudencia* is uniform when they are resolved by the full court [...] and this way contradictory resolutions are avoided’. Similarly senator Pacheco expressed that ‘when a single corporation is the one that has to apply a law constantly [...], it is much easier to achieve the uniformity of *jurisprudencia* and there will be fewer divergences [...].’⁸⁷

2.3.5 Limiting the Functions of the Judiciary

The system of precedents was to a certain extent affected by the political context. During the 1870’s the Supreme Court of Justice actively protected civil and political rights. However, the protagonism of the Supreme Court was the cause of increasing hostility with the other political powers. The highest point of tension was reached in 1876 when the Court, following the precedents that held competence to review the election of the members of the political parties and nullify all acts and laws of illegally elected authorities, it decided that the re-election of President Lerdo de Tejada was illegal because of fraud. This important incident destabilised the country and brought a new armed conflict that ended in the establishment of the dictatorship

⁸⁶ Protasio P. Tagle in Cabrera (n 77) 244.

⁸⁷ *ibid.*

of Porfirio Diaz and the later deposition of the ministers of the Supreme Court that were not loyal to the new regime.⁸⁸

The Supreme Court of Justice was the target of criticisms claiming for its de-politicisation and for a new Amparo Act on these grounds. After five years of legislative process the project of Amparo Act drafted by Vallarta was accepted in 1882; it attended the critics to the Supreme Court redirecting its political turn into a more technical function. The following years the Supreme Court played a less relevant political role but presided as it was by Vallarta and including notorious jurists, it was still a centre of legal development. However, as years passed the judiciary seemed to experience a period of lethargy. Porfirio Diaz had decided to put an end to the protagonism of the Supreme Court and the ‘vallartist’ influence. Vallarta, not comfortable with the executive and the new members of the Supreme Court that favoured the executive, opted for resigning in 1882.⁸⁹

During the dictatorship the judiciary entered into crisis: the resolutions of *amparo* were frequently disregarded by the authorities, the ministers of the Supreme Court and federal judges were appointed and removed by the president in the most arbitrary ways, counting with the support of the Congress. The members of the Supreme Court often received letters from the executive requesting compliance with its lines of action, though these requests really meant imperatives to be achieved by force.⁹⁰ Diaz is considered the responsible of eroding the judicial independence that the Court had enjoyed during the previous independent, opposing the permanence of justices in their function and deliberately controlling the election of the Court ministries and district judges.⁹¹ As the constitutionalist Emilio Rabasa commented: the mobility of the Court’s members had ended with the possibility of stability in its

⁸⁸ Cabrera (n 78) 26.

⁸⁹ Lucio Cabrera, *La Suprema Corte de Justicia Durante el Fortalecimiento del Porfirismo 1882-1888* (Suprema Corte de Justicia de la Nación 1991) 27.

⁹⁰ Genaro Góngora, *Poder Judicial Federal: Origen, Desarrollo, Estado Actual y Futuro* (UANL 1999) 31.

⁹¹ Timothy James, *Revolución Social e Interpretación Constitucional. La Suprema Corte y la Reforma Social Revolucionaria 1916-1934* (SCJN 2010) 31-37; Timothy James, ‘Liberal Jurisprudence, Labor Tribunals, and Mexico’s Supreme Court, 1917–1924’ (2009) 27 *Law and History Review* 92.

decisions.⁹² Jacinto Pallares denounced the lack of independence of the judiciary as one of the problems of the administration of justice in the porfirian times:

The truth is that the judicial power depends from the executive practically and legally, and this dependency has fatally occasioned the juridical and moral inferiority of the Mexican judiciary.⁹³

As the dictatorship advanced in time, Mexico seemed to depart more from the American line of judicial development, where the Court had actually assumed a strong political role, reflected, for example, in the acknowledgement of the power to review of presidential elections. Subsequently, American reception was regarded with scepticism and Mexican jurists started to develop a renewed sympathy towards French legal culture. French legal developments were more suitable for the current Mexican reality, specially the *droit administratif* that proved very useful to strengthen the executive. Thus, new comparative studies of French and Mexican institutions were performed; remarkably a comparison of *amparo* against judicial decisions and cassation arguing their almost absolute similarity and suggesting the conscious and precise imitation of more technically developed French cassation. The writ of *amparo* moved from its original purpose, that is, to control constitutionality, to function along the lines of cassation, so as to guarantee the correct application of the recently enacted legal statutes and codes, that is, to serve as a means to control legality. It is therefore understandable that the resolutions published within January of 1890 and December 1897 show development in the procedural and technical aspects of *amparo*, filling it with the technicisms of cassation, even though it still had a modest role in the protection of civil rights.⁹⁴ Jacinto Pallares also complained about this matter, arguing:

Judges and magistrates tend to kill the substance of the law due to the formulas, terms and other scientific machinery suited for a cheap science.- Instead of directly grasping the moral substance of the matter debated before them, they see it through the

⁹² Emilio Rabasa, *El Juicio Constitucional: Orígenes, Teoría y Extensión* (first published 1919, Porrúa 1955) 311.

⁹³ Lucio Cabrera, *La Suprema Corte de Justicia, la Revolución y el Constituyente de 1917* (Suprema Corte de Justicia de la Nación 1994) 111.

⁹⁴ Lucio Cabrera, *La Suprema Corte de Justicia a Fines del Siglo XIX 1888-1890* (Suprema Corte de Justicia de la Nación 1992) 82.

technicism and the formulas, which they handle with fake erudition [...] This is revealed even more clearly in the more technical recourses, especially in cassation, where the respective chamber has adopted a metaphysic more or less serious, so far from reality and social facts, of the interests that palpitate in the judicial life, that is impossible to make it feel the necessities of the litigants, their votes of justice, their complaints, their protests [...] But this fact is not exclusive of [the chamber] and everyday there are cases in which, because of a formula, a solemnity or any *chicana*, entire trials are nullified [...] The tribunals consummate their work by means of a simple decree, a word, and they do not know, or they do not want to acknowledge, that behind it there is life, that the formulas serve to guarantee the law, not to kill it.⁹⁵

An important stream of the precedents of the Court of that time tended to interpret the division of powers, and granted *amparo* for formal violations with regards to matter of competence of the authorities. This represented an oxymoron as the evaluation of constitutional competences was formal matter without foundation in the actual power arrangements.⁹⁶ However, the concern for matters of competence, as well as those of procedure and form, remained a characteristic of the decisions making of future Courts.

2.3.6 Towards an Official System of Binding Precedents

Possibly one of the last signs of the former judicial splendour during the dictatorship was the enactment of Vallarta's project of Amparo Act of 1882. But in a sense this project suited well the triumphing coup, as it removed any trace of political activity from the Supreme Court of Justice and technified the *amparo* action. However, the act attempted to strengthen the ordinary judicial functions defining procedural aspects of the *amparo* action and made improvements to the roughly outlined system of precedents. The new act established that all resolutions from district judges, the Supreme Court of Justice and dissident opinions had to be published in the official newspaper of the federal judicial power. It recognised the importance of the Court's opinions for giving the correct interpretation to the constitutional text⁹⁷ and also

⁹⁵ Cabrera (n 93).

⁹⁶ Timothy James, *Revolución Social* (n 91) 37-8.

⁹⁷ Article 37 of the Amparo Act of 1882 establishes: 'Decisions pronounced by judges shall be based in the applicable constitutional text. For its correct interpretation, attention shall be paid to the meaning given in the resolutions of the Supreme Court and doctrine.'

imposed a binding character of the Court's constitutional interpretation held in five definitive resolutions to all federal judges, under sanction of removal from their position, imprisonment or suspension.⁹⁸ Previously, Mariscal had been an important supporter of attributing judicial precedents with general binding force, that is, that they should have these effects for all administrative departments and society. However, Vallarta discarded general bindingness for the sake of political prudence, limiting the compulsory character of precedents to the federal judiciary.⁹⁹ He attempted provide precedents with bindingness in a strong sense, thus he adapted the provision of the decree of the Spanish Courts of 1813 (in force until 1872) that sanctioned with suspension of functions and a year's salary fine to judges that solved against the law.

Nevertheless, the system of binding precedents was highly criticised for several reasons. First, precedents of this type were suspected to have a political function and to intrude legislative functions, something that was not completely according with the trend of transforming the judiciary into an apolitical institution. Second, the binding (and coercive) effect of judicial precedents had created an insecure environment for judges that were afraid of risking their position or going to prison while deciding against the binding precedents of the Court. Third, judges and practitioners complained about faulty quality, unavailable and heterogeneous resolutions that made difficult for judges to commit with following the *jurisprudencia*. One of the main contemporary critics of the system of binding precedents was Judge Fernando Vega, who thought that *jurisprudencia* had not clarified statutes, but it was equally obscure; it was too changeable, volatile, complex and vague to oblige judges in the terms of the Amparo act of 1882.¹⁰⁰

⁹⁸ Article 70 of the Amparo Act of 1882 established: 'The grant or denial of *amparo* against the express text of the Constitution or its interpretation, established by the Supreme Court, in at least five uniform final resolutions, shall be sanctioned with loss of the position, and imprisonment from six months to three years, if the judge has acted deliberately; and if he has acted with negligence, he shall be suspended from his functions for a year.'

⁹⁹ Cabrera (n 78) 48.

¹⁰⁰ Matthew C Mirrow, 'Case Law in Mexico 1861 to 1919: The Work of Ignacio Luis Vallarta' in W Hamilton Bryson and Serge Dauchy, *Ratio Decidendi. Guiding principles of judicial decisions* (Duncker & Humblot 2006) 231.

Therefore, *jurisprudencia* as a binding source of law was abandoned in the new Federal Code of Civil Procedures of 1897. The code established that the *amparo* resolutions had to be according to the Constitutional text, omitting the mention to judicial precedents contained in the former statute.¹⁰¹ It also repeated the formula followed in the previous *amparo* acts, stating that resolutions only benefited the parties of the trial, and they could not be quoted in other trials.¹⁰² The official explanation for this shift was the invasive tendency of the judiciary against the legislative and the reestablishment of the division of powers as understood in the civilian tradition.

2.3.7 Revolutionary Discontinuities and the Building of a Model of Judiciary

The revolutionary movement of 1910 represented another challenge to the Supreme Court. During the first years of the revolution the Supreme Court of Justice kept on operating with relative normality, but as the revolution moved forward, the members of the Court, identified with the regime of Porfirio Diaz, could see that their place in the judiciary would come to an end. Around 1914 the intensified revolutionary movement and the North American invasion caused the closure and relocation of many federal courts of first and second instance. Additionally, judicial adjudication was disrupted by the suspension of individual rights in 1913 and the removal of the capacity to grant *amparo*.

As a result of the triumph of the revolution, a new political constitution was drafted and enacted in 1917. The main objective of the constitution was to incorporate a catalogue of social rights into the already existing body of individual liberal law. Additionally, the institutional framework was redesigned and certain competences were redistributed. The members of the constitutional assembly discussed extensively the role of the Supreme Court and worked towards bringing it back to its best times. The constitution reorganised the Supreme Court in order to provide it with a wider degree of independence from the executive, but it was also reiterated

¹⁰¹ Article 807 of the Code of Federal Proceedings of 1897 established: 'The resolutions pronounced by the judges shall be founded precisely in the correlative constitutional text.'

¹⁰² Article 826 of the Code of Federal Proceedings established: 'Amparo resolutions only favour the parties of the trial, and shall not be invoked to by others to stop compliance with the laws or providences that motivate them.'

that the Court should not have an active role in solving political conflicts. The role of the Supreme Court as a tribunal of cassation was also widely discussed. On the one side it was considered that it was an institutional fail to allow the federal revision of local judicial resolutions due to argued vices in the fulfilment of statutory legal requirements, but on the other it was accepted that since ‘the [local] judges are converted in the blind instrument of governors, that openly get involved in matters out of their attributions, it is precise to have a recourse, before the federal judiciary in order to repress all these excesses’ and that ‘the people was already used to *amparo* in civil matters, so as to get rid of the arbitrariness of the judges, that [...] it would be not only unjust, but impolitic, to deprive them from this recourse.’¹⁰³ Finally, due to this considerations, the competences of the Court as a tribunal of cassation remained unchanged.

The performance of the Court during the first two decades after the new constitution has been an object of controversy. Often it has been argued that the Supreme Court was submissive to the executive even after the revolution. However, more recently it has been argued that during the years immediate to the triumph of revolution the Court operated as an independent organ. Recent research has shown that the first Supreme Courts after the revolution appeared to have operated autonomously and not according to the will of the other powers. However, the first Courts seemed to have been driven by the legal inertia of the porfirian times, even holding back the operability of the revolutionary reforms. Their attachment to certain doctrines regarding separation of powers, and their preference to discussing legal technicalisms represented an impasse for the reforms supported by the other powers. Actually, the Court appeared to still be adhering to the features distinctive of porfirian law: its doctrines and the formalist-proceduralist approach to adjudication. In this manner, the Court practically obstructed the realisation of the social constitutional reforms by attaching to the former doctrines and reasoning patterns, placing more attention to matters of form and procedure to the content of the revolutionary law. As mentioned

¹⁰³ Cabrera (n 93) 65.

by a member of the Congress at the time ‘there was nothing that opposed more the revolutionary conquerors than the spirit of old lawyers.’¹⁰⁴

Consequently, the Supreme Court was reformed in 1928 with the aim of removing the ministers and securing its future affinity with the executive’s policies. The appointments of the members of the Court was put into the hands of the executive (which at that time had already evolved into the centre of the political system), beginning the era of subordination of the Court to the executive that remained essentially unchanged until 1994.¹⁰⁵ The process of appointment was loosely linked to the professional or judicial merits of the candidates, but more closely related to their political affinities, loyalty or friendship.¹⁰⁶ The Court (and the judiciary in general) functioned within the hegemonic party’s logic, becoming one more block of the corporatist state structure consolidated in 1930.¹⁰⁷

After the 1930s the Supreme Court assumed a passive role, distancing from politically sensitive issues and rarely challenging the executive. Arteaga Nava described the members of the Court as follows:

‘While judges, especially in other countries, have the reputation of being conservative, the truth is that in Mexico, except on rare occasion, we cannot say the same. It does not follow from this that they are liberal or revolutionary; rather that the highest magistrates are simply colourless, and follow the ideas of the highest members of the ruling group of the moment, especially those of the president of the republic, be they revolutionary, conservative, or whatever else is in fashion [...]’¹⁰⁸

Amparo actions of a high political content were often declared inadmissible, and from those studied by the Court only few were ruled in favour of the plaintiff under exceptional grounds of political opportunity. For example, in deciding a case in 1933, a member of the Court disclosed:

¹⁰⁴ James, *Revolución* (n 91) 76-84.

¹⁰⁵ Pilar Domingo, ‘Judicial Independence: The Politics of the Supreme Court in Mexico’ (2000) 32 *Journal of Latin American Studies* 712-13.

¹⁰⁶ *ibid* 722.

¹⁰⁷ *ibid* 727.

¹⁰⁸ Elisur Arteaga Nava, *Derecho Constitucional* (1995) in *ibid* 719.

We have ruled in favour of the plaintiff only because the country is at peace: if the circumstances were different, nothing would stop us from declaring that the dismissal of a military man is a political act that cannot be protected by the *amparo* suit.¹⁰⁹

Regarding the writ of *amparo* in politically unimportant matters, the Court appeared to be more autonomous and to hold a more or less successful role in protecting individual rights. Actually, in some litigious areas, the administration of justice was to some extent effective.¹¹⁰ However, the increase on caseloads seemed to have intensified the historical formalist-proceduralist reasoning pattern, and many of these cases were solved on these grounds. This trend seems to have lasted for decades. In this respect, the statistics of 1992 point that 77 per cent of *amparo* actions were dismissed on procedural grounds.¹¹¹

2.3.8 Towards an Established System of Precedents

The official system of precedents known as '*jurisprudencia*' was reintroduced in the Federal Code of Civil Procedure of 1908 after it was recognised that precedents were in any case 'a useful source, maybe indispensable for the correct understanding of the law [...] when their foundations are according to reason.'¹¹² A more ordered practice of precedents was aimed by introducing different, but at the same time strict rules regarding their creation and use. The new code established that only the Supreme Court could form *jurisprudencia* regarding constitutional and federal ordinary law¹¹³ when the decisions were reached by at least nine judges and reiterated in a line of five decisions without interruption by a contradictory criterion.¹¹⁴ The statute shows a tendency to mitigate the strong sense of bindingness contained in the former act by removing the sanctions for disobeying the *jurisprudencia*. Decisions were considered binding for inferior judges and the Court,

¹⁰⁹ Miguel González Avelar, *La Suprema Corte* in *ibid* 718.

¹¹⁰ *ibid* 726.

¹¹¹ *ibid* 717-18.

¹¹² Comments on the Preamble of the Reforms to the Federal Code of Civil Procedures in Lucio Cabrera, *La Suprema Corte de Justicia a Principios del Siglo XX, 1901-1914* (Suprema Corte de Justicia de la Nación 1993) 171.

¹¹³ Article 785 of the Code of Federal Proceedings of 1908 established: 'Jurisprudencia established by the Supreme Court of Justice in its *amparo* decisions shall refer to the Constitution of federal law.'

¹¹⁴ Article 786 of the Code of Federal Proceedings of 1908 established: 'The decisions of the Supreme Court of Justice, taken by vote of nine or more judges, constitute *jurisprudencia* whenever the matter solved has been held in five decisions not interrupted by a contradictory one.'

but the Supreme Court could disregard the established line of decision just by expressing its reasons.¹¹⁵ The citation of precedents was set on the side of the parties that now had to state clearly the binding criteria and the individual decisions from where they derived.¹¹⁶

From there on, the official treatment of *jurisprudencia* has remained more or less the same, having just small variations, even after the promulgation of a new Constitution in 1917. The Amparo Act of 1919 practically reproduced the articles of the Federal Code of Civil Procedures, except for the fact that the new statute expanded the scope of bindingness of *jurisprudencia* to local state tribunals. Even if the formal handling of the system of precedents remained the same, after the revolution, there was an expectation of a substantial break with the legal past; consequently all the judicial precedents from the times previous to the new constitution were declared ineffective and were attributed the status of non-binding ‘historical precedents.’

In 1936 a new Amparo Act (which operated until 2013) was enacted, establishing that the definitive resolutions of *amparo* and the dissident opinions of the judges would be published in the weekly publication of the Federal Judiciary, when necessary to constitute *jurisprudencia* or contradict it, and when agreed by the Court working in full or in chambers.¹¹⁷ A similar rigid rule for the constitution of binding precedents as that of 1908 was included in the new act, establishing that five consecutive definitive resolutions, not interrupted by other contradictory and approved by at least eleven judges, when dictated by the whole court and five for the case of chambers, constituted *jurisprudencia*.¹¹⁸ The main modification to the system of precedents introduced by this act was the expansion of the precedent creation faculty to the chambers of the Court, which was predestined to increase the problem

¹¹⁵ Article 787 of the Code of Federal Proceedings of 1908 established: ‘The *jurisprudencia* of the Court in *amparo* trials is obligatory for district judges. The Supreme Court shall follow its decisions. It may contradict established *jurisprudencia*, but always expressing in this case, the reasons for deciding in this sense. The reasons must refer to those present in the elaboration of the *jurisprudencia* that is contradicted.’

¹¹⁶ Article 788 of the Code of Federal Proceedings of 1908 established: ‘When the parties in an *amparo* trial invoke *jurisprudencia* of the Court, they shall do this in written form, expressing its sense and the decisions that have formed it; in which case the Court shall study the *jurisprudencia*. In the decision of the principal case, it will be mentioned the motives or reasons for admitting or rejecting the *jurisprudencia*.’

¹¹⁷ Article 197 of the Amparo Act of 1936.

¹¹⁸ Article 193 of the Amparo Act of 1936.

of contradictory precedents. This problem only became worse in time with the further widening of tribunals authorised to create precedents.

After the revolution the judiciary was left with an important backlog of court cases. Thus, the organisation of the Supreme Court of Justice was reformed to create three specialised chambers of five judges in 1928, and a fourth one in 1934. In 1951 the constitution was reformed to consolidate the collegiate tribunals as instances of *amparo*, so as to help alleviating the backlog cases. Collegiate tribunals would be in charge of deciding the *amparo* cases that did not require a ‘direct interpretation’ of the constitution. The creation of collegiate tribunals increased the number of contradictory criteria. Therefore, the Constitution established that ‘[i]f the collegiate tribunals of circuit hold contradictory theses in the *amparo* trials of their competence, the ministers of the Supreme Court, the General Prosecutor of the Republic or those tribunals could report the contradiction to the Supreme Court, who will decide, as a whole, which thesis should be observed.’¹¹⁹ In this way a new modality to constitute *jurisprudencia* was conceived besides the system of reiteration mentioned above: the so called *jurisprudencia* by contradiction of theses, which also operates nowadays.

With respect to the publication of the precedents, it can be observed that the unofficial legal publications that were initially active making available and reviewing judicial resolutions faded away. The official judicial weekly publication became for long time the only means where precedents were available. Nevertheless, the form of publishing judicial resolutions after the revolution varied from that introduced by Vallarta. The explicatory summaries of resolutions, first created to clarify and make easier the understanding of precedents, went through a process of formalisation. The text of the ‘jurisprudential theses’ published by the judiciary went from their early argumentative form to impervious rules or principles resembling a statute. In this manner, the summaries started having a life of their own and acquiring more relevance than the full-resolutions, which were rarely published.¹²⁰

¹¹⁹ Fraction XII of the article 107 of the Federal Constitution as reformed in 1951.

¹²⁰ See: Ezequiel Guerrero and Luis Santamaria ‘La Jurisprudencia Obligatoria en Mexico’ in *Diálogos sobre Informática Jurídica* (UNAM 1988).

2.4 Final Notes on the Mexican Legal Mind and the System of Precedents

As we have seen, the Mexican legal system since its very early days evolved along the lines of the civil law tradition. The roots of the laws of the colonial times elaborated by the Spanish regime are mainly identifiable with Romano-Canonical tradition. However, the interaction of this type of law with the indigenous laws created a peculiar high level of complexity that exceeded the heterogeneity characteristic of European feudal systems.

Additionally, Mexico as an independent State followed closely the political and juridical developments of countries of the same tradition with which legal drafters were acquainted, such as Spain and France. This close intellectual affinity encouraged the borrowing of ideas such as nation-state, constitutional separation of powers and codification of law. In this manner, Mexican law followed the trend of aiming to rationality by creating comprehensive and systematic codes with abstract and general formulations of uniform application. This set of rational laws could only find its source in the State, and more concretely in its legislative branch, leading to the classical civil law emphasis on statutory law and the correlated deductive legal method, although showing some contextual particularities. However, in the first years after the independence, it also became common to revise the legal models developed in the United States and to experiment with some common law legal features. Nevertheless, some aspects of the civil law inheritance appeared to dominate strongly, even those common law inspired institutions.

The Mexican legal community, as almost any civilian legal community, has been traditionally one that values uniformity and generality in law. In this way, the main and most valuable form of law has been positive law enacted by the legislative authority. Positive law is written law with a high level of generality and that must be applied syllogistically. In this sense, there seems to remain a strong connection with the text of the law, which denotes a certain 'cult to legal text' that is often associated to practitioners of the civilian tradition. The enacted law, participating on different rationalist elements, is considered to be almost scientific and of logical application. In the Mexican context, this rationalist dictates were held commonly associated with

the civilian mind with particular strength. As we have seen, after the independence of Mexico, the attachment to the ideas prescribing the unification of law was so strong that there was little space for negotiating the inclusion of different relevant areas of the complex societal life, even if this meant further difficulties. Since its early days of existence and until the end of the twentieth century, the ideas over which the Mexican legal system was built developed in a tense and conflictive relationship with different areas of the social world. The law did not seem to find a balance between the complexity of factual reality and the reduced scope recognised by the official law. Thus, this unresolved conflictive relationship between the wider society and the legal framework strongly marked the development of legal ideas and practices within that context.

The imbalance between the legal concepts and beliefs over which the legal system was built, and the factual reality often lead to a practice of negotiating the institutions (but outside any formal institutionalised framework) and looking for alternative routes to guarantee order. In some sense, the pluralism and flexibility of the old colonial laws that apparently suited best the social structure had to be incorporated, but this time they were not achieved by means of the law. That does not mean that the actual legal system was obsolete, but that its operation was sometimes subject to cryptic exceptions and private negotiations,¹²¹ which actually contradicted the universalising tendency of modern legal ideas. The constant negotiation between law and reality forged the legal mentality, imprinting it with a distinctive pragmatism.¹²² In this scenario many considerations external to the law are often analysed, playing a fundamental part in deciding about its operation, even if these deliberations remain undercover or are disguised. In fact, the Mexican legal culture is often portrayed in legal and non-legal literature as one characterized by ‘lie and inauthenticity’¹²³ and allowing many inconsistencies between the law and the factual practices.¹²⁴

¹²¹ Escalante, (n 39), 289.

¹²² López Ayllón (n 50) 256.

¹²³ Octavio Paz, *El Laberinto de la Soledad* (MUP 2008).

¹²⁴ A common historical example of this inconsistency often used to illustrate this matter is the letter that President Benito Juárez (a recalcitrant liberal) wrote so as to clarify the application of the Statute of 25 of January of 1862, which ordered the execution of all those that collaborated with the foreign invaders. However, Juárez acknowledged that the application of this statute would lead to the execution of almost all the inhabitants of the port of Mazatlan, and therefore some exceptions had to

However, the panorama described above should not be interpreted in an absolute manner, drawing upon conclusions of a definitive inoperability of the law. Pilar Domingo has noted that ‘[a]lthough there was no even application of the law, by no means was the Mexican state lawless, and a modern system of law operated, channelled through the court system, and also through the parallel system of special tribunals or administrative courts.’¹²⁵ When the law is in operation, it is usually depicted as a very strict dogmatic structure often identified as an extreme kind of legalism (which is often called positivism within the context),¹²⁶ which represents an exacerbation of the civil law distinctive traits. In other words, when the law enters in function tends to be rigid, legalistic and formalist, prescribing a mechanical application that pre-empts the development of some aspects of legal reasoning.¹²⁷ In this legal system, reliance to the rules has been possibly taken too far, which often leads to the prioritisation of matters of form and procedure over substance, and the settlement of legal cases under those grounds. In a sense, the Mexican legal system appears to have realised the ‘formalist fiction’, by frequently isolating the law from foreign considerations, creating something that resembles a closed system – although, with the aid of the system of informality described above that allows non-legal considerations in decision making.¹²⁸ Through that way of performing, the law

be enforced. He authorised to suspend the application of the law in certain cases and lifted responsibility to the officials acting in this way; but highlighting that this norm should not achieve publicity that could compromise the statute. See: Escalante, (n 39) 291 and López Ayllón (n 50) 25.

¹²⁵ Domingo (n 105) 727.

¹²⁶ Jaime Cárdenas, ‘Hacia un Cambio en la Cultura Jurídica Nacional’ (2007) *Boletín Mexicano de Derecho Comparado* 300-1.

¹²⁷ See for example: Ana L Magaloni, *¿Cómo Estudiar el Derecho desde una Perspectiva Dinámica?* (Documentos de trabajo del CIDE, No. 19, 2006); Jaime Cárdenas ‘Diez Tesis sobre Nuestro Atraso Jurídico’ in Pedro Torres (ed) *Neoconstitucionalismo y estado de derecho* (Limusa, 2005); Enrique Cáceres ‘Psicología y Constructivismo Jurídico: Apuntes para una Transición Paradigmática Interdisciplinaria’ in Martha Muñoz *Violencia social* (UNAM 2002); Matthew Taylor ‘Why No Rule of Law in Mexico? Explaining the Weakness of Mexico’s Judicial Branch’ (1997) 27 *New Mexico Law Review* 144.

¹²⁸ It is true that the arguments of legalism and formalism are not exclusive to this context, and are also recurred to explain the operation of law in different places and times. However, we shall note that there is difference between the characterisations of the Mexican system and a more general claim raised from other legal systems: the first refers to an extreme form of exclusion of non-legal reasons into law, while the other describes a milder degree of exclusion of ‘foreign to the law reasons’ in systems aiming to find a fair equilibrium in the consideration of legal and non-legal reasons. On the uses of the term formalism see: Frederick Schauer ‘Formalism’ (1988) 97 *The Yale Law Journal*.

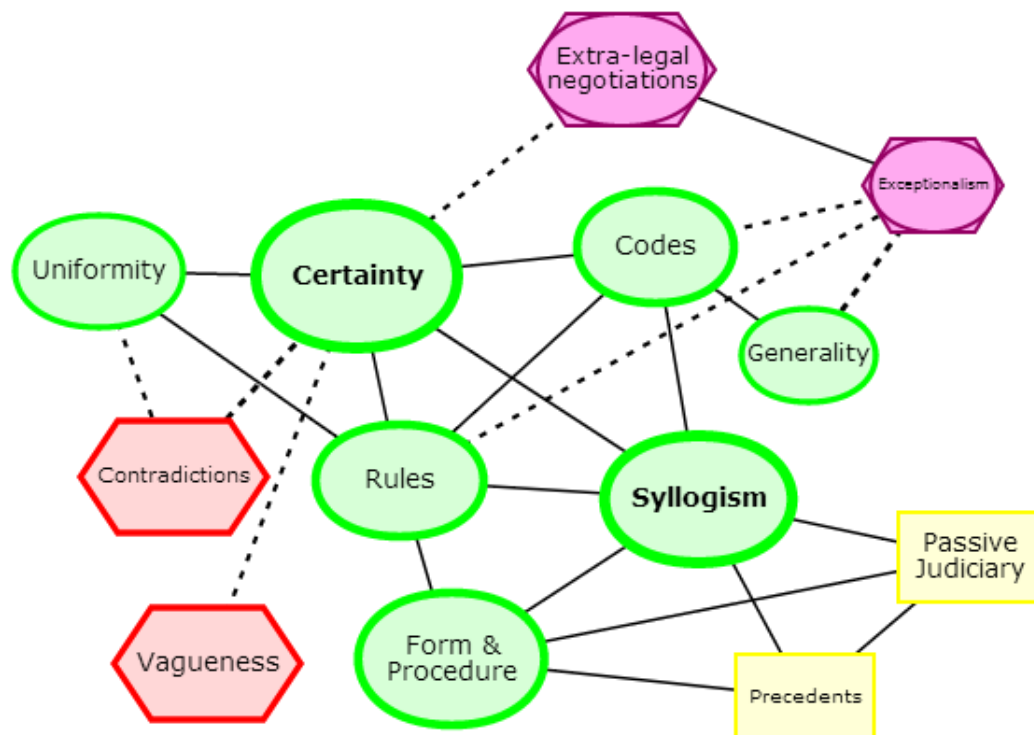
acquires a high degree of certainty and objectivity, but also it becomes immutable and risks of ossification.¹²⁹

The model of law in this context has been perpetuated by the process of education through which legal practitioners have been formed for generations. As we have explained, the civilian bias, parallel to a set of particular socio-political circumstances, favoured the development of certain image of the law, which has circulated in the law schools for a long time. Through the educational process a set of concepts and beliefs about what the law is and how it functions (i.e. propositional knowledge) are delivered, but also concordant methodologies (i.e. procedural knowledge) are learned. In this context, legal professionals have been formed under the idea that the law is a set of written normative enunciates that must be applied to matching factual scenarios following a logical syllogism. For this reason, special attention is given to learning normative legal text, and there is no tendency to generate interpretative and argumentative skills. Legal enunciates are seen as forming a scientifically structured system. In this sense, conflicts between laws (known commonly as legal antinomies) are thought to be regularly ‘dissolved’ by determining their scope of (spatial, temporal, material and personal) influence.

As we have seen, this has been the framework under which the law and different legal institutions, such as the judiciary, have developed. Herein we provide a representation of the concepts and ideas that form the core of the Mexican legal mind, which follows the methodology explained in our previous chapter. This

¹²⁹ Octavio Paz skilfully describes a wider Mexican obsession with forms and formulas that in fact permeates the life of the law: ‘The Mexican, contrary, to what a superficial interpretation of our history supposes, aspires to create an ordered world according to clear principles. The agitation and animosity of our political struggle prove to what point the juridical notions play an important role in our public life. In everyday life, the Mexican is a man that makes an effort to be formal, and that very easily turns formalist. And it is explicable. The order – legal, social, religious or artistic – constitutes a safe and stable sphere. In its scope it suffices to adjust to the models and principles that regulate life; nobody, for manifesting, needs to recur to the continuous invention that the free society requests. Maybe our traditionalism – that is one of the constants of our being and what gives coherence and antiquity to our people – comes from the love that we profess to form. [...] Sometimes the forms drown us. During the last century the liberals banally tried to subjugate the reality of the country to the straightjacket of the Constitution of 1857. The results were the dictatorship of Porfirio Diaz and the revolution of 1910. In some sense the history of Mexico and that of every Mexican is the struggle between the forms and formulas that try to enclose our being and the explosions with which our spontaneity takes revenge. [...] Our legal and moral forms, instead, frequently mutilate our being, preventing our expression and the satisfaction of our vital appetites.’ Paz (n 123) 60-1.

particular schema has also influenced the form of understanding particular legal features, such as precedents, and the popular legal methods within the context.



2.1 Cognitive-Affective Map of the Traditional Legal Mind and Approach to Precedents

The creation of a system of precedents in Mexico came precisely in the formative period of the legal system; when some American ideas about the law were receiving special attention. The necessity of unifying the interpretation of the constitution, codes and statutes, and contradictory resolutions helped introducing the common law idea of giving publicity to judicial decisions and granting them with authority. The idea of having a system of precedents was not precisely natural in the Mexican context, and probably it would not have acquired so much resonance if it was not supported by two of the most influential legal personalities of the XIX century: Ignacio Mariscal and Ignacio Vallarta. Thus, the manner in which the system of precedents was structured in this system is then closely linked to the way these jurists understood the institution.

It can be attributed to Mariscal the creation of the Mexican system of precedents and influencing Vallarta's ideas on the subject. Mariscal had first-hand insights about the

American legal system from the time he was serving as a diplomat in the United States, and, with the common-law system of precedents in mind, he argued against the ‘formula Otero’ and held that judicial resolutions should have general effects emulating the northern judicial review. Even though his ideas in this matter did not prosper, Mariscal insisted that *amparo* resolutions should have effects not only between the parties, but that they also determine the law for all. His plea gained force when it was understood that only in this form constitutional interpretation could remain uniform and, thus, he became the main inspiration on creating a system of precedents for this purpose. He argued that the Supreme Court’s *amparo* resolutions ought to be obligatory for the Court and the lower hierarchy tribunals, similarly to *stare decisis*. In his view, first, the Supreme Court ‘shall neither contradict nor change its opinion except in very rare cases where new foundations are argued or the facts that intervene are exceptional’¹³⁰ and, second, ‘[i]ts interpretation, thus, becomes obligatory and conclusive for all departments of the federal government and the people.’¹³¹ Mariscal argued for an interpretative uniformity coming from the recognition of the gravitational force of the judicial decisions, to which further interpretations and practice had to circumscribe, but without considering the necessity to ‘stand to what has been decided’ in terms of a strict legal duty.

On the other side, Vallarta had a more distant connection with the common law system of precedents, which he mostly learned through Mariscal. Although Vallarta has a genuine attraction towards the model of judiciary and precedents presented by Mariscal, he seems to start pushing it away of the original proposal and merging it with the understandings operating in the context. Vallarta thought that the precedential value of consecutive resolutions had to be objectivised and granted stronger binding force – thus, he articulated a model in which five resolutions in the same sense with no other in contradiction would become a binding precedent but only to the judiciaries. The strong binding force of precedents was conferred by providing criminal punishments to justices in case of inobservance. In this manner Vallarta formulated a system of precedents that would seem more according with civilian tradition and the requirement of judicial prudence that the complex political

¹³⁰ Ignacio Mariscal, *Algunas Reflexiones sobre el Juicio de Amparo* (Dublán y Chávez, 1878) 15.

¹³¹ Ignacio Mariscal in L Cabrera (n 77) 242.

context demanded. This form of precedents was finally included in the Amparo Act of 1882, also called Vallarta Act, defining the model of precedents in the whole legal system and until nowadays.

Despite the fact that the system of precedent was integrated to the legal system, Mexican practitioners showed some problems adapting to the ideas behind them and to the sort of practice they suggested. In the making of the system of precedents Mexican jurists evidently were motivated by their impressions of the American system of precedents. However, the ideas about the separation of powers, the codes and the deductive method seemed to be more accurate to them. In this form, the common law inspired system of precedents suffered several modifications in order to be more coherent with the highly-valued continental ideas. Precedents were reframed along the lines of legislative legal sources. Thus, precedents were reputed binding in a strong sense similar to legislative-made rules, and a set of strict rules of application were enacted. The phenomenon of hybridisation caused some peculiar eccentricities in the system of precedents, which Emilio Rabasa noticed describes as follows:

The federal code [of 1908], heir of all the wrong things found in the preceding laws has a section dedicated to the formation of precedents. This is as extravagant as attempting a common law established by statutory law! [...] Is the artifice of the lay valorising the respectability of resolutions to establish the customary, the spontaneous, that which sprouts from nature itself. Something similar to an industrial procedure to falsify old wine with that of the last harvest and give to the public a fraudulent and noxious product [...]¹³²

This understanding of precedents was set and perpetuated not only by the particular legislative rules defining the way of functioning of judge-made law, but also, and most relevantly, by way the legal community has been taught to think about and use precedents in practice. As we have seen, despite the fact that in the Mexican legal system precedents have had a long lasting official recognition these legal sources were generally overlooked. If we analyse legal education, we will find, as we have already explained, an extreme emphasis to legislative legal sources and to the deductive method. Legal precedents are insufficiently approached by the legal curriculum – f.e. García Máynez influential book introduces precedents in less than

¹³² Rabasa (n 92) 310.

ten pages, where he mainly explains the statutory law that gives rise to the federal system of precedents. The author, following his general understanding of law, uses the language of all-or-nothing bindigness, validity and applicability to describe the operation of legal precedents. He argues, that precedents have ‘scopes of validity’ determining their application in analogical form to legislative legal source.¹³³ In law schools, generally, there is no action directed to create competence with regards to the use of legal precedents. Precedents are not presented as legal sources requiring different skills than (the very narrow) methods taught for using statutes. These factors, in a way, might help explaining the problem of precedents reported by the legal community – especially, if we take into account the current wave of legal change happening within that context.

¹³³ García Máynez (n 52) 68-75.

3. Challenging Legal Minds: The Rule of Law Project in Mexico

“Our knowledge is not like a house that sits on a foundation of bricks that have to be solid, but more like a raft that floats on the sea with all the pieces of the raft fitting together and supporting each other.”

Paul Thagard, Coherence in Thought and Action

3.1 Introduction

Legal minds are not finished products. They can always be challenged by changes in the environment or, most commonly, in the relevant social communications. Our way of thinking about the law or concrete legal tasks is permanently jeopardised by possible change. These frameworks may remain more or less unaltered for periods of time or they may be subject to a linear evolutionary dynamic, but there is no guarantee that a more radical change will not happen. The cognitive-affective predispositions of the subscribers of a legal tradition could be strongly challenged by changes in the relevant legal communications, be that rules, doctrines, theories, and so on. Referring to change in legal traditions, Patrick Glenn once pointed out that: ‘a small initial variation of wind direction, multiplied many times over in effect by other causal factors in weather development, may mean the difference between a local storm or a hurricane.’¹ Glenn mentions that, as in the meteorological metaphor, it is uncertain ‘what will happen to a minor doctrinal variation, seen as ingenious, interesting and benign at the time of its formulation, once its full implications are realised over several generations.’² Glenn is right that legal changes of any sort might unleash further reconfigurations, some of them arising as strong storms with the capacity of washing away deeply engrained traditions.

¹ Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity of Law* (Oxford University Press 2000) 15.

² *ibid.*

Yet what Glenn and most of comparativists are missing is that changes of this sort also call for cognitive changes. The legal rules, doctrines or theories operating in a legal system can change, and with them the concepts, beliefs, ideas and ways of practicing law may also suffer modifications. In this sense, legal changes might translate into a challenge to the subjects' minds, which ought to introduce new knowledge features. Thus, legal changes might be perceived as a more or less aggressive intrusion into the cognitive life of the members of a legal community, which might as well trigger a set of revisions and modifications in the operating corpus of knowledge. The effects that legal change has on the cognitive-affective structures of the legal community can be of different magnitudes, and need to be assessed in a case by case basis.

This chapter looks into the phenomenon of legal change and its effects on knowledge structures in a particular scenario. It explores the chain of changes that the rise of the idea of the rule of law in the early 1990s unleashed in the Mexican context, focusing mainly on the cognitive-affective implications for the local community. This chapter broadly explains the rise of the global idea of the rule of law (as comprised in the development promotion programs) and the way it has been communicated to a number of jurisdictions around the world. It attempts to identify the key ideas, concepts, beliefs and values behind the complex rule of law reformation program and the way they have challenged Mexican legal practitioners. It aims to account for some collateral changes, such as the ways of understanding the role of judicial resolutions or legal reasoning style, and to account for the cognitive problems these modifications involve. It will be argued that the rule of law ideal, and the chain of changes it unleashed, can be properly considered as the prelude to the problem of legal precedents experienced by the Mexican legal community.

This chapter rehearses the most representative approaches used by comparative legal studies to account for the changes derived from the introduction of foreign legal features into different contexts. Therefore, it analyses the suitability of legal comparatists' understanding of travelling legal features as 'legal transplants' or as 'legal irritants' to account for the dynamics of change unleashed by the introduction of the 'rule of law' in the Mexican context. Additionally, it analyses how the

circulation of a new discourse involves the reconfiguration of prevailing knowledge structures, and might develop into a cognitive problem for the members of the legal community. Consequently, herein we will need to expand the comparative approach with some insights from the cognitive sciences in order to account for changes happening at the level of the knowledge structures held by legal practitioners. As we shall see, only by looking at the cognitive dimension of legal change can we account for the magnitude of the transformations mobilised by the rule of law ideal and reflect on the practical problems that the Mexican legal community is experiencing with tasks as precedent-based reasoning.

3.2 Legal Change and Cognitive Change

The rule of law movement worldwide has had the deliberate aim to influence the legal, political, social, and economic setting in recipient countries. Donor-agents have channelled significant amounts of money and other resources for countries to adopt the framework previously described, and many recipient countries, some more eagerly than others, have attempted aligning to it. However, the instrumentalism of the reformation efforts has marked their further analysis with a profound evaluative tendency. As different parts of the rule of law packages have been implemented, the response has usually been that of assessing its success according to specific purposes, which could be identifiable with a certain way of institutional performance (e.g., independent functioning of the judicial branch or fast and efficient processing cases), or the more general objectives of strengthening democracy and achieving economic prosperity.

This type of analyses seems to be overly attached to the teleology of the reform program. Nevertheless, focusing on the expected outcomes of certain reforms might be making us miss the woods for the trees, in the sense that the search for very specific effects might be making us blind to a set of unexpected changes unleashed by the introduction of ideas such as the rule of law. The reformation undertaken in a legal system in order to adapt to the rule of law framework might entail reconfigurations even though they might be somehow different from those that were foreseen. While looking for the accomplishment of an ideal legal performance or an

extra-legal agenda, we might be missing what is actually happening within the recipient legal system – that is, the real effects of the introduction of foreign features, even if they are not the desired ones.

This research moves away from the evaluative tendency permeating the rule of law implementation studies. Thus, it does not aim to evaluate the rule of law agenda or the means used to accomplish it, it does not look towards analysing the particular institutional designs introduced in the Mexican legal system. Finally it does not aim to assess whether determinate (mediate or immediate) reform objectives have been accomplished. Instead, our objective is to understand the dynamics of change that a complex foreign legal feature like the rule of law program, both as an abstract idea and as package of concrete reforms, set into motion.

Either willingly embraced by the recipients or imposed by external forces,³ the rule of law reformation program entails a set of foreign features that might not converge with the pre-existing framework. Foreign features developed by international institutions or foreign governments rest on a set of beliefs, ideas, values, etc. that might seem alien to the recipients. The rule of law as an abstract idea carries a set of understandings and values regarding the legal, social and political order, but also the particular foreign institutions designed under this general ideal might be sensed unfamiliar in the new context. In this respect, foreign features are likely to challenge the cognitive-affective framework held by a given group, and consequently produce a set of changes (even if they were unexpected) in the local knowledge structures.

Comparative legal studies have for a long time attempted to understand the dimension of legal change, especially that deriving from the borrowing and transfer of legal features from one context to the other. In this endeavour, comparatists have often taken recourse to metaphors to explain the dynamics of change experienced by the recipient legal context and the travelling legal features. The most widespread explicative metaphor is that of ‘legal transplants’, which is often adopted as the

³ Ugo Mattei has actually contested the possibility of clearly distinguishing between the coercive imposition of a legal system without consent and consensual voluntary reception by an admiring legal system of prestigious legal models developed elsewhere. See: Ugo Mattei, ‘A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance’ (2002) 10 *Indiana Journal Global Legal Studies*.

default language to talk about travelling legal ideas, patterns, institutions, and so on. Thus, herein we will start by questioning the helpfulness of this way of thinking about legal borrowings and transfers in order to understand further discursive and cognitive changes. Then, we will explore Teubner's alternative metaphor, which characterises travelling legal features as 'legal irritants'. We will assess the capacity of this metaphor to provide us with a better understanding of change, including change at a cognitive level. Additionally, we aim to complement these understandings by introducing certain insights developed by the cognitive sciences regarding changes in complex knowledge frameworks.

3.2.1 Legal Transplants

Alan Watson first used the term 'legal transplants' to describe the 'moving of a rule or a system of law from one country to another or from one people to another.'⁴ He uses the medical metaphor of transplanting body organs as an analogy of what happens with cross jurisdictional transposition of legal features. He argues that 'a successful legal transplant – like that of a human body organ – will grow in its new body, and become part of that body just as the rule or institution would have continued to develop in its parental system'⁵ adding that '[s]ubsequent development in the host system should not be confused with rejection.'⁶ In essence, for Watson, legal features are easily transferred between jurisdictions without significant adaptations.

The work of Watson has deeply marked the language and interest of comparativists with respect to the transposition of foreign legal features. In a way, the popularisation of the use of the metaphor of transplantation has led to a particular reading of the process of transferring legal features. The main concerns of the literature regarding transplants are the conditions in which they take place, and the chances of success or failure to assimilate foreign legal transfers. Thus, law (comparable to body organs or tissues) can be transplanted to a new body, which can accept or reject it. This approach has turned into a debate about the possibility or impossibility of

⁴ Alan Watson, *Legal Transplants. An Approach to Comparative Law* (University of Georgia Press 1974) 21.

⁵ *ibid* 27.

⁶ *ibid*.

transplants; a question that has been tightly linked to the discussion on the connections between law and society. Thus, the discussion about the (im)possibility of legal transplants occurs in a continuum on whose one end are located those that argue the weak connection between law and society and the possibility of successful transplants, and on the other those that argue in favour of a strong connection between the legal system and its context that precludes any chance of success.

Firstly, there is Alan Watson, who, after analysing the legal history of the Western world, has concluded that legal transplants from one context to another have been relatively frequent, successful and the main motor of legal evolution. For him legal features travel with relative ease from country to country regardless of the context, proving wrong the theories that claim that all law mirrors society. He argues that law is out of context most of the time: societies change and the law remains the same, law is sometimes imposed to conquered countries, or voluntarily introduced by legislators, jurists or practitioners into foreign territories without this representing a real threaten for the transplanted law.⁷ In this a-contextual legal view law is said to travel easily across jurisdictions, becoming rooted disregarding the conditions of the body into which it was implanted.

On the other end, we find Pierre Legrand, who, in what probably is the most sustained critique of Watson, pictures law as contextually engrained. Legrand's major criticism to Watson is his reductionism of the legal phenomenon, which arguably narrows down the life of the law to rules and leads to misleading conclusions about the connections between law and society, and consequently, about the possibility of legal transplants. He argues that anyone agreeing with Watson's position must accept the rather simplistic model of 'rules-as-bare-propositional-statements', because only bearing this in mind it would be possible to argue 'that "the law" [...] is somewhat autonomous entity unencumbered by historical, epistemological, or cultural baggage.'⁸ Instead, Legrand reminds us that the rules are never self-explanatory, but that 'the meaning of the rule is, accordingly, a function of the surrounding epistemological assumptions which are themselves historically and

⁷ Alan Watson 'Law Out of Context' (2000) 4 *The Edinburgh Law Review*, 147-148.

⁸ Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 *Maastricht Journal of European & Comparative Law*, 114.

culturally conditioned.’⁹ Any rules that enter a specific legal system are processed by an epistemic community, which is immersed into a specific historically and culturally constructed *mentalité*. Thus, the cultural background of the recipient cannot be ignored, as it is the reason for the existence of a particular viewpoint in the recipient land, and which will lead to a process of modification of the transplanted figure in a manner that it cannot be argued to be the same. Therefore, he concludes that since it is impossible to transport socially built meanings from one culture to another in a significant way, hence legal transplants simply cannot happen.¹⁰ In that manner, law can never be out of context.

Watson’s account has received multiple criticisms with regards to the manner in which he draws the relationship between law and society,¹¹ but Legrand’s seems to go beyond them, challenging not only his sociological assumption about law and society, but also his epistemological understandings. He reminds us that legal features are eventually processed by cognitively ‘loaded’ legal practitioners. Legrand does not claim that there is an objective and necessary connection between law and society, but that the minds of the recipients of those developments are irremediably situated in a context and, therefore, will inevitably reconstruct the ‘transplanted’ feature under a completely different light. Legrand’s approach is interesting due to the introduction of cognitive considerations into the debate of legal transplants. Nevertheless, his argument is built to refute the possibility of legal transplants. Legrand does not appreciate that travelling features might have an effect in the legal minds that he pictures as immutable or impenetrable.

The metaphor of transplants could have the potentiality to open the discussion about the reactions of the new recipient body due to the introduction of a foreign organ, as for example the occurrence of infections or reactions to toxicity. Nevertheless, Watson’s lack of interest in this area of research seems to have marked the limits of the metaphor – in which case these reactions seem to be considered as signs of rejection. As Nelken has pointed out, the frequently used metaphor of transplants

⁹ *ibid.*

¹⁰ *ibid* 120.

¹¹ See for example Friedman’s ratification of the connection between wider social needs and law’s natural evolution in: Lawrence M Friedman, ‘Some Comments on Cotterrell and Legal Transplants’ in David Nelken and Johannes Feest (eds.) *Adapting Legal Cultures* (Hart Publishing 2001) 93-8.

somehow leads to the assessment of success or failure of that operation, which explains the high number of evaluative studies on this subject.¹² Teubner also argues that the underlying metaphor of transplants is misleading because it gives the impression that transposing certain legal features translates into a narrow binary alternative: either they are repulsed or accepted, hiding the important evolutionary dynamics unleashed when foreign features are inserted into different legal systems.¹³ As Teubner notes, what happens in a legal system when determinate foreign features are introduced is a more complex chain of effects that the metaphor of legal transplants tends to hide.

3.2.2 Legal Irritants

Teubner suggests that the alternative biological metaphor of irritation should be used to describe what goes on when a legal idea, rule or institution is introduced elsewhere. In biology or medicine ‘irritants’ are agents or stimuli that cause inflammation or discomfort on the body. They might be substances or allergenic agents recognised as foreign and potentially harmful for the organism and that cause some protective reaction. In a similar manner, foreign legal features are irritants in so far as once introduced they might cause perturbations resembling an ‘allergic reaction’. Teubner argues that ‘when a foreign rule is imposed in a domestic culture [...] it is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events.’¹⁴ Thus, travelling legal features are legal irritants that, once introduced in a new context, will unleash unforeseen reactions.

Teubner argues that the irritation produced by institutional transfers in the new context happens in two different levels. On the one hand, the foreign rule or institution causes an internal irritation; i.e. it causes imbalances in the legal discourse and ‘it [...] irritates the minds and emotions of tradition-bound lawyers.’¹⁵ On the

¹² David Nelken, ‘The Meaning of Success in Transnational Legal Transfers’ (2001) 19 Windsor Yearbook of Access to Justice 349-50.

¹³ Gunther Teubner ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences’ (1998) 61 The Modern Law Review 12.

¹⁴ *ibid.*

¹⁵ *ibid.*

other – and this is the core of Teubner’s thesis – legal transfers may act as external irritants, causing discomfort of the law’s binding arrangements. The foreign feature acts then as ‘an outside noise which creates wild perturbations in the interplay of discourses within these arrangements and forces them to reconstruct internally not only their own rules but to reconstruct from scratch the alien element itself.’¹⁶ In his view, foreign elements may create disruptions in the other social system and trigger the reconstruction of the social discourses to which law is closely tied, and this will eventually act back irritating the legal scope of the institution in a co-evolutionary dynamic leading to a new point of equilibrium.¹⁷ For this reasons Teubner concludes that ‘legal irritants cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic on which the external rule’s meaning will be reconstructed and the internal context will undergo fundamental change.’¹⁸

According to Teubner, the degree of irritation will be dependent on the strength with which the new law is coupled in binding arrangements to other social processes. In legal areas loosely coupled with social arrangements the transfer of institutions is comparatively easier than when the law is tightly coupled to binding arrangements with social processes, due to a lesser resistant response from different social discourses.¹⁹ However, not even in cases of loose coupling does the transfer work mechanically or as easy as a transplant. This means that even in situations where the law is technical or isolated from social contextual arrangements, legal transfers do not operate in a simple manner, but they have to be assimilated to the internal discourse and integrated by individuals that form part of a particular legal culture.²⁰ As Teubner himself notes, the internal dynamics of irritation of the legal discourse recalls Legrand’s culturalism, whereas the contextual knowledge, legal reasoning style and worldview act as determinant factors in the assimilation of the transferred feature.²¹

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ *ibid* 12.

¹⁹ *ibid* 21.

²⁰ *ibid* 18-20.

²¹ *ibid* 19.

Still, Teubner implicitly acknowledges that travelling legal features have some effects on the cognitive-affective structures held by legal practitioners – something that Legrand does not seem to admit in his one-way process of acculturation.²² Thus, legal transfers are expected to generate irritations of different degrees depending on the level of challenge they pose to the pre-existing structures. Conflicting legal transfers are then expected to have an irritating effect in the recipients' minds that will push them towards reconfigurations. As noted by Teubner, this kind of 'internal' irritation seems inherent to the process of transferring legal features from a context to another, regardless of their relationship with wider social arrangements. Nevertheless, the author does not provide a full exploration of the dynamics of internal irritation as his main concern is to explore the processes of external irritation.

Teubner's alternative model of transfers as legal irritants is grounded on his epistemological approach consistent with systems theory. In this view law becomes a closed self-referential system of communication that constructs a discourse of its own, although often having some connection with other discourses.²³ Law has achieved autonomy through technification and positivisation, but it still conserves a certain degree of connectedness with specific social discourses – something that Teubner calls binding arrangements. For Teubner 'contemporary legal discourse is no longer an expression of society and culture *tout court*; rather it ties up closely only with some of its areas, only on specific occasions and only to different fragments of society.'²⁴ Thus, in this view, society is fragmented – and legal institutions are not connected to the whole of society but coupled to specific fragments of it. It is within this 'map' of the law that Teubner's builds the mechanics of irritation; a conception that accepts the occasional existence of connections between segments of the legal and social discourses.

²² Teubner argues with respect to the introduction of 'good faith' to Britain that 'it may well be that "good faith" (together with "legitimate expectation", "proportionality" and other continental general clauses) will trigger deep, long-term changes from highly formal rule-focused decision-making in contract law toward a more discretionary principle-based judicial reasoning' in *ibid* 20-21.

²³ Gunther Teubner, 'How the Law Thinks: Toward a Constructivist Epistemology of Law' (1989) 23 *Law and Society*; Gunther Teubner and others, 'The Autonomy of Law: An Introduction to Legal Autopoiesis' in David Schiff and Richard Nobles (eds.) *Jurisprudence & Legal Theory* (Butterworth 2003).

²⁴ *ibid* 22.

The lineage of Teubner's metaphor has prevented its wider use, since its coming as a whole package means that by using it one has to align to the underlying theory and description of the law and society connection.²⁵ Yet arguably, one need not necessarily subscribe to the systems theory framework in order to use the metaphor of legal irritants in a meaningful way. Even if the idea of the legal system as an autonomous entity capable of experiencing some sort of cognitive irritation is abandoned, Teubner's approach offers some important insights. The idea of legal irritants suggests that foreign legal features can challenge or 'irritate' tradition-bound legal minds. Another important advantage of the legal irritants metaphor is throwing light over the Janus-faced evolutionary process that the introduction of legal features might entail: one that might involve reconfigurations of the foreign element and the internal cognitive-affective framework. The literature about transplants has often overlooked the fact that travelling legal features carry a new set of ideas with them, which explains the lack of analysis regarding the adaptations required after the introduction of a foreign feature. Additionally, only a few approaches take into account the existence of a set of predispositions tied to the recipients, which is the merit of Legrand's culturalist model. Teubner's model stands in the understanding of these two premises: that the legal features are not neutral information and that these are received by cognitively 'loaded' subjects whose knowledge structures might be in need of reconfiguration if the new features are active or simply not let to oblivion. Acknowledging these points allows one to observe the possible mismatches between the understandings travelling with the foreign features and those inhabiting the domestic minds, which could produce irritation and unleash an evolutionary process until the perturbed stability is finally recovered.

Teubner's account focuses more on the so called dimension of external irritation, in other words, the irritation of the extra-legal discourse connected to the legal transfer, and lesser attention is paid to the dynamics of internal legal irritation. Nevertheless, the separation of these two dimensions arguably becomes elusive if one focuses on the irritation happening at the cognitive level. Due to Teubner's theoretical affiliation to the language of systems theory, his main objective is to explain the interaction

²⁵ See for example: David Nelken, 'Towards a Sociology of Legal Adaptation' in David Nelken and Johannes Feest (eds) *Adapting legal cultures* (Hart Publishing 2001) 19-20.

between systems, i.e. the legal, political, social, economical systems, where they resemble actual subjects that keep memories, think and communicate. In this sense, the irritation that he is more interested in analysing is that of the impersonal systemic discourses. However, if focusing on the dimension of human cognition, it becomes somehow more difficult to create a clear division between external and internal discourses, as members of the legal community possess an entangled set of knowledge features.

Nevertheless, Teubner's account can also be meaningful and useful if one opts for a psychological perspective – that is, if the emphasis in systems of communication is relaxed and more attention is paid on the dynamics of change for actual human beings. Even if Teubner's objectives were not to discuss psychological processes, it is not necessarily incompatible to do so while using his metaphor of legal irritation. In fact, the metaphor of irritation is also helpful to understand the disruptions happening at the level of individual cognition due to legal change, as there are actually some similarities between the systemic processes described by Teubner and cognitive reconfigurations.

3.2.3 Cognitive Change

As indicated, legal changes are usually followed by various cognitive-affective reconfigurations. Legal practitioners might need to change their beliefs, concepts, values, but also the forms of doing certain things. The accounts of Legrand and Teubner offer some indications on how legal changes (i.e. the circulation of new legal communications) involve not just discursive changes, but that they also have cognitive consequences. Nevertheless, their analysis of this subject rather falls short due to their central theoretical commitments consistent with postmodernism and the systems theory account, respectively. We can, however, expand our understandings on the subject if we take into account some insights of the cognitive sciences, where the cognitive consequences of change have been more widely studied.

First, foreign legal features might communicate new beliefs, concepts and values, which might or might not be compatible with the cognitive-affective structures of the recipients. Second, these recipients are individuals holding a specific cognitive-

affective framework and that require doing some adaptation in face of the novel communications. These cognitive changes or adaptations are, however, of different magnitudes depending of the relationship between the above mentioned factors. Commonly, in epistemology three forms of epistemic change have been distinguished: suppression, expansion and revision.²⁶ In suppression, a specific belief is removed from the knowledge structure. In law, for example, this could happen when a less determinant legal rule is removed from a statute. In expansion, a belief is added to the knowledge structure. For example, a legal expansion could be the inclusion of a new hypothetical case within the scope of a legal concept. Revision is the most intense form of epistemic change as a belief is *added* to the knowledge structure, and simultaneously other beliefs are *removed* from new knowledge set. Epistemology usually works with a narrow understanding of knowledge as propositions. This, however, has not deterred the use of this classification by more comprehensive cognitive approaches, which are more consistent with the expanded perspective on knowledge taken by this thesis.

According to coherentist theories, especially Thagard's,²⁷ the revision of previously held knowledge sets happens when a new belief is added and causes modifications in the relations of coherence and incoherence between the new belief and the pre-existing framework. In other words, belief revision takes place when a new piece of knowledge becomes accepted and some previously accepted (but now incoherent) knowledge becomes rejected in order to preserve the overall coherence of the knowledge structures.²⁸ The advantage of Thagard's framework is that it takes into account both 'cold' and 'hot' factors in change, in so far as it acknowledges that legal change might involve *both* cognitive *and* affective reconfigurations: 'a change of heart and mind.'

Belief revision as a response to knowledge incoherences closely resembles the chain of reconfigurations derived from the discursive imbalances that Teubner described at

²⁶ Sven Hansson, 'Logic of Belief Revision' (*The Stanford Encyclopedia of Philosophy*, Spring 2014) <<http://plato.stanford.edu/archives/spr2014/entries/logic-belief-revision/>> accessed 11 February 2014.

²⁷ Paul Thagard, *Coherence in Thought and Action* (MIT 2000).

²⁸ Paul Thagard and Scott Findlay, 'Changing Minds about Climate Change: Belief Revision, Coherence, and Emotion' in Paul Thagard, *The Cognitive Science of Science: Explanation, Discovery, and Conceptual Change* (Massachusetts Institute of Technology 2012) 333.

the systemic level, but this time happening at the level of the mind. For example, Teubner argued that an idea such as ‘good faith’ would most likely have an irritant effect on British law due to its un-connectedness with the set of local discursive arrangements. If, however, one focused on the minds of British lawyers, a similar dynamic of irritation could be appreciated. The idea of good faith might be foreign and incoherent with other of understandings, leading to multiple mental reconfigurations. The search for equilibrium that Teubner describes is no more than a search for coherence, just as the one that happens within the individual minds in their attempt to make sense.

Nevertheless, not all belief revisions are the same. They are of different magnitudes. Thagard has acknowledged a psychologically realistic approach to belief revision must account for the fact that some revisions are harder to make than others and that some revisions have more global effects.²⁹ When describing scientific belief revisions, Thagard notes:

Scientific belief revision comes in various degrees. A new proposition describing recently collected evidence may become accepted easily unless it does not fit well with accepted views. Such acceptance would be a simple case of expansion. However, if the new evidence is not easily explained by existing hypotheses, scientists may generate a new hypothesis to explain it. If the new hypothesis conflicts with existing hypotheses, either because it contradicts them or competes as an alternative hypothesis for other evidence, then major belief revision is required. Such revision may lead to theory change, in which one set of hypotheses is replaced by another set, as happens in scientific revolutions.³⁰

While arguably the nature of the legal enterprise is quite different from that of science, several of Thagard’s observations equally apply. The magnitude of the revision of the legal knowledge structures caused by a new feature depends on the level of conflict it engenders in the established framework and the consequent amount and magnitude of the reconfigurations it entails. Adding or removing a rule that is consonant with the established ideas might not be a difficult task for legal practitioners – and in this case, Alan Watson might seem right to argue that legal

²⁹ Paul Thagard, ‘Concepts and Conceptual Change’ (1990) 82 *Synthese* 257.

³⁰ Thagard and Findlay (n 28) 334.

changes are generally uncomplicated procedures. Nevertheless, adding a principle as ‘good faith’ in a common law context might not be as easy as the above. This process might actually lead to incoherence between different legal ideas, values or concepts, and a stronger reframing of the local knowledge. Some other changes, such as the introduction of the idea of codification back in the Enlightenment, might however involve even a stronger challenge and reconfiguration of vital ideas about the nature of law and legal practice.³¹

Radical changes are fairly exceptional, but when they happen they involve a radical *gestalt* shift. Restructuring the cognitive-affecting maps used to navigate through life cannot be expected to be an easy and automatic task. Thus, single individuals or groups experiencing such a revolutionary conjuncture might struggle for some time before they produce new coherent mental structures, and learn to think and act accordingly. In legal studies it is uncommon to attend to the cognitive dimension of legal change and how legal practitioners transit from a cognitive-affective framework to another. Even if it is not uncommon to find the acknowledgment that ‘[a] drastic change could reduce the most experienced practitioner almost to the level of a beginner’³², a detailed account of how change is experienced by practitioners at a cognitive level is missing.

This underexplored subject in legal comparative studies represents a gap in our understanding of legal transitions. However, some valuable insights of how changes involve cognitive reconfigurations can be found in the history of science. The history of science has often pointed at several examples of revolutionary cognitive changes and the problems and difficulties that scientific communities experience while restructuring their knowledge framework. For example, in ‘The Structure of Scientific Revolutions’, Kuhn conveys an image of the acute confusion that paradigm shifts can bring about in scientific communities. He explains how Copernicus complained about the inconsistency of astronomical investigations

³¹ It has been noted that the turn towards ‘the codification mentality was a natural law battle against feudal history’ – a process that cognitively could not have been easy. David B Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (Cambridge University Press 2008) 187.

³² Alan Watson, ‘Legal Change: Sources of Law and Legal Culture’ (1983) 131 *University of Pennsylvania Law Review* 1153.

following the shift from the Ptolemaic model, and Einstein explained that the quantum revolution created the sense of losing ground and any firm foundation.³³ Nevertheless, Kuhn portrays these transitions as happening without mid-steps. Nancy Nersessian, who has attempted to capture the dynamics of conceptual change in sciences at a cognitive level, has noted that the process of conceptual change in science does not happen abruptly.³⁴ As Nersessian indicates conceptual change does not happen ‘with the last act’ or when ‘the pieces fall together’ – it is something that happens to the relevant community over an extended period of time.³⁵

Revolutionary change at a cognitive level is lived as a revision and replacement of different fragments of complex knowledge structures. This radical change cannot be expected to happen instantly. Revising, substituting, reorganising and, finally, finding a new coherent balance between one’s belief and ideas is time consuming. The process entails an approximation to a new knowledge that at first might appear fairly unfamiliar, and replacing segments of the pre-existing knowledge framework.³⁶ Paul Thagard notes that during conceptual revolutions individuals need some time to create new mental nodes and links that allow them to replace or reorganise their ideas, but also it might take some time for the new structures to become socially shared.³⁷ Thagard shows that in conceptual revolutions individuals are likely to merge old and new ideas for some time until they attain full conversion.³⁸

Nevertheless, not only scientists suffer due to major reconfigurations. Any single individual or member of a community that sees his mental structures challenged will experience confusion. In these revolutionary moments it is not surprising to find that individuals hold mismatching concepts and beliefs, that they might possess some explicit understandings that are not fully developed, or that they lack the necessary tacit knowledge. In the same form, legal practitioners experiencing a ‘legal

³³ Thomas Kuhn, *The Structure of Scientific Revolutions* (3rd edn, University of Chicago Press 1996).

³⁴ Nancy Nersessian, ‘How Do Scientists Think? Capturing the Dynamics of Conceptual Change in Science’ in Ronald Giere (ed.) *Cognitive Models of Science* (University of Minnesota Press 1992) 6.

³⁵ *ibid* 7.

³⁶ George Posner and others, ‘Accommodation of a Scientific Conception: Toward a Theory of Conceptual Change’ (1982) 66 *Science Education* 211-27.

³⁷ Thagard notes that during the chemical revolution, Lavoisier was still thinking in terms of the former phlogiston theory even if he was proposing an alternative theory of acids. See: Paul Thagard, *Conceptual Revolutions* (Princeton University Press 1992) 48-9.

³⁸ *ibid* 56-7.

revolution' are likely to hold a set of incompatible ideas or, even having replaced some of their former concepts, they might have not mastered the necessary practical competences. In fact, strong changes of this sort might cause legal practitioners not only to become conceptually confused, but also to lose their expertise regarding practical matters.

When legal change involves the fundamental restructuring of both conceptual and procedural knowledge, an emergence of diverse knowledge problems between tradition-bound legal practitioners can be expected. In this sense, when legal changes represent important reconfigurations, they can genuinely 'stun' legal operators, who will face problems to adapt to the new circumstances. When deeply embedded legal ideas change, they arguably lead to a different way of thinking about and operating within the law. Legal practitioners, then, may need to 'reinvent' themselves to function in the new circumstances.³⁹ Thus communities would take some time to adapt to the new circumstances, sometimes displaying their attachment to fragments of older viewpoints and forms of operation.

Glenn uses a sound example to talk about this delay in adaptation by recounting the story of a group of British soldiers during Second World War. The soldiers were watched by a time-motion expert that searched towards improving procedures. The expert was particularly puzzled by a couple of soldiers of different gun crews who, a moment before firing, came to a rigid attentive posture for a three second interval, extending throughout the discharge of the gun. He showed the pictures to a colonel searching for an explanation. The colonel was also puzzled but at the end he said 'I have it. They are holding the horses.'⁴⁰ In a similar manner, foreign legal features and the wave of changes that they introduce have the potentiality to irritate cognitively legal practitioners to the point that they might keep on 'holding the horses' in the times of fast-speed cars.

³⁹ Patrick Glenn, talking about changes in tradition notes that in cases of 'radical discontinuity of tradition, as where people in a given place entirely forgot, or abandoned, the elements of their tradition, and adopted another [...] we would probably say not only that the previous tradition was no longer pertinent, but also that the people involved were no longer the same people, or at least that their identity as a group of people had changed.' Glenn (n 1) 12-3.

⁴⁰ *ibid* 16.

This could be precisely the problem of the Mexican legal community. Legal practitioners are experiencing a strong challenge into their deepest assumptions about the legal enterprise, causing increasing confusion regarding several aspects of practice, and most relevantly for this thesis, about the role and use of precedents. In what follows, the form in which the rule of law as a foreign feature was introduced in the Mexican context is taken up for discussion: it can be shown that it engendered conflict and activated the reconfiguration of various pre-existing structures, thus causing the problem of precedent that is under study.

In Mexico the legal changes taking place during the past years have represented authentic revolutions for the knowledge of the legal community. The rule of law reform activated a revolutionary reconfiguration. Overall, the change has entailed a transition from a rigid understanding of the law towards one that allows more flexibility. This change does not only affect an isolated belief or concept, but the entire understanding of the law. Consequently, the community of professionals in that context has been forced to reconsider several aspects of their practice, including the value of features like legal precedents and their practical role.

As the transition is still being experienced, contradicting knowledge fragments are likely to be coexisting close to each other. It is also possible that new cognitive tools have not yet been mastered. Therefore, in these conditions we may expect the emergence of several inconsistencies and problems. The reported doubts about the form precedents should be used in practice and the different problems that the legal community senses when engaging with these features ought to be understood as happening in this context of major cognitive restructuring. In other words, the problem reported by the legal community is the consequence of being 'trapped' between two knowledge frameworks and not having yet built the necessary practical competence to perform under the new conditions. The Mexican legal community is experiencing a strong revision of its cognitive-affective structures, including the understandings about judicial precedent. As the process is not yet completed, legal practitioners display inconsistent ideas and do not seem to have built the necessary practical expertise required under the new conditions. Let us then explore the

problem that precedents are creating in the Mexican legal system in connection the ongoing revolutionary change introduced by the rule of law ideal.

3.3 Towards the Rule of Law Ideal

At the beginning of the 1990s the world witnessed the rise of the new global framework: liberalism, democracy and the rule of law became the mantra that resounded all around the globe. Although not genealogically connected, these three ideas seem to have been enclosed together in their contemporary expression, constituting the global framework of operation. Tamanaha reminds us that despite the fact that ‘the rule of law, liberalism, and democracy are often thought to make a happy triumvirate’,⁴¹ their relationship is filled with tensions. Nevertheless, the tensions and contradictions between these three ideas have not stopped them from ‘travelling’ together and creating tighter links, a process which, in some sense, has redefined their historical meaning. While the focus here is on the rule of law, to understand it in the context of promotion programs it is important to address it as part of that tripartite ideal, and to acknowledge the relationships of causality drawn between them.

3.3.1 The Global Development Framework: Liberalism, Democracy and the Rule of Law

Since the late 1980s the world was under the impression that there was a clear consensus about what developing countries should do to achieve prosperity, and the answer appeared to be in developing a market economy, strengthening democracy and the rule of law – that is, following the so called Washington Consensus. Some people rushed to announce ‘the end of history’ stating that in the universalisation of Western liberal democracy we were witnessing marked the end of humanity’s ideological evolution.⁴² The belief on the rightness of this path caused a strong global mobilisation – on the one side developed countries created offices, aid programs, drafted value statements, and on the other, developing nations commenced to adopt

⁴¹ Brian Z Tamanaha, ‘The Dark Side of the Relationship Between the Rule of Law and Liberalism’ (2004) 3 NYU Journal of Law and Liberty, 517.

⁴² Francis Fukuyama, ‘The End of History?’ *The National Interest* (Summer, 1989).

the new global values and carried on a series of reforms aiming to alter their local structures and align them to the global framework. Since the 1980s, but more intensively in the 1990s, Western states and international institutions embracing these ideas prescribed to less developed countries a set of economic and political reforms that aimed at the liberalisation of trade and foreign investment, deregulation, privatisation of public assets, redirection of public expenditure, protection of property rights, enhancing democracy and the rule of law.

The idea of liberalising the economy was the first to start rooting at a global scale. The economic crises experienced by many Latin American countries operating under the model of ‘import substitution industrialisation’⁴³ and the fall of the communist bloc helped situating economic liberalism as the new global establishment. Thus, countries all over the world, some willingly and others in response to pressure, started a process of reformation in order to privatise state-owned enterprises, liberalise financial and commercial markets, and change labour and tax policies, which reflected into the drafting and performance of economic legal institutions. At this early stage of this global wave, the role of international organisations, such as the World Bank and the International Monetary Fund, was to incentivise economic development in third world countries by providing economic aids conditioned to an ‘apolitical’ reform agenda with strict economic aims.

However, the economic development project eventually took a ‘political turn’ after underdevelopment started to be attributed to bad governance in the World Bank’s report on Sub-Saharan Africa.⁴⁴ The idea that a country’s political life could have implications for its socioeconomic development became a common ground of donor nations and institutions in the 1990s. Thus, many of the members of the donor community incorporated democracy to their developmental agendas, although other preferred to continue acting under the less political connotation of good governance. Supporters of democracy assistance initiatives often found an organic connection between the economic and political agenda: on the one hand, economic reform would strengthen democracy by increasing economic wealth and shrinking the scope of

⁴³ Werner Baer, ‘Import Substitution and Industrialization in Latin America: Experiences and Interpretations’ (1972 7) Latin American Research Review.

⁴⁴ World Bank, *Governance and Development* (1992).

influence of the state, and on the other, democracy would help the market economy by increasing transparency, accountability, the operation of the rule of law, strengthening a system of rights and institutional limits.⁴⁵

This was not the first time in recent history that democracy received such attention and promotion, but the magnitude and reach of this wave of democratisation was unprecedented. The first (1960s and 1970s) and second (1980s) waves of democratisation, responding to the aim of eradicating communist regimes, did not achieve the same level of acceptance and global reach as the third democratic wave (1990s). The end of the cold war and the breakup of the Soviet Union brought what was called the ‘worldwide democratic revolution’, and by the early 1990s democracy had turned into a global cause and the core priority of policy makers. Democracy assistance programs proliferated fast, and by mid-1990s democracy aid had expanded all around the developing and ex-communist world. A mix of factors intervened in the strengthening of the wave: many countries joined the global inertia due to the exhaustion of their domestic economic and political models, but also due to international pressure or persuasion. Democratisation also became a necessary precondition for membership in international organisations and participation of economic aids and programs, which pressed non-democratic countries towards democratic conversion. However, the embracement of democratisation effort by some countries had a ‘snowballing’ effect, stimulating other countries to follow the same path.⁴⁶

The ideas of economic liberalism and democracy were later on connected to the rule of law ideal, which was understood as the means to implement them. The rule of law became central to this enterprise; on the one hand, it was conceived as the necessary means to secure legal predictability, to protect property rights and the enactment of contracts – basic elements of the market economy – and on the other, it was seen as compulsory to provide the system of civil and political rights, and to limit the operation of governmental institutions typical of a democratic regime. These relationships might have not proved to be clear-cut, but the rule of law aid providers

⁴⁵ Thomas Carothers, ‘The Rise of Democracy Assistance’ in Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Carnegie Endowment for International Peace 2009) 46.

⁴⁶ Samuel P Huntington, ‘Democracy’s Third Wave’ (1991) 2 *Journal of Democracy*.

were confident of the existence of a direct causal connection between the strengthening of the rule of law and the improvement of democracy and economic development.⁴⁷ Following this line of thinking, in the beginning of the 1990s, the World Bank and the International Monetary Fund added as a condition for granting loans that the recipient countries establish the rule of law, presenting it as an economic safeguard rather than an action based on political grounds.⁴⁸ In fact, the instrumentality of the rule of law in pursuing substantive political and economic objectives was not always stated, and often it was claimed that improving the institutional operability of the rule of law was an end in itself. The apparent detachment of the rule of law from the binomial liberalism-democracy helped it gaining high levels of global acceptance. Thus, the rule of law acquired the quality of universal good, facing almost no criticism or opposition. According to Thomas Carothers ‘[o]ne cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world’s troubles. The concept is suddenly everywhere – a venerable part of Western political philosophy enjoying a new run as a rising imperative of the era of globalization [...]’.⁴⁹ Tamanaha also points out that ‘the rule of law is the dominant legitimating slogan of the world today’ and, ‘[e]ven governments that reject, or express reservations about, democracy and human rights as Western cultural and political inventions not suitable for their own societies, nonetheless claim that they abide by, or are working toward achieving the rule of law.’⁵⁰

In spite of the apparent consensus in favour of the rule of law, this notion is arguably highly problematic as there is no agreement on what it actually is. In legal and political theory the discussion of what the rule of law means is extensive and divergent. However, the different lines of arguments presented at the theoretical level reflect onto the more practical grounds of policy making only to a certain degree, which means that while some features of the historical theoretical debate might ‘filter’ into the contemporary policy discussion, ultimately the idea of the rule of law

⁴⁷ Thomas Carothers, ‘The Problem of Knowledge’ in Thomas Carothers *Critical Mission. Essays on Democracy Promotion* (Washington DC, Carnegie Endowment for International Peace 2004) 134-35.

⁴⁸ Brian Z Tamanaha, ‘The Rule of Law for Everyone?’ (2002) 55 *Current Legal Problems* 99.

⁴⁹ Thomas Carothers, ‘The Rule of Law Revival’ (1998) 77 *Foreign Affairs* 95.

⁵⁰ Tamanaha (n 48) 98.

at this pragmatic level seems to acquire a life of itself. Carothers has claimed that the rule of law aid providers acted being more or less confident of knowing what the rule of law looked like – they seem to understand it as ‘law applied fairly, uniformly, and efficiently throughout the society in question, to both public officials as well as ordinary citizens, and to have law protect various rights that ensure the autonomy of the individual in the face of state power in both political and economic spheres.’⁵¹ Nevertheless, it has not proved difficult to find different rule of law concepts merging into the discourses of donor institutions and creating a very broad and diffuse policy making scope.⁵²

According to Humphreys, the rule of law promotion actually deviates from the traditional concept of the rule of law (grounded in theory and history) and introduces a concept dependent on certain assumptions about the optimal role of law with respect to politics, economics and society. Humphreys finds that the conceptual variation of the rule of law program is given by its association with different public goods that accommodate themselves, precisely, in the rule of law’s indeterminate scope. He argues that the openness of the vocabulary and the ambiguity of the various narratives reassured that different groups made their own associations with different public goods through the rule of law idea – e.g. ‘lawyers and judges will think of procedural rights and the public good that the law itself represents; economists will focus on property rights and contract; bankers, investors and other donors, who rely on [World] Bank contracts and guarantees for investments in developing countries, will be reassured that steps are being taken to protect their assets. Human rights advocates and other potential critics of the [World] Bank may

⁵¹ Carothers (n 47) 135.

⁵² Tamanaha notes that there are two versions of the rule of law mixed in the contemporary discourse of international organization, on the one hand the pre-liberal one related to the protection against the dangers of concentration of political power, and a liberal version more concerned with securing predictability; see: Tamanaha (n 48). González de Asis also notes that the rule of law is somehow conceived as an end in itself and a means to economic growth or democratisation, separately or together, which ‘in practice is a daunting challenge for any conceptual contortionist’ María González de Asis, *Anticorruption Reform in Rule of Law Programs* (2006) The International Bank for Reconstruction and Development. The World Bank < <http://siteresources.worldbank.org/WBI/Resources/AnticorruptionReforminRuleofLawProgramsFINALVERSION092706.pdf> > accessed 28 February 2014. More practical exercises aiming to map the different versions of the rule of law circulating in the discourse of specific donor institutions show the same disparity; see: Alvaro Santos, ‘The World Bank’s Uses of the “Rule of Law” Promise in Economic Development’ in David M. Trubek and Alvaro Santos (eds), *The New Law and Economic Development: a Critical Appraisal* (Cambridge University Press 2006).

recognise its rule of law goals as valuable to their own goals and advocacy.⁵³ But for him the very fact that the rule of law ‘contains’ all these numerous and dissimilar claims tells us something important about it: the existence of a contest that unsettles the possibility of something like positive law and suggests that law is always loaded with unsettled goods.⁵⁴ Actually, the ambiguity in the aims behind the rule of law and the judicial reform has allowed certain dynamism in the ideas encompassed in the programs delivered by foreign governments and international organisations through time. In this way, the general discourse of the rule of law reform has sometimes been adapted to target some local problems of the recipient countries.

Significantly, this indefiniteness of underlying goods permeating the rule of law project seems to have had yet another effect on the law. It created a ‘thin’ version of law, entangled with a specific type of meta-law (identifiable with relevant public goods). In other words, law became a function of other higher level goods. In this manner, the traditional liberal emphasis on the ‘closeness’ of the law as a source of a predictable framework of action changes towards a version that stresses ‘openness’ and the possibility of finding contested versions of the law regarding diverse values or public goods. Law, then, seems to become even more dependent of other discourses that seem to capture its formerly attained autonomy. Tamanaha has posed a similar argument with respect to the evolution of the American legal system during the twentieth century. He notes that there is a tendency of departing from the idea of law as an end in itself with the implications for autonomy that this represents, and abiding by the idea that law is a means to fulfil different goods. Tamanaha alerts that this displacement does not mean the disappearance of one image of the law for the other, but just the most common use of the second picture in detriment of most traditional understandings about the law.⁵⁵ Similar observations can be made about the idea of rule of law as understood by reformation programs, which seemingly contain both narratives about the law, although apparently posing more emphasis on its instrumentality. In this way, the idea of law as a close, predictable, formal body

⁵³ Stephen Humphreys, *Theatre of the Rule of Law. Transnational Legal Intervention in Theory and Practice* (Cambridge University Press 2010) 142.

⁵⁴ *ibid* 5-6.

⁵⁵ Brian Z Tamanaha, *Law as a Means to an End* (Cambridge University Press 2006); Brian Tamanaha, *The Perils of Pervasive Legal Instrumentalism* (WOLF Legal Publishers 2006).

continues to circulate, but losing strength in favour of a more open-ended version. Thus, the recipients of the rule of law narrative will most likely come to face a form of law that appears as a vessel containing different discourses, which they will be forced to interpret and prioritise according to concrete regional needs.

Nevertheless, apart from the circulation of a fuzzy rule of law discourse, developmental agents drafted concrete checklists of actions to be undertaken by the recipient countries. In this manner, judicial reform became one of the medullary points of the rule of law project checklist. The rationales leading to the primacy of the judiciary in this enterprise are various and often unclear.⁵⁶ Building upon different understandings and assumptions, well-functioning judiciaries were linked with the major objectives of enhancing economic performance, democracy and human rights. Broadly speaking, on the economic side it has been argued that only a well-functioning judiciary would be able to assure low transaction costs associated with the enforcement of contracts, to secure the right of investors and build a predictable scenario by holding the other two branches of government accountable.⁵⁷ On the political side, the judicial reform was seen as indispensable for consolidating democratic institutions by protecting human rights and promoting harmonious social relations.⁵⁸

Donor institutions did not agree totally regarding the reforms that would help building the appropriate judiciary; however, the core of the typical judicial reform program was basically the same. The measures generally have aimed to strengthen the judicial branch by securing its independence through an efficient system of appointments and discipline, guaranteeing a minimum budget, increasing the judicial competences to declare legal and constitutional violations, and speeding the processing of cases by enhancing procedural laws and introducing of IT and managerial training.⁵⁹ Nevertheless, by enhancing the judiciary, the rule of law program placed a lot of weight on this institutional branch as the guarantor of legality

⁵⁶ Richard E Messick, 'Judicial Reform and Economic Development: A Survey of the Issues' (1999) 14 World Bank Research Observer 118-23.

⁵⁷ *ibid* 120-21.

⁵⁸ *ibid* 119.

⁵⁹ Maria Dakolias, *The Judicial Sector in Latin America and the Caribbean: Elements of Reform* (World Bank 1996).

and, often, of constitutionality. The judges then became a key piece in the administration of law contested meanings, which tended towards creating active courts that depart from the traditional depiction of judges as ‘no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour.’ In this way, judicial reform has often brought over the judicialisation of the social and political life, which represents an important expansion of the judicial function, especially for those jurisdictions with a traditionally less active judiciary.⁶⁰

3.4 The Rule of Law in Mexico

As we have previously seen, the global spread of liberalism, democracy and the rule of law that took place during the 1990s, caused a lot of mobilisation at the interior of several countries, challenging the traditional form of dealing with economic, political and legal issues. As it will be explained here, that global background unleashed a strong wave of changes also in the Mexican context, supported at the same time by the circumstances of the internal setting.

After a relatively long period of economic isolation and a more or less stable way of dealing with legal and political issues Mexico’s internal order underwent a profound crisis. Following the collapse of the oil prices in 1981, Mexico, defeated in its extensive foreign borrowings, entered a phase of economic crisis, which also intensified the existing legitimacy crisis of the political system. Thus the main objective of governments since then and until the mid-1990s was to substitute the economic model of import substitution industrialisation with a model of free market economy. The economic agenda was driven by the domestic elite, who found the global framework to be coinciding with their own policy preferences, but also by leading institutions such as the IMF and the World Bank, which played a major persuasive role during loan negotiations and assisted further in the implementation of the reforms with technical advice and financial support.⁶¹ The economic reforms,

⁶⁰ C Neal Tate and Torbjorn Vallinder (eds) *The Global Expansion of Judicial Power* (New York University Press 1997).

⁶¹ Judith Teichman, ‘The World Bank and Policy Reform in Mexico and Argentina’ (2004) 46 *Latin American Politics and Society* 39-74.

aiming towards liberalising trade, privatising public goods, and deregulating economic activity and the operation of financial markets, were carried out during the term of President Carlos Salinas de Gortari (1988-1994), affecting extensively the economic institutions of the country. These steps were taken in order to stabilise the oil crisis, but also for the country to join definitively the international commercial community and to establish more commercial partnerships around the world. Following, Mexico carried on negotiations to sign the North American Free Trade Agreement (NAFTA) that finally went into effect in 1994; the Economic Partnership, Political Coordination and Cooperation Agreement with the European Union, signed in 1997; and bilateral agreements with different Central American countries that all together had reformative effects on the internal economic framework. However, failures on the implementation of the new economic model and increasing internal political conflicts⁶² drove Mexico into a new, deeper economic crisis in 1994, essentially realised through the massive migration of capitals of scared investors following a great deal of speculation about the risk of investing in the domestic market. In order to overcome the crisis, Mexico borrowed around 50 billion US dollars from the US and international institutions, and was thus bound by further externally imposed recommendations towards modifying the economic system.⁶³

As Mexico's connection with the economic international community deepened, the global ideas about the operation of political and juridical institutions penetrated and acquired increasing relevance,⁶⁴ especially since they represented an alternative to the highly deteriorated juridico-political establishment. In a sense, the local

⁶² The insurgence of an armed rebellious indigenous group in Chiapas in January of 1994 and the assassination of the leading presidential candidate during a public campaign act in March of the same year attracted international attention and pervaded the image of progress that Mexico had built during the beginning of the 1990s.

⁶³ For detailed accounts on the bailout and posterior domestic reforms see: Maxwell Cameron, 'Mexican Meltdown: NAFTA, Democracy, and the Peso' (Workshop 'Mexico in the Post-NAFTA Era: Democracy, Civil Society, and Societal Change': CERLAC-York University, York, 22-24 September 1995) < <http://www.yorku.ca/cerlac/documents/Cameron.pdf> > accessed 28 February 2014; John H Chun, "'Post-Modern' Sovereign Debt Crisis: Did Mexico Need an International Bankruptcy Forum?" (1996) 64 *Fordham Law Review*.

⁶⁴ The exact circumstance in which the ideas of democracy and the rule of law spread and lead to institutional reform in Mexico are obscure. However, it is often argued that, at first, these ideas were formulated as recommendations from the Washington institutions and members of the NAFTA to Mexico, so as to conclude the economic reform. See: Gabriela Beatriz González-Gómez and María de Lourdes González Chávez, 'La Reforma Judicial de 1994' (2007) 15 *Nómadas. Revista Crítica de Ciencias Sociales y Jurídicas* 403-05.

momentum was found in conjunction with the global tendencies: thus the ideas of democracy and the rule of law became highly influential models within the local context, placed in the centre of the agenda of political and legal reforms. In this way, as noted by Dezalay and Garth, Mexico became a 'full participant in a growing global industry promoting the import and export of the rule of law.'⁶⁵

From the beginning of his administration, President Ernesto Zedillo (1994-2000), showed a clear commitment with continuing the neoliberal economic project, but also a strong inclination to carry on an integral reform of the political and legal system. In his inauguration address, Zedillo argued that now more than ever Mexico needed to be a country of laws, where the Constitution and the laws are fully observed and the authorities act accordingly, so as to provide the certainty in contractual relationships that is central for economic growth and securing the operation of civil rights. He added that for this purpose he would present an initiative of constitutional reform to strengthen the federal judiciary, which from then onwards would also guarantee the democratic equilibrium between the political powers.⁶⁶

Zedillo also argued that the political power had to be (re)distributed, that the traditionally strong powers attached to the presidency had to be reallocated and subjected to the legal framework. In an interview to the international press, the former president explained: 'Presidents in Mexico have historically accumulated overwhelming de facto power. This was part culture and part practice of presidents themselves. I have said I will limit my power to those clearly stipulated rights and obligations contained in the constitution. In Spanish, we have talked of the *limited presidency*. Some people in Mexico have interpreted that as a weakness, but it's basically a constitutional exercise of power and that's what Mexico needs.'⁶⁷ Similarly, on the 'National Plan for Development of 1995-2000', drafted by every presidential administration, Zedillo set as a policy axis of his government the establishment of the rule of law. Therein it is possible to appreciate that the rule of law is used as a wide and diffuse concept that is meant to limit the political powers,

⁶⁵ Yves Dezalay and Bryan G Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (University of Chicago Press 2002) 3.

⁶⁶ Ernesto Zedillo, Speech (1 December 1994).

⁶⁷ Interview of Zedillo with the *Financial Times* London, 30 January 1996 in Stephen Fidler 'Mexico: What Kind of Transition?' (1996) 72 *International* 718.

to secure certainty of economic transactions and, also, to enforce human rights – all this seemingly following the broad scope of the rule of law discourse of development institutions.

In this manner, the global idea of the rule of law permeated the local context, becoming the paradigm of progress. The rule of law discourse, as embraced by local political actors, denotes a message of change with respect to the political order, but also a different daily operation of the law and the judicial apparatus. In this sense, the new discourse had always the potential to reach the legal community and challenge their legal understandings. The new model relied on a strong judiciary to secure the operation of the legal framework; something that was at odds with the role that the judiciary played during the past decades.⁶⁸ Although the discourse resounded strongly in the political sphere, at first, it didn't seem to be acknowledged by the legal academic and professional circles of Mexico, and in this manner there was no profound technical discussion about the way to implement it in positive law.⁶⁹ Nevertheless, the attention of the legal community was finally attracted when the abstract discourse consolidated in a package of reforms to the constitutional order.

A few days after taking office, Zedillo undertook an initiative of constitutional reform, which looked towards modifying the structure of different juridico-political institutions. The initiative would finally attract the attention of the legal sector and the public opinion, yet the haste with which the reforms were approved did not allow for proper discussion on the subject neither in the congress nor outside it.⁷⁰ The rule of law and democracy discourses, then, commenced to concretise through a set of constitutional reforms that, in general, aimed to build a more balanced relationship between the three political branches, to decentralise the power towards the states and municipalities, to create electoral system that allowed actual political competition, and to improve the administration of justice. The legislative discussion of the presidential initiative for constitutional reforms showed the conviction that the rule of law was the biggest demand in contemporary Mexico, and that the judiciary was

⁶⁸ As noted by Fix-Fierro, the judiciary was more like a 'third class power' rather than a 'third power'. See: Héctor Fix-Fierro 'La Reforma en México: ¿De Dónde Viene? ¿Hacia Dónde Va?' (2003) 2 *Reforma Judicial*. *Revista Mexicana de Justicia* 252.

⁶⁹ *ibid* 260.

⁷⁰ *ibid* 264.

central in this endeavour. In this discussion it is also possible to see how the idea of attaining the rule of law starts merging with that of securing the constitutional regime, and how the federal judiciary is elevated to the guarantor of different kinds legal and constitutional of values.⁷¹

The package of reforms was published on the Official Diary of the Federation on the 31st of December of 1994, concentrating highly in restructuring the federal judiciary. The reform consisted on 27 amendments to substantive articles of the constitution and 12 amendments to transitional articles, which represented important changes to the form of operation of the federal judiciary. The reforms aimed to secure the independence of the judiciary, turn it into a more specialised organ and to expand its scope of influence. Thus, the structure of the Supreme Court of Justice changed, by means of reducing the number of ministers from 24 to 11 in order to convert it into a professional organ in charge of the most relevant cases. The term of the ministers of justice changed from a 6-year period matching the presidential term to a 15 years term so as to reduce the influence of the executive in their performance. Following similar reasons, the procedure to appoint members of the Supreme Court of Justice was changed in order to assure higher involvement of the Senate; also the requirements for the Supreme Court's nominees were modified to clearly state that the aspiring minister should not have served in high rank public positions at least a year before the nomination. Additionally, the time consuming administrative tasks that the Court was in charge was passed to the hands of a new administrative organ dealing with the career service, monitoring corruption and enforcing sanctions. But also, the scope of operation of the Court was widened with complementary constitutional review actions additional to the writ of *amparo* that augmented its political power and profiled it as a Constitutional Tribunal.⁷²

The new constitutional actions, the so called constitutional controversies and action of unconstitutionality, gave the Court a more active role in the national politics. These actions were based on the (continental) European model of constitutional control, characterised by the concentration of these functions in a specialised

⁷¹ Chronicles of the Legislative Process of the Constitutional Reforms of 31 of December of 1994.

⁷² Decree of Constitutional reforms of 31 of December of 1994.

constitutional tribunal. These actions did not substitute the already existing American-based model of judicial review incarnated in the *amparo* action that still kept operating, but they complemented the scope of constitutional revisions adding new legitimised subjects and circumstances where (un)constitutionality could be discussed. However, they had a more political connotation than that of *amparo*, as they are exclusive of political organs and the resolutions solving them could achieve general effects (contrasting with the particular effects that *amparo* was attributed with). The so called constitutional controversies are actions pursued by the legitimised political organs from the three levels of government (federation, state, and municipality) against the presumed unconstitutional acts or general norms (laws and regulations) of other organs.⁷³ On the other side, the actions of unconstitutionality legitimise the political minorities, the political parties, the general Prosecutor of the Republic and the Human Rights Commission to challenge general norms that are considered to be against the federal constitution.⁷⁴

In order to secure the end of an era, all ministers of the Supreme Court were sent to early retirement, and a new group of judges was appointed to integrate the renovated organ. Also, the renewed Court distanced itself from the previous organ by deciding to start a new ‘epoch’ of the Judicial Weekly of the Federation.⁷⁵ Additionally, the constitutional reforms were helped with material aids to improve judicial operation. Thus, the reform translated also into an increasing budget, modernising information systems, improving judicial managerial skills, and increasing transparency.

The multiple actions implemented to carry out the rule of law reform had important effects over the judiciary and the legal system in general. As a product of the reforms the new Supreme Court’s discourse denoted a break with the past by frequently mentioning a change in its way of operating and its duty to put upright the administration of justice. This can be observed in the Annual Informs of the Court –

⁷³ Article 115 Fraction I Federal Constitution (thereinafter CPEUM).

⁷⁴ See: Article 115 Fraction II CPEUM.

⁷⁵ The so called epochs of the Judicial Weekly of the Federation are chronological segments in which the decisions of the federal judiciary are divided. There is not an explicit criterion on when a new epoch should be declared, but usually it is done when there have been substantial reforms that affect the operation of the judiciary and the creation of precedents. See: Agreement 5/1995 of the Supreme Court (thereinafter SCJN).

for example, in that of 1995 the President of the Court, describing its first year of function, noted:

We did not allow hesitations, we never eluded responsibility and firmness in our tasks, we did not spare efforts to achieve the purposes that animated the judicial reform of 1994, because our compromise with Mexico was and still is to *recover the lost confidence in the federal tribunals*, as initial goal, and, later, to *put upright the labyrinthine path of access to justice*. A lot has been said about this human right [of access to justice], but few has been achieved, because the efforts of parts and justices get lost in the tangle of procedural traps that nest in rancid and suffocating laws.⁷⁶

Similarly, in 1997 he stated that:

In attention to the changing environment in which we are living, this Supreme Tribunal of the Republic has taken in the clamour of granting the citizens an effective access to the Tribunals in charge of administrating justice, and under this tone *it intends to break stereotypes and stiff interpretations and application of the laws* of the federation, states, federal district and the municipalities [...]⁷⁷

In general, the reform of the judiciary reinforced the idea that the rule of law was a matter that ought to be taken seriously, and that the judiciary had to play a major role in this transition. In this way, the reform emerged not just as a change in legal rules, but also as a shift in the general discourse about the law shared by the legal community. It has been noted that new centrality of the judiciary meant a ‘silent revolution’ of great magnitude,⁷⁸ which on the one hand overturned the traditional understandings about the relationship between the judiciary and the other powers,⁷⁹ and on the other changed the self-understanding of judges and professionals of law. Still, the rule of law also involved a profound change regarding the very idea of how law should function in practice, adding elements of dynamism that were absent in the Mexican discourse and knowledge establishment. This wider change was bound to resonate strongly with all members of the legal community.

⁷⁶ Report of the president of the SCJN (1995).

⁷⁷ Report of the president of the SCJN (1997).

⁷⁸ Robert Kossick, ‘The Rule of Law and Development in Mexico’ (2004) 21 *Arizona Journal of International and Comparative Law* 725.

⁷⁹ Luis González ‘Transición y Poder Judicial en México’ in Alberto Aziz and Jorge Sánchez (ed), *Globalización, Poderes y Seguridad Nacional* (CIESAS-M A Porrúa 2005) 210.

The overall message first sent by the reforms, was reinforced by a great amount of academic research and conferences about the rule of law and the judicial reform, which mostly subscribed to the message of (good) change and the necessity of further modifications to complete the reforms.⁸⁰ In this manner, the idea of extending the reforms to secure a widened rule of law and a stronger judiciary became paradigmatic. Therefore, this tendency was expanded and reflected in further statutory and constitutional reforms. For example, the local state judiciaries also carried out different constitutional and legal reforms introducing new actions (comparable to the federal actions of constitutionality and constitutional controversies) and provided the economic and technical means in order to secure the new framework. The rule of law reform became a positioned objective of the following administrations of Vicente Fox (2000-2006) and Felipe Calderon (2006-2012). Nevertheless, in the latest years, the shape-shifting rule of law ideal seems to be mostly associated with the guarantee of human rights and a good-functioning administration of criminal justice,⁸¹ something that is also in consonance with the current global trend.⁸² This latest understanding of the rule of law in Mexico has eventually led to the embracement of new ideas, such as the importance of subscribing to oral trials and the adversarial system.⁸³

⁸⁰ See for example: Sergio López-Ayllón and Héctor Fix-Fierro, “‘Faraway, So Close!’ The Rule of Law and Legal Change in Mexico, 1970-2000’ in Lawrence M Friedman and Rogelio Pérez-Perdomo (eds), *Legal Culture in the Age of Globalization: Latin America and Latin Europe* (Stanford University Press, 2003); Héctor Fix-Fierro ‘Judicial Reform in Mexico: What Next?’ in Erick Jensen and Thomas Heller (eds) *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford University Press 2003).

⁸¹ Presidency of the Republic, *National Plan of Development 2006 - 2012* <<http://pnd.calderon.presidencia.gob.mx>> accessed 27 June 2012.

⁸² Ana María Salinas de Frías, Katja Samuel and Nigel White (eds) *Counter-Terrorism: International Law and Practice* (Oxford University Press 2012); Seung-Whan Choi, ‘Fighting Terrorism through the Rule of Law?’ (2010) 54 *Journal of Conflict Resolution* 940-66.

⁸³ The rule of law program, as being conceived nowadays, incentivises reforms to the criminal justice system in the recipient countries. Following this trend, a number of Latin American countries have introduced new criminal procedural codes, which arguably represent the deepest transformation in the criminal procedures undergone in nearly two centuries. The reforms aimed to solve problems such as lack of due process, transparency and inefficiency by introducing oral trials and framing the transition from inquisitorial to accusatorial criminal procedures. See: Máximo Langer, ‘Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery’ (2007) 55 *The American Journal of Comparative Law* 617-76.

3.4.1 The Rule of Law Project as a Legal Irritant

The opacity with which the global import-export of the rule of law was made, in addition to the diffused nature of the rule of law idea, that is, its capacity to adapt to several utterances, make it difficult to trace back the genealogy of the Mexican rule of law reform and its precise content. Despite these difficulties, it is possible to conclude that, either a recommendation of foreign donor institutions or a borrowing of politicians and scholars, the rule of law idea behind different reforms entailed a set of beliefs and values that were extraneous for the Mexican context. As such, the rule of law, indicating (at least broadly) a set of assumptions of its own, caused irritation to the minds of legal practitioners.

Additionally, that the rule of law discourse was enthusiastically embraced in Mexico or the fact that it happened to fit the social-political conjuncture, does not take away the irritating potential of this legal feature, in the same way that appreciating spring does not take away the possibility of developing seasonal allergies or irritations. It is true that the preceding reconfiguration of the political system helped the local fast spread and survival of the rule of law discourse and the ideas related to the role of the judiciary. The weakening of the presidential institution, the debilitation of the hegemonic party with its corporatist organisation of society (that even reached the judiciaries) and the more active participation of other political forces seem to have created a fertile ground for the discourse of the widened judiciary and the juridicisation of more areas of the social life. According to Domingo, the redefinition of the political system in fact not only aided the survival of the idea of a more active judiciary, but somehow drafted it: as the foundations of the relationship between the executive and the judiciary eroded, the judiciary was meant to be transformed to fit the new exigencies.⁸⁴ Yet one must partly disagree with Domingo's statement as it gives the impression that the new ideas with respect to the law and the judiciary had a bottom-up origin. In fact, as discussed above, these were the product of global tendencies. In our view, the reformation movement of the 1990s represented the

⁸⁴ Pilar Domingo, 'Judicial Independence: The Politics of the Supreme Court in Mexico' (2000) 32 *Journal of Latin American Studies* 728.

introduction of a new discourse about the law and the judiciary that precisely due to the political momentum of the context, was found appropriate or at least convincing.

Thus, this apparently welcoming environment for the reform should not obscure the magnitude of the challenge posed by the new set of ideas. Legal practitioners seemed to be convinced that the new legal path was the right route for development, and therefore were very positive about the introduction of further reforms. The positive affective inclinations of the legal community towards the rule of law do not change the fact that the novel ideas contradicted the pre-existing discourses, which eventually involved difficult cognitive reconfigurations.

As explained in the previous chapter, the traditional manner of thinking about the law as a subsidiary order disclosed a proceduralist and formalist nature when in operation. The idea that the law had to be flexible and connect to more areas of the social world meant something new. In part, this meant the inclusion of more disputes under the scope of the law. At first this was materialised by the creation of new legal actions for the resolution of political and electoral conflicts, and later on by the expansion of actions to protect human rights. Nevertheless, this shift eventually involved the reconsideration of the way some extralegal considerations are included into the law, that is, the revision of the traditional (formal) legal method. Moreover, the idea of strengthening the judiciary, to the point of becoming the central institution for the administration and enforcing the legal framework was also a meaningful change to the remarkably weaker and more passive power that the judiciary was assigned in the past. The change was first suggested by the reforms to the federal judiciary, but this soon expanded all over the system, encouraging new material reforms in different states of the federation. In this form, the wave of changes also involved a tacit revision of the theoretical framework behind the judicial function and the reconsideration of the value of judge-made law.

The reformative impulse of the rule of law can be thus seen as affecting the formal institutional setting in different areas: from the reform of human rights to securing

the separation of powers.⁸⁵ Nevertheless, there seems to be a core regarding the rule of law: the expansion of the legal scope and the judicial function. Arguably, it is this core that emerges as a big challenge for local legal practitioners, and not necessarily the individual rule reforms that somehow reflect it. Legal practitioners had to make sense of the new functions assigned to the law and the judiciary. Therefore, in recent years it is possible to observe an increased recurrence to new theoretical approaches dealing with legal decision making and constitutional theory in search for answers. These theories have been discussed in specialised academic forums, but also have been ‘translated’ to the less technical language in books and seminars for legal professionals. The questions that the new legal framework seems to be triggering are directed to understand the role of the constitution, the figure of the judge and the model of legal reasoning. The search has been concentrated in certain theories of wide circulation within the context: Ferrajoli’s *garantismo*, Dworkin’s rights theory, and Neo-constitutionalism. Also circulating, but within narrower circles, is the economic analysis of the law. We will briefly explain them as understood in this context.

The theoretical model of *garantismo* articulated by Luigi Ferrajoli has been welcomed and widely spread in the Mexican legal context.⁸⁶ For Ferrajoli the rule of law should be framed in the light of a substantive democracy, where fundamental rights rule at its core. This perspective denies intrinsic value to law for the simple fact of being enacted – it calls for the revision of optimal legal performance (or in Ferrajoli’s words, validity) on the grounds of constitutionality rights, creating a

⁸⁵ The idea of the division of powers forms part of the wider discourse of enforcing the constitutional regime of horizontal and vertical competencies across the federal system. In this manner, the idea of the rule of law was reinterpreted as enforcing the ‘organisational part’ of the constitution through the new ‘actions of constitutionality’ and ‘constitutional controversies’. In a similar fashion, the appeal to human rights gave a new life to the ‘individual guarantees’ or civil rights included in the constitution for a long time. Thus, the reformed judiciary was encouraged to take part in the guarantee of human rights, which tried to be accomplished not only by means of the new judicial actions, but also by the reinforcement, and in some manner reshaping, of long-standing legal features (such as *amparo* and the ‘investigatory faculty of the SCJN’).

⁸⁶ On the reception of Ferrajoli in Mexico, see for example: Armando Alfonso ‘El Garantismo y sus Perspectivas en México’ (2005) 19 IUSUNLA; Miguel Carbonell, ‘Luigi Ferrajoli en Mexico’ *El Universal* (Mexico, 2 November 2007) <<http://www.eluniversal.com.mx/editoriales/38923.html>> accessed 5 April 2012.

strong link between (statutory) law and the constitutional values.⁸⁷ This theoretical account also has important consequences for the model of judge, which becomes crucial in the permanent improvement of the legal order by taking into consideration fundamental rights into their function of adjudication.⁸⁸ The influence has been strong, to the point that ‘many resolutions of the Supreme Court of Justice of Mexico have been based explicitly or implicitly in the texts of Luigi Ferrajoli.’⁸⁹

The idea of neo-constitutionalism consists on the expansion of the constitutional provisions to the whole legal system. In other words, this theory prescribes the omnipresence of the constitution, especially constitutional rights, that irrigate the entire legal order. The constitutional principles condition the validity and interpretation of the lower hierarchy laws. In a sense, neo-constitutionalism is similar to *garantismo*, as they both appeal to the principle of constitutionality, instead of that of simple legality as the basis of a democratic State. In this view, the judge becomes the guarantor of the constitutional order, by interpreting infra-constitutional provisions through the glass of the constitution. This theory prescribes a model of legal reasoning that leaves behind the mechanical syllogism associated to positivism, and moves towards the consideration of constitutional values and principles in every interpretation of the law.⁹⁰

According to Dworkin, legal practice is in nature interpretative. In this sense, the law is subject to interpretation and reinterpretation according to the moral and political values of the practice, that is, to the shared principles of the community. Dworkin also notices that the law is not only composed by rules that work as all-or-nothing mandates, but also by principles that respond to the dimension of weight or importance.⁹¹ Thus, the function of the judge has been understood as interpreting the law according to relevant principles, and balancing them when they seem to clash. It

⁸⁷ Marina Gascón Abellán ‘La Teoría General del Garantismo a Propósito de la Obra de Luigi Ferrajoli “Derecho y Razón”’ (2001) 31 *Jurídica. Anuario del Departamento de Derecho de la Universidad Iberoamericana*, 201-06.

⁸⁸ Rodolfo Moreno Cruz, ‘El Modelo Garantista de Luigi Ferrajoli. Lineamientos Generales’ (2007) 120 *Boletín Mexicano de Derecho Comparado* 852.

⁸⁹ Prologue by Miguel Carbonell in Luis Roberto Barroso, *El Neoconstitucionalismo y la Constitucionalización del Derecho* (UNAM 2008).

⁹⁰ Miguel Carbonell, *Teoría del Neoconstitucionalismo. Ensayos Escogidos* (Trotta-UNAM 2007).

⁹¹ Ronald Dworkin, ‘The Model of Rules’ (1967) 35 *The University of Chicago Law Review* 14-46

is precisely the idea of having a law that is reinterpreted through principles what has been very attractive in the Mexican context, challenging strongly the pre-established idea that law is a matter or enacted rules. However, an important part of Dworkin's theory appears to have been lost in translation, that is, the fact that the interpretative practice should be justified and guided by the aspirational value of integrity. Law as integrity holds that interpreters should identify legal rights and duties assuming that their only author is the community personified. It requires that rights and duties flow from past collective decisions that not only contain narrow explicit contents, but also implicit principles and values that justify the practice.⁹² In that sense, the idea of integrity is the one that hold backs the interpretative power of the judges generating an overall coherence. Thus, the way the Dworkinian approach to law has mainly been understood by the Mexican legal community as a license to take into account matters of value in the interpretation of the law, without the important restraint proposed by this account.⁹³

The economic analysis of the law is an approach that introduces economic considerations to assess the efficiency of legal institutional design or policy making, but also to guide the judge in decision making. As noted by Roemer and Valadés '[i]n the academic community there are few Mexican universities that show any interest in economic analysis of law. Among them we can mention the Autonomous Technological Institute of Mexico (ITAM), Center for Economic Research and Teaching (CIDE). Likewise, a certain interest has been detected in the Law School of the National Autonomous University of Mexico (UNAM)',⁹⁴ but also organisations like the Mexican Academy of Law and Economics (AMDE) show an increasing interest in studying and extending the correlation economy-law. This perspective has implications also for a model of judge and legal reasoning. According to this theory, legal decision makers have to be receptive to cost-benefit economic considerations while reasoning and deciding about the law. In this respect, as in the other

⁹² Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 225-28.

⁹³ Jorge L Esquirol, 'The Turn to Legal Interpretation in Latin America' (2011) *American University International Law Review*.

⁹⁴ Andrés Roemer and José Diego Valadés, 'Law and Economics in Mexico' in Boudewijn Bouckaert and Gerrit De Geest (eds), *Encyclopedia of Law and Economics: The History and Methodology of Law and Economics* (Edward Elgar 2000) 263-64.

perspectives the law starts to be open to a broader range of considerations, although in this case the gate is widely open to (economic) consequentialist reasoning.

Although essentially different, these theories (and especially in their received versions) seem to touch some common elements: their flexibility and the possibility of including different principles or values at their core, especially, by means of judge-made law. In this manner, we can see that the discursive change introduced by the reforms of 1994 has led the Mexican legal community to a search for a new model of law and legal reasoning along more flexible lines. The idea of law as interpretative practice, where the legal order is understood through constitutional values, fundamental rights, economic utility or other kind of goods, seems to be a popular option. In this respect, Jaime Cárdenas notices that this chain of changes seems to be forcing a reconfiguration of the national legal culture. He suggests that the system should transit to a dynamic model of argumentative law, no longer based on rules but on the interpretation of principles and values.⁹⁵ In fact, it has been noted that countries like Mexico are living a ‘turn to interpretation’ which overall ‘presents additional elements for legal reasoning, such as the application of neutral principles; the utilization of past facts of a legal, social, or historical nature; and the introduction of consequentialist thinking.’⁹⁶ Nevertheless, the turn to interpretation seems to be lead more by naïve idealism, rather than by conviction derived from a full understanding of the new model.⁹⁷

The new theoretical framework also had important consequences for the model of judge and the value given to judge-made law. These theories were first received by the federal judiciary (which has developed the habit of citing interpretativist theories), but they seem to be spreading across the legal system. In this manner, the model of judge that plays an active role in establishing the direction of the law through its interpretation is becoming widespread, challenging the past perspectives that indicated a more passive judicial function. There have been many attempts to expand the operation of the judiciary by formal institutional reforms. The rise of

⁹⁵ Jaime Cárdenas Gracia, ‘Hacia un Cambio en la Cultura Jurídica Nacional’ (2007) *Boletín Mexicano de Derecho Comparado* 311.

⁹⁶ Esquirol (n 93) 1035.

⁹⁷ *ibid.*

constitutionalism, the human rights discourse and the concern of guaranteeing effectively the constitutional charter and the system of national and international rights have pushed towards the reconfiguration of the long-standing *amparo* action. The *amparo* action, for a long time was a highly technical means to contest the unconstitutionality of acts and laws as we indicated in the previous chapter; but due to the ongoing chain of legal revisions it also has undergone gradual reform to make it more flexible. In fact in 2011 the Federal Constitution was reformed to extend the reach of *amparo* and to leave behind formalisms and technicisms that affect the extent of its protective scope. Additionally, a new Amparo Act was enacted by the Congress in 2013, with the aim of modifying the *amparo* action and adjusting it to the new legal viewpoints. The initiative for a new *amparo* statute compiled an important part of the ideas that have been circulating in the legal system after the rule of law reform. The initiative states:

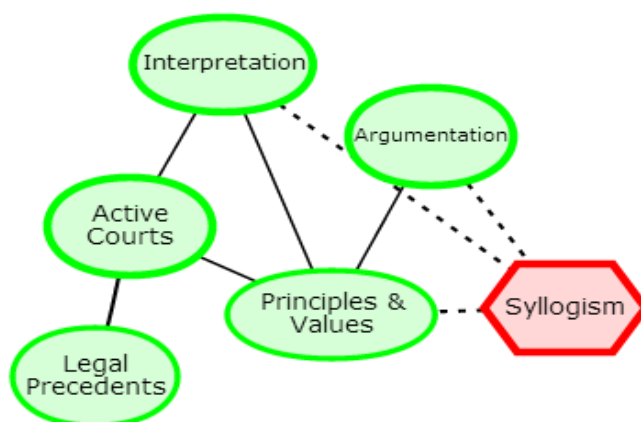
It is important to notice that the successful democratic transitions have been supported by the judicial powers (generally, constitutional tribunals) to achieve a reading of the constitution and the laws that is according to the democratisation of the institutions [...] The inexorable cultural, political and social transformations that the country has lived during the last decades, make it necessary to harmonise and adequate the laws and institutions so as to guarantee that these changes subscribe the rule of law framework. A relevant case where we can notice the importance of harmonising the institutions and the laws is that of the *amparo* trial. The *amparo*, as we have indicated, is the most transcendent juridical instrument in the Mexican State and it is because of this that it is imperative to engage into a series of changes and modifications to the Statute that regulates it, in order to modernise it and, in consequence, strengthen it. In consequence of the international logic that has extended the protection of human right and due to the necessity to build a new and more efficient *amparo* trial to control the acts of public authorities, it is pretended to widen the scope of protection.⁹⁸

As discussed above, the legal changes were strong and meaningful, affecting deeply the way the law and certain institutions were understood, and pushing towards further reconfigurations in an attempt to fully join the new trend. The legal change propelled not only the revision of isolated beliefs, but an authentic revolution

⁹⁸ Initiative of Reforms and Project of Decree of the Amparo Act of 2013 (thereinafter LA 2013) <http://sil.gobernacion.gob.mx/Archivos/Documentos/2011/02/asun_2735356_20110215_1297791384.pdf> accessed 14 February 2014.

involving core legal concepts. In this way, it is, to a high extent, expected for a legal change as the one described to produce an important degree of ‘cognitive irritation’ in the recipient legal community. In view of a change of this magnitude, legal practitioners not only need to change their conceptual understandings, but also they need to develop different practical knowledge in order to respond to the new environment. Thus, it would definitively be understandable if the legal community has problems to adapt to the new requirements of legal practice.

In response to the changes that affected widely the Mexican legal system, the legal community has been forced to move away from different traditional understandings. One of the major changes has been the acknowledgement of law as something more complex than the logical application of statutes. Thus, legal practitioners have given place to a picture of the law as an interpretative and argumentative practice, where there might encounter important disagreements. In this moment of the ‘gestaltswitch’ it is only possible to observe a general sense of having encountered a new path that nobody realised was there before. A great amount of communications circulating among Mexican legal practitioners show their increasing interest in legal argumentation and interpretation, and these legal subjects seem to be now identified as the core of the professional practice, but somehow they do not seem to be part of the legal community’s tool-box. In this way, it is frequent to find courses of legal interpretation and legal argumentation organised by academic and judicial institutions that usually give an overview of relevant theoretical approaches to law as an interpretative practice. These courses surely help reinforce the new legal ideas, but they are poor in delivering practical competences.



3.1 Cognitive-Affective Map of the Rule of Law Core Ideas

3.4.2 Revaluating Legal Precedents

The importance acquired by the judiciary has led to another reconfiguration: the historical role attributed to precedents. Judicial resolutions have acquired increasing relevance for legal practice. As the judiciary acknowledged the new role of legal precedents, it has created new institutions to compile and publicise the information – for example, the General Direction for the Coordination of the Compilation and Systematisation of Jurisprudential Thesis and the Institute of Jurisprudential Investigation, Promotion and Diffusion of Judicial Ethics were created to help in the drafting of precedents, their compilation and publicising. When these organs were created the Supreme Court Stated:

Due to the transcendence the judicial resolutions held by the Supreme Court of Justice of the Nation and the Collegiate Tribunals of Circuit [...] it is necessary to establish an organ in charge of the careful analysis of the jurisprudential and isolated criteria held by this high tribunal and the Collegiate Tribunals [...] which will involve different benefits to the administration of justice, including the wider diffusion of the sense and reach of these criteria by means of the organisation of forums of analysis and the publication of research and studies on the subject, and the early detection of contradictions [...]⁹⁹

These organs have periodically organised publications for the diffusion of the relevant criteria of the Supreme Court, and seminars about *jurisprudencia* aimed at legal practitioners. For example, in the description of one of these seminars the Institute of Jurisprudential Investigation states:

The interest that the study of *jurisprudencia* provokes is a general feeling. The role that the Supreme Court of Justice of the Nation has been fulfilling as the legitimate interpreter of constitutional norms has awakened an increasing interest from the parties, the public opinion and the experts in law towards the judiciary. Additionally, legal research and legal education prefer, more and more, the practical analysis of the law that develops from judicial controversies, as it is more fertile and dynamic than the legalist model. It is not strange, thus, to experience a boost of essays, conferences and books

⁹⁹ Agreement 11/2006 of the SCJN.

supported on the criteria of the tribunals, or the analysis of *jurisprudential* issues in the light of theoretical principles to collaborate in the construction of the ratio iuris [...] ¹⁰⁰

The increasing use of precedents was also supported by the automatisisation of judicial criteria. Since the early 1990s the Supreme Court started working on a database and a search engine to make *jurisprudencia* easier to retrieve. Previously, federal precedents were only available on the paper version of the Federal Judiciary's Weekly, which made them more difficult to be accessed by judges and legal practitioners. The system, released with the name of IUS, has been available for sale on CD and for free on the Supreme Court's website, making easier the search and quoting of these legal materials. The IUS is not a friendly system, but it has definitively helped legal practitioners to be informed about the legal criteria held by the federal tribunals in a more simple way than during the paper print days. In this sense, the increasing necessity of being informed about the activity of the tribunals was also possible thanks to the technological advances of the previous years that brought closer judges and practitioners to past judicial resolutions.

Nevertheless, the increasing use of precedents did not derive from their availability in electronic format, but mainly from the change of perception regarding the relevance of judge-made law derived from the chain of modifications above noted. Nowadays precedents are searched and invoked in trial because they are considered to be important legal constructions. Legal precedents seem, however, to be especially important at this specific historical moment – since the role of the law and the judiciaries was otherwise in the past, the legal precedents of the past couple of decades seem to be of high importance for the construction of the law. In a sense, many of these legal resolutions are not only a link of a chain novel, but the first link of that specific story. Many precedents appear to provide the first interpretation on a legal subject or are actually expected to overturn the line followed in the past.

¹⁰⁰ Institute of Jurisprudential Investigation, Promotion and Diffusion of Judicial Ethics, 'Seminar of *Jurisprudencia*' <<http://www2.scjn.gob.mx/red2/investigacionesjurisprudenciales/seminarios/seminario-de-jurisprudencia.pdf>> accessed 10 July 2012.

3.4.3 The Problem of Legal Precedents

In short, the rule of law reformation program involved the diffusion of a new set of ideas about the law, which picture it as a more flexible and arguable enterprise. As the judiciary was being repositioned as a decisive institution that settles legal meanings, legal precedents were also being repositioned as important sources of law. These ideas were warmly received despite the fact that they clashed with the pre-existing framework. Mexican legal practitioners have praised the argumentative character of the law, the active role of the judiciary, the importance of precedents for the development of the law. Yet arguably that does not mean that they fully understand the implications of these ideas or that they have acquired and mastered the necessary know how to perform in new circumstance. Accepting an idea is by no means the same as learning to think and act according to it. The fact that the legal practitioners acknowledge that the new ideas are important does not mean that they have fully changed their minds and hearts. They are still in transition.

In this form, the new legal ideas coexist with older understandings, which are still the base for forming legal practitioners in this context. In the Mexican setting the rigid image of the law still plays a major role, and permeates the way of thinking about certain legal features, even if other ideas have started to circulate. Actually, the use of certain new ideas in the current communications or discourses often denotes the sense of coming into terms with something foreign. These circumstances make it more likely for legal practitioners to hold conflicting ideas or to attempt interpreting new ideas according to the pre-existing knowledge framework.

With regard to legal precedents, legal practitioners had to relocate precedents into their legal tool box, that is, they had to start thinking of precedents as important for legal practice. However, the legal community does not necessarily know how to deal with precedents in this new context. Thus, this fundamental change in 'legal style' has not been problem-free for the legal community. Faced with massive changes across all aspects of the legal profession (and indeed wider society and politics) in a short period of time, practitioners in Mexico haven't had the time to conclude the

transition, clinging to some previously learned knowledge features. To come back to Glenn's example, they are still holding the horses.

The emergence of knowledge problems in these circumstances is by no means surprising, but that does not make them less disrupting. A change like the one that has been described in this thesis is likely to cause a plurality of knowledge mismatches. Nevertheless, herein we will focus on the problems that the legal community is experiencing with respect to a particular matter, i.e. the use of judicial precedents, which have been expressed by the legal community in various occasions.

3.4.3.1 The Legal Community's Complaint about Precedents

The members of the Mexican Supreme Court of Justice, immersed in the reformatory inertia explained above, felt empowered to continue the path towards constructing 'a new judiciary for the twenty-first century.' The judges of the Court were willing to open a dialogue with the internal legal community and the wider society, which would set the judicial function under public scrutiny from different perspectives. They aimed to understand the problems of the local and federal systems of justice, in order to design and carry on an integral reform of the Mexican judiciary. Therefore, in August of 2003 the Supreme Court of Justice decided to undertake a 'National Enquiry about the Integral and Coherent Reform of the System of Impartation of Justice in Mexico', searching for the necessary reforms for the judiciary. The Supreme Court called for documents describing observed problems regarding the administration of justice, as well as proposals to solve them. The documents could be presented by 'any person with interest' from the 27th of August of 2003 and until the 31 of August of 2004.¹⁰¹ The Supreme Court compromised to organise and analyse the information collected, so as to elaborate a draft for the integral reform of the judiciary and present it to the federal legislative and executive powers.

As a result of the enquiry, the Court received 5,844 documents containing around 11,709 proposals to reform the administration of justice in Mexico. Due to the open-ended nature of the enquiry, the documents approached the most various subjects and

¹⁰¹ Initially the call for documents was closing on the 30 of January of 2004, but it was later extended to allow a wider participation. See: Agreement 1/2004 SCJN.

reflected the wide scope of concerns regarding the performance of the judiciaries in Mexico. The examination, evaluation and presentation of the data gathered from the documents were performed in several stages, happening over the following three years. First, the problems and proposals of reform were classified by a group of researchers, who also elaborated a diagnosis of the participants' perception. Later on, the themes from the submitted documents were discussed by different 'reflection forums' integrated by academic experts. Simultaneously, the forums generated statistical information about the concerns emerging from the enquiry and the type of participants behind the presented documents. In a further stage at the end of 2005, the Court organised the first meeting of administrators of justice with the objective of discussing the results of the reflection forums and to compromise with the continuous improvement of the judicial function. Finally, an interpretation of the information gathered from the documents and the discussing forums was published as 'The White Book for the Judicial Reform.'¹⁰²

According to the statistical information published as an appendix of the book, the thousands of entries were produced in different local states across Mexico, for which the perception of the participants system-wide is well represented.¹⁰³ More than 80% of the participants in the enquiry were members of the internal legal community, that is, practicing lawyers, members of legal associations, local and federal judges and legal academics.¹⁰⁴ In this respect, the national enquiry can be considered to capture a good sample of the problems perceived by the legal community in Mexico. The original papers submitted by the members of the legal community have, however, not been kept in the archives of the Supreme Court of Justice despite their value and potential utility.¹⁰⁵ Still, the problems reported by the legal community can be observed from the working documents and the final book derived from the national enquiry.

¹⁰² SCJN, *Libro Blanco de la Reforma Judicial. Una agenda para la Justicia en México* (2006).

¹⁰³ SCJN, *Anexos Libro Blanco de la Reforma Judicial* (2006).

¹⁰⁴ According to the statistics 21% of participants were lawyers, 7% associations of lawyers, 24% federal judges, 9% local state judges, and 20% legal academics; *ibid.*

¹⁰⁵ The information was requested to the SCJN, but it was unable to provide it due to the fact that it is not longer in its archives.

The researchers systematising the information identified thirty four core themes from the documents, one of them directly addressing ‘the problem of federal precedents.’¹⁰⁶ In the working papers the researchers noted that the participants recurrently reported doubts regarding the role and use of the Mexican legal precedent: *jurisprudencia*. They also reported some problems regarding the use of precedents and offered possible solutions. They frequently expressed concerns about the lack of clear rules for the use of *jurisprudencia*. According to the researchers, this situation seemed to cause confusion among the participants, who also argued that precedents had harmed the possibility to predict the outcomes of judicial adjudication. In general, the working group found concerns regarding the diversity, multiplicity and contradictions between judicial precedents, as well as the lack of rules of application of *jurisprudencia*.

The participants considered that in the past years more federal precedents had emerged, making it very difficult to know them all and use them in practice. They argued that many precedents were repetitions of previous criteria, which seemed somehow unnecessary. In their view, the plurality of precedents only added on the bulk of criteria to keep track of and created practical difficulties. To remedy this situation, a ‘deputation’ of the databases containing precedents was suggested, that is, the deletion of old precedents or those that have been overcome by more recent judicial criteria.¹⁰⁷ Additionally, a common concern expressed by practicing lawyers and members of the judiciaries was the increasing existence of contradictory precedents. The participants considered that the existence of contradictions between precedents was one of the main problems affecting legal practice and an important source of uncertainty. Therefore, a recurrent suggestion was the creation of new institutional mechanisms for the dissolution of contradictions. One of the proposals to face the increasing contradictions was creating a new type of intermediary body in charge of dissolving contradictions, that is, deciding the decisions that should prevail.¹⁰⁸ Similar proposals suggested convening meetings between the magistrates of collegiate tribunals – where most contradictions derive from – to identify, discuss

¹⁰⁶ SCJN, *Anexos...* (n 103).

¹⁰⁷ SCJN, *Libro Blanco...* (n 102) 169-70.

¹⁰⁸ *ibid* 119.

and prevent contradictions.¹⁰⁹ Another suggestion was to limit the ‘territorial validity’ of precedents to the circuit to which they belong.¹¹⁰ Also, the participants also complained about the lack of clear and explicit rules for the application of precedents. Legal practitioners requested rules defining the scopes of validity of past legal resolutions in analogy to the scopes of validity recognised for statutes – that is, determining if precedents are valid when referring to a different territory or subject-matter.¹¹¹ One recurring suggestion was to limit the scope of territorial validity of the *jurisprudencia* issued by the collegiate tribunals of circuit to the circuit where they were issued – as this would also serve limiting contradictions.¹¹²

In relation to these concerns and solutions, the group of researchers in charge of the enquiry included a suggestion on how to improve the system of precedents in the White Book. Their recommendations read as follows:

The clarity and systematisation of *jurisprudencia* is a matter that generates legal certainty and directs the action of the agents that intervene in judicial processes, which influences the whole legal system. The Supreme Court of Justice must implement a set of short term actions to improve the systematisation of precedents. The above mentioned with the object of simplifying the search of precedents, and reaching a better understanding of their scope and effects. This systematizing effort will help the depuration of precedents to avoid contradictory theses issued in different historical moments and to secure the congruency with the strategies of the judicial reform. This reform requires the joint work of the members of the Federal Judicial Power. In the medium term, an additional effort must be made to improve the quality of the theses of *jurisprudencia*, in their creation, their content and composition. Additionally, it must be explored the possibility of limiting the scope of territorial validity of the *jurisprudencia* issued by the collegiate tribunals of circuit, limiting it to the circuit where they were created.¹¹³

In 2007, in a much smaller enquiry about the problems related to the judiciaries organised by the Senate of the Republic, legal practitioners expressed similar doubts regarding the use of *jurisprudencia* and what to do with conflicting and repetitive

¹⁰⁹ *ibid* 169.

¹¹⁰ *ibid*.

¹¹¹ *ibid*.

¹¹² *ibid* 392.

¹¹³ *ibid*.

legal resolutions. The number of participants in this enquiry was not as representative as in the Supreme Court's study. Nevertheless, the problems experiencing when using precedents have been expressed repetitively ever since by different means, from official judicial communications to masters theses and blog entries. A look at some of these communications usefully yields a fuller image of the doubts, concerns and problems perceived by the Mexican Legal community.

One of the main concerns of legal practitioners has been that of contradictions. They have particularly highlighted the harm that contradictory precedents do to legal certainty and the importance of expanding the resources available to bring unification to the system. In this respect, there have been several proposals with respect how legal contradictions can be dissolved. For example, the Tribunal of Justice of the State of Tabasco has published on its website a proposal to expand the actors that can request the Supreme Court of Justice to decide about contradictory resolutions in the following terms:

The function behind unifying the applicable laws is to guarantee legal certainty, this function is clear and requires no further comments [...] In an effort to provide legal certainty to society, we must enlarge the actors with legitimacy to denunciate the contradiction of precedents, with the aim to provide an *erga omnes* legitimacy, that is, to all members of society [...]¹¹⁴

Similar indications can be found in legal opinion blogs as in the following entry:

[...] we must take into account that the thesis of *jurisprudencia* are delivered by a diversity of judicial entities, such as the two chambers of the Court or the different Collegiate Tribunals of Circuit that exist in the country, which in face of the diversity of subject matters and regions in which these Tribunals are located, commonly emit different interpretative criteria, namely isolated thesis or *jurisprudencia*, that contradict themselves, and which to a certain extent can lead us to believe that there is legal uncertainty in the scope of *amparo*, in the sense that we do not know which of the diversity of existing criteria, is the one that can be adopted by the Judge to solve the legal problems in which we are involved as parties or legal representatives [...] This

¹¹⁴ Leonel Cáceres, 'La Denuncia de Contradicción de Tesis. Una Propuesta para Ampliar la Legitimación de los Sujetos en su Promoción en Relación con los Artículos 197 Y 197-A de la Ley de Amparo Vigente' (Tribunal Superior de Justicia de Tabasco 2005) <<http://www.tsj-tabasco.gob.mx/resources/pdf/biblioteca/denunciadecontradiccion.pdf>> accessed 25 January 2014.

problem can be solved by creating an organ depending from the Supreme Court of Justice of the Nation, with regional jurisdiction, directly in charge of reviewing the theses held by the Tribunals of each circuit, in order to inform the possible contradictions between theses to the Court, so that it decides about the criterion of Thesis or *Jurisprudencia* that should prevail.¹¹⁵

Actually, some official actions to solve the reported problems, especially the existence of contradiction, were taken recently. In this respect, the new Amparo Act of 2013 created a new instance (that is, the circuit plenaries) to carry on the unification of the legal precedents of the different federal circuits. In the discussion of the constitutional reforms previous to the emission of the new Amparo Act the legislative established:

[...] the reform of the articles 94, 100 and 107 of the constitution provides judicial circuits with relative autonomy to give more homogeneity, precision and specificity to the criteria and precedents created in each circuit [...] This will contribute to generate a broader sense of legal certainty, value which this reform aims to promote and secure.- In this way, the contradictions between precedents that arise within the same circuit will be resolved by a new organ – the circuit plenary [...] These organs are formed by member of the collegiate tribunals, as they have firsthand knowledge of the problems in their own scopes of decision. This will allow the homogenisation of legal criteria and avoid that different tribunals solve differently in similar cases.¹¹⁶

The new homogenising institutions started to function in June 2013. Therefore, it might still be too soon to assess the success of this measure. Nevertheless, the creation of these organs might just provide a temporary relief to the problem of precedents. Arguably the solution is not grounded on a complete analysis of the problem of precedents. For example, the drafters of the reform do not seem to take into account the fact that plurality and, to a certain extent, disparity is an unavoidable trace of a system with different decision-makers. Despite homogenising actions like the one taken recently in the Mexican context, there will always be a moment where legal reasoners will have to carry

¹¹⁵ Víctor Gómez Álvarez, 'La Jurisprudencia y su Unificación de Criterios' (Travesía Metodológica, 2011) <<http://travesiametodologica.blogspot.co.uk/2011/12/la-jurisprudencia-y-su-unificacion-de.html>> accessed 25 January 2014.

¹¹⁶ Analysis to the project of Amparo Act. <<https://www.cjf.gob.mx/Reformas/boletin/0812/5.2NuevaLeyAmparo.pdf>> accessed 14 February 2014.

on their practice in face of multiple and even contradictory choices. This is even more pronounced in a system of law where different actors introduce a diversity of interpretations and arguments. In this sense, building the system of law that the legal community has been reportedly attempted to build, that is, one that takes law as an argumentative practice and not as a set of completely fixed certainties, requires learning to deal with different sorts of complexities. Looking for the constant unification of legal resolutions by legal officials seems to still show some traces of the traditional way of thinking about the law, whereas the aim to secure a high degree of (fixed) certainty led to the narrowing of the legal enterprise to discussing procedural formulas. In a way, the concerns, and even the solutions, posed by the Mexican legal community still seem to reflect the well-learned ‘Garcia-Maynez legal perspective and methodology’ explained in the previous chapter; that is, presuppose that legal reasoning is a (formal) logic operation of mathematical exactitude.

The circuit plenaries also seem to provide a solution for the problem of feeling overload by numerous precedents. These institutional organs will be in charge of unifying the system in face of multiplicity. Nevertheless, this measure seems to overlook the fact that legal precedents in the Mexican context are not yet as numerous. This seems to suggest that this overload is ‘perceived’ and not exactly objective. In this case, legal practitioners should probably be complaining about the opposite, that is, about an underload of information. The acknowledgement of this fact allows us to see with more clarity that the problem of legal precedents has to do more with the knowledge held by Mexican legal practitioners than with the actual available information. Another fact that points towards this direction is that the federal judiciary is often called to solve contradictions when, to a closer look, there aren’t actual mismatches between precedents.¹¹⁷ In this sense, many of requests to solve contradictions come from a deficient legal analysis of precedents – or in other words, where

¹¹⁷ See: José Ramón Cossío Díaz, *Lógica y Premisas Implícitas en las Contradicciones de Tesis* (2006) 29 DOXA: Cuadernos de Filosofía del Derecho.

contradictions could have been ‘dissolved’ by legal reasoners if they had taken into account some other considerations.¹¹⁸

In this way, it can be argued with confidence that part of the transition of the Mexican legal community has to do with learning to think differently about legal precedents. They need to see precedents in a way that is consistent with the interpretative and argumentative form of law that they are trying to attain. In the past, the strong commitment to the ideal of codification and the deductive method lead to the formation of a system of precedents that matched these ideas, even if that stopped it from being really functional. Now it seems to be the moment to question these embedded understandings and to see precedents under a different light. In this way, legal practitioners need to find the certainty that they feel is now lost by too many and sometimes contradictory precedents beyond fixed rules provided by authorities. They instead need to be able to find certainty in the realisation that they can see ordered legal patterns from precedents, even these are eventually defeasible. This means that they need to update their conceptual understandings, but most importantly, they ought to develop the necessary tacit knowledge behind precedent-based reasoning operations. In other words, the problem of precedents is of a cognitive nature and, consequently, requires measures that go beyond the reform of the system of courts or the enactment of rules to guide legal practitioners. Therefore, the measures to assist the transition need to be cognitively meaningful – which means that they need to go beyond the dimension of institutional and rule reform.

3.5 Final Remarks

With this setting in mind let us go back to our initial point. At the beginning of this chapter it was said that legal changes, that is changes in rules, doctrines, theories and so on, involve cognitive changes of some sort, that is, changes in concepts, beliefs, values, forms of doing things and so forth. In this sense, legal changes, such as legal transfers, become ‘cognitive irritants.’ Nevertheless, not

¹¹⁸ *ibid.*

all cognitive-affective reconfigurations call for the same efforts. Some legal changes may derive into relatively easy epistemic modifications, but there are others that lead to a deep revision of core knowledge features, that is, to cognitive revolutions.

This chapter suggests that the rule of law ideal that has been spreading globally has a high potential to irritate the minds of legal professionals in the recipient contexts. The rule of law ideal, which operates both as an open discourse and a set of concrete reforms, entails certain beliefs, concepts and values that are not necessarily shared by the local legal professionals. In this respect, image of the law as undetermined and open-ended body that needs to be decided by an active court, which circulates with the rule of law discourse is not necessarily shared across legal systems and may create irritation. The magnitude of the irritation, however, will depend on the interplay between the new framework and the previously held body of knowledge.

In the Mexican context, where traditionally legal practitioners have been particularly inclined to think about the law as a static and settled body of rules that are ‘applied’ logically, the introduction of the rule of law ideal seems to pose an important cognitive challenge. It involves a major revision affecting the prevailing conceptual understanding of law and methods over which the local legal practice develops. A revision as such involves a broad range of reconsiderations, which in the case of study has even reached the understanding of legal (re)sources and legal reasoning. This chapter provided an exploration of the ongoing discursive and cognitive reconfigurations derived from the rule of law reformation enterprise in the Mexican context, but also of the problems derived from them. We noted that the problem experienced by Mexican legal practitioners regarding legal precedents is properly understood as ‘a problem of knowledge’ derived from the a strong epistemic revision, which calls for the development of new explicit and tacit knowledge.

Reaching a new equilibrium from conflicting frameworks, as well as acquiring accurate skills by Mexican legal practitioners seems to be taking a long time. In

the meantime instability is felt and permeates the whole legal enterprise. Therefore, legal practitioners need to improve their knowledge regarding precedents, but this does not seem to be taking place from within. In moments as such it is particular useful to examine how others devise similar practices. In this way, we consider that only by understanding precedents outside the Mexican context, we will be able to see precedent-based reasoning in a different shape, and actually revise and reconfigure the local practice along more functional lines. For this reason we will dedicate our next chapter to attaining a better understanding of legal precedents, identifying some lessons regarding precedent-based reasoning that could be of use for Mexican legal practitioners.

4. Lessons on Precedent-Based Reasoning

*“Through others, we become ourselves.”
Lev Vygotsky, Child Psychology*

4.1 Introduction

In a moment of radical legal reconfiguration, as the one that the Mexican legal community seems to be experiencing, it is highly useful to observe how problematic tasks, such as precedent-based reasoning, are generally thought to be performed. The problem is where from to draw useful understandings regarding that practice – that is, where to find clear and unbiased indications of why and how professionals carry on their tasks. This is particularly difficult with regards to precedents-based reasoning, whereas the descriptions of how legal practitioners deal with past legal decisions have often been permeated by theoretical and ideological partisanship or derive from specific contexts. Herein we consider that legal theoretical perspectives are a good starting point to gain a better understanding of how precedents work. Nevertheless, they need to be complemented with other insights in order to be appreciated in the right dimension. Herein we aim to provide an expanded view of precedents – that is, a view that takes into account insights from different areas of study. We consider that expanding our understanding might help us grasping some of the core functions and operations of precedent-based reasoning beyond the traditional ways of portraying this activity, and which mainly refer to particular doctrines of precedents operating in the common law tradition.

In fact, according to some segments of the legal scholarship legal precedents are characteristic feature of the common law tradition, and not of civil law systems. It has been argued for long that the main distinction between the common law and the civil law tradition lays on their different treatment of legal precedents. The predominant role of precedents has been usually praised as the main feature of the common law, as opposed to the rejection of any significant role of past judicial cases

in the civil law context.¹ Common law practitioners are frequently seen as working widely with decided cases, while their civil law counterparts as dealing mainly with codes and doctrine. The ones are usually depicted as exclusively dealing with case-based particularities, whereas the others immerse in abstractions.² The following extract from John Salmond exemplifies the common viewpoint:

The importance of judicial precedents has always been a distinguishing characteristic of English law [...] In practice, if not in theory, the common law of England has been manufactured by the decisions of English judges. Neither Roman law, however, nor any of those modern systems which are founded upon it, allows any such place or authority to precedent.³

Even if these general claims contain fragments of truth, they might need to be mitigated to describe fairly legal practice in the several corners of the civil law tradition, especially as functioning nowadays.⁴ Historical studies have evidenced the fact that precedents have not been totally unknown in the civil law world in past times. Also, according to recent comparative studies, precedents might not be as foreign to several legal systems belonging to the civil law tradition, as it has been commonly stated.⁵ Nowadays, it seems that certain international or supranational exchanges,⁶ and the spreading of the model of ‘adversarial legalism’ that gives

¹ John Bell notes that many books on comparative law reproduce stereotypes regarding the use of precedents in the two major legal traditions. The common rhetoric and presentation of the civilian tradition (mainly represented by France) is that it rejects precedents the status of sources of law, while the common law tradition takes for granted that precedents are important legal sources. John Bell, ‘Book Review: Comparing Precedents’ (1997) 82 *Cornell Law Review* 1248.

² John H Baker, ‘Case Law in England and Continental Europe’ in *The Common Law Tradition: Lawyers, Books and the Law* (The Hambledon Press 2000) 108.

³ John Salmond quoted in James W Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Johns Hopkins University Press 2000) 179.

⁴ Zweigert and Kötz have noted that: ‘recently the attitudes of Common Law and Continental Law have been drawing closer. On the Continent statute law is losing something of its primacy; lawyers no longer see decision-making as a merely technical and automatic process, but accept that the comprehensive principles laid down by statutes call for broad interpretation, and have begun to treat the *jurisprudence constante* of the courts as an independent source of law.’ Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd edn OUP 1998) 71.

⁵ See: Neil MacCormick and Robert Summers (eds), *Interpreting Precedents: A Comparative Study* (Ashgate-Dartmouth 1997); Ewoud Hondius, *Precedent and the law. Reports to the XVIIth Congress of the International Academy of Comparative law, Utrecht, 16-22 July 2006* (Bruylant 2007).

⁶ For example, the increasing exposure to legal precedents delivered by international and supranational decision makers, such as those of the European Court of Justice and the European Court of Human rights, has the potential of changing the local style of dealing with precedent, especially in the civil law world. See: Allen Shoenberger, ‘Change in the European Civil Law Systems: Infiltration

primacy to courts in the production of law,⁷ might be facilitating further intersections in the use of precedents in the civil law and common law world. However, it appears that certain historical facts (e.g. theoretical commitments) ruled out or reduced the open and extended use of precedents in the civilian tradition.⁸ On the contrary, historically the common law tradition has expressly allowed, and to a certain extent encouraged, the use of past (judicial) cases. In fact, past cases have persistently been considered central in the development of the common law, despite the changes in doctrine.

In this way, we might conclude that using legal precedents is not a practice limited to common law systems, but that precedents form part of the artillery of both common law and civil law practitioners, and that play a more or less important role in the construction of the law, legal argumentation and of judicial decision making. Nevertheless, this does not mean that practice with precedents across the two legal traditions is one and the same. Historical facts have shaped divergent discourses and knowledge structures across legal traditions, leading to different styles in the use of legal information.⁹ In a certain way, these differences seem to have placed common law systems in a one way or the other more advantageous position with regards to their understanding of legal precedents.¹⁰

of the Angloamerican Case Law System of Precedent into the Civil Law System' (2009) 55 *Loyola Law Review*.

⁷ Jan Komarek, 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent' (2013) 61 *American Journal of Comparative Law*.

⁸ According to the comparative study on precedents of the group self-nominated the "Bielefelder Kreis" '[f]or historical reasons certain legal systems formally, discourage or even discountenance the open citation of precedents in judgements [...]. But even in these cases, precedents in fact play a crucial role.' Neil MacCormick and Robert S Summers, 'Further General Reflections and Conclusions' in Neil MacCormick and Robert S Summers (eds), *Interpreting Precedents: A Comparative Study* (Ashgate-Dartmouth 1997) 532.

⁹ The historical decisions in the civil law context gave precedents a reduced role in the life of law. It was in that sense that several of the functions of precedent were substituted by other legal sources, such as a relatively wide body of statutes and, especially, the extensively developed doctrinal studies of law. Aleksander Peczenik, 'Scientia Juris: Legal Doctrine as Knowledge of Law and as a Source of Law' (vol 5) in Enrico Pattaro (ed) *A Treatise of Legal Philosophy and General Jurisprudence* (Springer 2005) 1-8.

¹⁰ Komarek has argued that civilians are not unskilful when reasoning with precedents, but that they have their own ways of dealing with cases beyond the common law understanding of precedent. See: Komarek (n 7). We do not tend to refute the fact that civil-law methods of reasoning with past decisions are somehow different to those of the common law, and that, therefore, common law theories of precedents might not provide complete insights of practices elsewhere. Nevertheless, we do acknowledge that due to the historical development of the civil law tradition past decisions seem to

In fact, in some civil law jurisdictions the historical commitments have led to problematic approaches to precedents. In this respect, Siltala has noted that the United Kingdom and the United States seem to have a well articulated doctrine and tradition on precedents, while the contrary holds for civil law countries such as Italy and France. He notes that, for example, in France it is lived ‘a curious divergence of the officially expounded ideology of adjudication and the judges own professional self-understanding of their role in judicial adjudication’ – meaning that, even if under the official ideology precedents lack any kind of official force and deciding present cases on the grounds of past decisions is considered as ‘not motivated and illegal’ according to the Civil Code, previous decisions are used and considered de facto authoritative by legal practitioners.¹¹ Additionally, Siltala noted that in countries like Italy, there is ‘a mixture of [...] conflicting and mutually inconsistent theoretical positions’ regarding precedents.¹² Further, according to Siltala the source of these deficiencies lies in the lack of professional self-reflection on how to do things with precedents and the absence of proper case-based reasoning tools.¹³

For certain reasons, that are not possible to deeply analyse in these thesis, most of civilian jurisdictions,¹⁴ despite their explicit ideological and theoretical commitments, seem to have managed to develop legal practitioners with a somehow better intuition and tacit understanding of precedent-based reasoning than in the case of Mexican practitioners. We could only assume that somehow the process of legal education in these systems provides practitioners with some general legal reasoning tools, which allows them to engage in a form of precedent-based reasoning without facing the extreme problems of the Mexican community. This leads to considering that perhaps in these legal systems certain ‘theories in use’ overpass the ‘espoused

have remained under-explored. Additionally, we consider that it is possible to understand further past decisions in the civil law context by analysing precedents in the common law – and at the same time to ‘mind the gap’ between the historical decisions of both traditions.

¹¹ See observations regarding the French system in: Raimo Siltala, *A Theory of Precedent: From Analytical Positivism to a Post-Analytical Philosophy of Law* (Hart Publishing 2000) 127.

¹² See observation regarding the Italian system in *ibid* 131-32.

¹³ *ibid* 145-48.

¹⁴ I am referring to the ones included in Neil MacCormick and Robert S Summers (eds), *Interpreting Precedents: A Comparative Study* (Ashgate-Dartmouth 1997).

theories.¹⁵ In this way, tacit knowledge, even if not explicitly supported, might still be transferred across generations.

Nevertheless, it appears that the bolder acknowledgement of the practice of precedents has provided some advantages for common law practitioners. In this respect, it has helped building a stronger theoretical framework, a more developed doctrine of precedents, a relatively more open and effective transmission of the accepted canons of precedent-based reasoning, and a community of practitioners with better knowledge regarding the operation of precedents. Moreover, legal systems of the common law tradition have also shown more academic interest in analysing different features of the practice with precedents, which has had an important impact on the development of legal research. For a long time most of the academic investigations into precedents and precedent-based reasoning have come from or have been related to common law systems, only followed in bulk by those referring to mixed-jurisdictions. It is only in recent times that legal academia has exhibited an increasing interest in the amount of precedents produced by supra-national and international entities, and that the use of precedents in different civil law countries has come to considerable attention.

Legal theorists in the common law world have held a longstanding interest in legal precedents, and have produced extensive literature on the broader subject. Reviewing legal theoretical perspectives is a very fertile exercise for one who aims to gain a general understanding of legal precedents. Nevertheless, one should be very careful while pursuing this undertaking, since theoretical conclusions could lead to overextended generalisations. Legal theories have the tendency to present themselves as free of space and time constraints. Actually, legal theory has the tendency to hide that the abstract explanatory frameworks it provides usually derive from particular institutional settings. In fact, sometimes the general theories offered only represent the law or legal features in a particular context – that is they take some particular institutional traits as general characteristics. In this manner, where theoretical constructions are not mindful of the fact that legal features develop within particular

¹⁵ Michael Eraut, *Developing Professional Knowledge and Competence* (Falmer Press 1994).

contexts, we must acknowledge the possible tension between theoretical generalisation and contextual particularities.

The awareness of the law's contextual character has entirely permeated this thesis. In previous chapters we acknowledged the value of Pierre Legrand's reminder that legal styles develop as a product of a historically built context. A culturalist approach to law stressing the particularities, however useful, can have important limitations: it can reduce the possibilities of communicating relevant developments from one legal system to the other. For this thesis, abandoning ourselves to an irremediable incommunicability would be strongly problematic, since in the Mexican legal system practitioners seem to be experiencing difficulties in finding the solutions for its problems autonomously and, therefore, from within. This being the case, it becomes important to pose the following questions: Can we communicate insights between jurisdictions without making overextended conclusions? Is it still possible to be mindful of contextual differences even when we purposively introduce knowledge from elsewhere?

Similar questions have been addressed by Geoffrey Samuel who insightfully identifies the advantages – but, in the same respect, also the shortcomings – of both generalising legal theories and what he catalogues as contextual post-modernist perspectives. He notes that since 'it is at the level of legal theory that differences between legal families become elusive [...], then the style of a particular family will appear of little relevance.'¹⁶ It is the function (and probably also the strength) of legal theory to transcend legal families or legal systems by making general claims; however, as Samuel has noted 'post-modernist thinking has the great advantage of allowing one to escape from this kind of logic and to ask whether a legal theory born out of one legal family is appropriate for another family'.¹⁷ The tension between generalisation and contextualism, however, does not seem to dissolve. Nevertheless, the (historically developed) particularities and the generalised knowledge claims of

¹⁶ Samuel argues that this holds true for legal theories that claim that the law is equated to learning propositions (rules and principles), concepts (such as rights or duties), a theory of argumentation (from a generalized perspective), or institutions. See: Geoffrey Samuel, *The Foundations of Legal Reasoning* (Maklu 1994) 65-6.

¹⁷ *ibid.*

legal theory should be in a constant dialogue that may eventually allow finding useful intersections.

In this chapter, we will follow a similar perspective, presenting generalising legal theories of precedents, but at the same time use legal history to understand them in the right dimension. The legal theories we present mainly derive from the common law understanding of precedents, but once reviewed through the lenses of their contextual origins we expect to find relevant ‘lessons’ for the Mexican system with regards to the use of legal precedents. Herein we shall speak of ‘lessons’ as these are associated to learning experiences that recognise the active role of the learning agent in reconstructing knowledge and creating associations. By taking foreign legal experiences as ‘lessons’, we distance ourselves from the tendency of searching across legal systems for all or nothing guidelines; from reducing foreign insights to absolutes of the kind that either should or should not be fully adopted. In many respects, is this latter inclination has for long haunted legal comparative studies and institutional design, which (as analysed in Chapter 3) have succumbed to the unyielding language of legal transplants. We argue that in talking about such things as ‘lessons’ we recognise that in other systems legal practitioners might have developed sharper insights with regards to certain legal features, which might be of use knowing in a different context. Additionally, we think that by using this language we denote that whoever is receiving a lesson can further interpret or develop it.

Nevertheless, this thesis will take this learning experience some steps further by additionally analysing perspectives on precedents that do not proceed from the legal theory background. It is to say that due to the language and epistemological paradigm of orthodox legal theory, the interests and questions that theories have been asking regarding precedents might be rather limited.¹⁸ Theoretical constructions on precedent sometimes are contracting each other or seem to be leaving some aspects behind. As in this study our aim is to provide a clear image of the use the precedents

¹⁸ According to Samuels, legal scholarly work is pursued within the authority paradigm, and while following this commitment it might not be telling us much about life. Geoffrey Samuel, ‘Interdisciplinarity and the Authority Paradigm: Should Law be Taken Seriously by Scientists and Social Scientists?’ (2009) 36 *Journal of Law and Society* 459. In our view this also applies to the theories of legal precedents.

that eventually can serve educative purposes, and that at some point could orient the legal community when using these legal sources, we will recur to the analysis of other understandings on the matter, especially those developed in the cognitive science and the legal artificial intelligence (hereinafter legal AI) community. These understandings are not an alternative to legal theories, but insights that allow us to make sense of legal precedents theories and see more clearly which of these theoretical constructions seem better grounded than others.

AI studies are not frequently used for the purpose of understanding how legal precedents are approached by legal practitioners. Nevertheless, they should not be overlooked, since they may potentially provide us with very useful insights that are often not captured by the descriptions and prescriptions of legal theory. As the aim of AI has been to recreate human processes by computers they have dedicated a considerable amount of effort to modelling different forms of human problem solving methods, used both in an out the legal practice. As noted by Rissland, the AI community has made important progress in developing techniques, computational models, and systems that allow modelling human cognition and building systems to get the job done.¹⁹ The AI community has show special interests in the methods of legal reasoning followed by human experts, especially with regards to their handling of precedents. Thus, the work of AI provides a quite elaborate blueprint of the processes involved when reasoning with legal precedents that draws both on legal theoretical understandings and cognitive sciences insights.

Computer scientists have informed their models of reasoning with precedent with insights from legal theory, but also from those more general views regarding analogical reasoning and case-based reasoning (hereinafter CBR) provided by cognitive scientists. That is to say, these studies take into account the generalities of case based reasoning as operating in different disciplines, but – when exploring legal practice to the point – they provide an interesting and useful intersection of relevant understandings regarding legal precedents. Following this, as AI research has come across important findings about the diverse and significant uses of past cases in human knowledge construction, classification, evaluation and acquisition, we will

¹⁹ Edwina Rissland, 'AI and Similarity' *IEEE Intelligent Systems* (May/June 2006) 39.

take recourse to such knowledge output in order to provide the widened the picture of legal precedents that we are aiming at.²⁰

Thus, in this chapter we will, first, analyse some of the main theoretical perspectives on legal precedents. The theoretical enquiry regarding precedents is most focused on unveiling the justifications lying behind the use of precedents and presenting models of precedents ‘anatomy’ and ‘physiology.’ The models included herein derive mainly from observations about reasoning with legal precedents in the common law tradition. As already observed, it is a common tendency for these theoretical articulations to make general claims about legal precedents, often forgetting their own contextual origins. Nevertheless, in this work we will approach theoretical models not as providing general a-contextual grounds applicable to any jurisdiction, but as thoughtful insights about certain legal features that might be transformed into useful examples or lessons to be used in other jurisdictions.

Additionally, we engage into a brief historical overview of legal precedents, focusing mainly in the common law context, but also including insights of respective civil law developments. Our objective in this exploration is to re-dimension the legal theoretical perspectives according to the historical development followed by precedent-based reasoning. Both the historical and the comparative perspective are two important tools for expanding our vision and achieving a degree of detachment from false generalisations. Also, in an attempt to see precedents past this scope we will present relevant research in the areas of AI regarding precedent based reasoning, from which we will derive further lessons of potential value for the Mexican system.

There is one parenthetical remark to add at this stage of the discussion, before we proceed with examining the theoretical perspectives on legal precedents. The following analyses will not make a sharp distinction between precedents as a formally recognised source of law (as e.g. in the manner of *stare decisis*) and precedents as an informal reasoning tool, while exploring the practices of reasoning

²⁰ As indicated by Samuels, AI has the potential of providing a basis for testing legal theories by reporting the (in)adequacy of legal theories about legal reasoning. For example, research in AI has indicated the deficiencies in the rule model of legal reasoning. Geoffrey Samuels, ‘Can Legal Reasoning Can Be Demystified?’ (2009) 29 *Legal Studies* 192.

with legal precedents in general. The distinction between the formal authority of past decisions (provided by explicit institutional recognition) and the informal authority (provided by lawyers consulting and referring past decisions) will, however, start to appear more clear after our exploration of legal theoretical models on precedents and legal history. Common law systems seem to intertwine both approaches to precedents. Civil law systems feature mainly the latter, to the point that they value these past instances of reading the law, but they might not consider them part of the formal legal narrative. Nevertheless, after our exploration we will find out that this distinction might not always be clear or even useful.

4.2 Legal Theories on Precedents

Legal theorists have typically discussed two main subjects in relationship with precedents. First, they have tried to understand the reasons behind the use of precedents, i.e. the justifications for the existence of precedents in a legal system. Second, they have attempted to provide an account of how legal reasoners use legal precedents. This latest subject has been usually connected to the question of what are precedents, which usually leads to providing an ‘anatomical’ analysis of precedents that connects to the form of reasoning they entail. However, there are a few accounts less concerned with unveiling the true form of precedents and providing a ‘physiological’ account – that is a description of their way of functioning.

We consider that inquiring on both the reasons behind the use of precedents, as well as the anatomical and physiological portraits of precedents provides us with relevant information for the reconfiguration of precedents in the Mexican context. Nevertheless, the literature attempting to account for precedents nature and way of functioning is extensive and divergent. In fact some of these perspectives seem to derive from normative indications, while others attempt to offer descriptions. In this sense, once again we need to be mindful with the offered theories and assess them in the light of different considerations.

4.2.1 Reasons for Precedents

The reasons that have generally supported the practice of considering and adhering to precedents (either when ordered explicitly by a rule or principle or when happening without an expressed articulation) have been frequently the values of equality and legal predictability, which are considered highly relevant in a well functioning legal system.

Equality justifies the use of precedents on moral grounds since they are instruments to attain the moral value of justice, at least in its formal shape. It is difficult to conceive of any successful system embracing the rule of law that does not hold the value of formal equality. Significantly, the law is currently connected to the idea of equality in adjudication, that is, to the application of the same justice to everyone – which entails that like cases should be treated alike, regardless of who are the parties and who is deciding the case. As noted by MacCormick ‘[f]aithfulness to the Rule of Law calls for avoiding any frivolous variation in the pattern of decision-making from one judge or court to another.’²¹ In this terms, failing to treat similar cases in a similar way it is considered arbitrary, and, thus, unjust. In this manner, the prerequisite of guaranteeing justice seems to require that future decisions are in concordance with previous resolutions deciding upon similar cases.

Formal equality is in general at the basis of any legal system’s design and precedents are considered a way of achieving it. Codes and statutes have been more generally considered as the for excellence manner to achieve formal justice. However, precedents usually provide a further reflection on the relations of equality between certain legal categories and factual situations that were not considered by more abstract aprioristic formulations. Precedents, thus, are more concrete articulations or interpretations of the categories that should share a certain treatment according to the law. Nevertheless, one of the most complex matters in the use of precedents is precisely the evaluation of ‘likeness’ – that is, determining what situations should be considered as belonging to the same legal category, and, consequently, treated in the same manner. As we shall see, different models of precedent based reasoning

²¹ Neil MacCormick, *Rhetoric and the Rule of Law* (Oxford University Press 2005) 143.

propose diverse versions regarding the assessment of likeness: from mere fact comparison to concept-based categorisations.

Another reason for precedents is that they constitute means to secure a predictable or certain legal system, which allows subjects to engage in different activities with a priori knowledge of the consequences they will encounter. The fact that legal precedents are seen as a means to secure predictability seems somehow ironic if we take into account that the main problem felt by Mexican legal practitioners with regards to precedents was that, in their view, they contributed to the unpredictability of law. In this sense, the way precedents are seen to make the law more predictable or certain might reveal us something about the problems experienced by Mexican practitioners.

The premise of the value of predictability is the usefulness of being able to anticipate the future. Thus, the idea of using legal precedents relies partly in social stability, that is, in the creation of a context that supports firmness in social expectations and orderly interactions.²² In other scopes of life where innovation is at the core, as for example in arts, it is likely that consistency with the past is not as relevant as areas that attempt to provide stability, such as the law, although of course that does not mean that the past lacks meaning for the artistic enterprise. This general quest for legal predictability or certainty is fulfilled with different ‘legal devices’, but along history it has been claimed that legislation and codes are more suitable than precedents for this purpose. Actually, Bentham posed well-known criticisms to the common law’s capacity of securing predictability through its system of precedents.²³ Contrary to Bentham’s conclusions, others claim that judicial precedents also help legal predictability by securing a more consistent decision making. Indeed, legal precedents seem to narrow the gaps and ambiguities left by legislative law, reducing the space for discretion. As noted by MacCormick ‘the job of the legislation is never completed when the text leaves the legislature. [...] The final process of concretisation or determination [...] will still have to take place through judicial decision. In future, reliable commentaries on the legislation will give an account of

²² Alan Goldman, ‘The Force of Precedent in Legal, Moral and Empirical Reasoning’ (1987) 71 *Synthese* 325.

²³ Gerald Postema, ‘Bentham and the Common Law Tradition’ (Clarendon Law 1989).

the judicial glosses and explanations or interpretations that now contribute to the body of law that the legislation has called into being.’²⁴ Thus, judicial precedents should be able to reduce uncertainty by building more concrete legal patterns than the abstract rules of codes and statutes.

Nevertheless, the form in which legal precedents contribute to predictability is not totally clear. The reasons for this confusion have to do with the historical introduction of the doctrine of *stare decisis* in the common law, which led to the theoretical assimilation of precedents with binding rules. In this respect, some theorists seem to consider that legal precedents help certainty by laying down rules that must be applied in the future (we will later on provide a more comprehensive explanation of the model of rules). This understanding is, however, problematic for several reasons. First, it seems that the predictable framework delivered in this manner is quite narrow, comprising only the area of textual clarity of the rule. Second, it does not account for law as an argumentative practice, where new legal considerations are always bringing dynamism to the law. Third, focusing on predictability of this sort creates a strong tension between the value of legal certainty and other values, as focusing on fixed literal certainties deters the analysis of other considerations.²⁵

This sort of predictability seems to be close to the expectations of Mexican legal practitioners, which expect clear indications of legality in the form of all-or-nothing rules. Nevertheless, Dewey suggests that we give up this image of legal certainty. He notes that ‘[e]normous confusion has resulted, however, from confusion of *theoretical* certainty and practical certainty. There is a wide gap separating the reasonable proposition that judicial decisions should possess the maximum possible regularity in order to enable persons in planning their conduct to foresee the legal import of their acts, and the absurd because impossible proposition that every

²⁴ MacCormick (n 21) 10.

²⁵ In this respect, it has been argued that achieving predictability by means of legal precedents is desirable, but excessive emphasis on this value can generate conflicts with other values of the legal system, such as substantive justice. It is said that standing by the precedent to secure predictability might increase sub-optimal solutions to cases just for the matter of providing certainty. In fact, Schauer has noted that ‘[s]tability may be unimpeachable in the abstract, but in reality stability comes only by giving up some of our flexibility to explore fully the deepest corners of the events now before us.’ Frederick Schauer, ‘Precedent’ (1987) 39 *Stanford Law Review* 602.

decision should flow with formal logical necessity from antecedently known premises.²⁶ In that sense, ‘to claim that old forms are ready at hand, that cover every case and that may be applied by formal syllogizing is to pretend to a certainty and regularity which cannot exist in fact. The effect of the pretension is to increase practical uncertainty and social instability.’²⁷ In his view, the general legal rules and principles contained in past legal decisions are ‘working hypotheses, needing to be constantly tested by the way in which they work out in application to concrete situations.’²⁸ Failing to acknowledge the operation of these mechanics increases the ‘sense’ of unpredictability. The question is if we can think of a form of certainty that is broader and less rigid. Dewey considered that legal certainty should be better achieved through considering general principles as useful statements of the ways a precedent has been treated. In this way, certainties are better understood as reliable expectancies. However, subscribing to the idea of certainty as reliable expectancies might lead to consider that legal decision making is a matter of precise quantitative legal predictions, as in fact some legal academics and practitioners seem to assume.²⁹ The image of the legal professional as one concerned with statistical regularities might not be an accurate or even desirable one. Legal professional can be better seen as deriving less technical certainties from the construction of coherent legal narratives. In this form, precedents help legal predictability inasmuch they help making-sense of the bulk of law and building coherent narratives. Certainty unfolds as knowing in advance the strength of certain arguments against other possibilities. As noted by MacCormick, [t]his is not an exact science, for it is not a science at all but a practical skill, a practical art. Yet it very much depends upon knowledge and learning [...]’³⁰ These certainties are not of the kind that cannot be doubted –even if the community of experts shares this view and treats it as axiomatic– instead, they should be treated as potentially defeasible certainties.³¹

²⁶ John Dewey, ‘Logical Method and Law’ (1914-1925) 10 *The Cornell Law Quarterly* 25.

²⁷ *ibid* 26.

²⁸ *ibid*.

²⁹ See, for example: Daniel Martin Katz, ‘Quantitative Legal Prediction – or – How I Learned to Stop Worrying and Start Preparing for the Data Driven Future of the Legal Services Industry’ (2013) 62 *Emory Law Journal*.

³⁰ MacCormick (n 21) 14.

³¹ *ibid*.

This version of legal predictability or certainty is a more functional one if we take into account the argumentative dynamic character of the law. The arguability of the law introduces dynamicity and flexibility into the legal enterprise, making it difficult to find indubitable fixed certainties in legal sources such as precedents. In this form, it becomes important that legal practitioners are able to detect or ‘see’ certainties arising from more or less coherent legal patterns. Understanding legal certainty in this form seems to be more useful for legal practitioners when performing complex tasks, i.e. where there is a plurality of considerations. This form of operation also finds support in some insights from the cognitive sciences, where subjects are seen as resorting to coherence-making when facing complex tasks.³²

Besides equality and predictability precedents have been justified along different lines. Certain views seem to indicate that the use of precedents responds to epistemological and cognitive functions. Precedents seem to fulfil an important role in knowledge development and acquisition. MacCormick and Summers have argued that ‘[a]pplying lessons of the past to solve problems of present and future is a basic part of human practical reasoning.’³³ In this way, precedents play an important role for legal reasoners as they constitute lessons to solve current and future problems. It has also been noted that ‘[t]he body of precedents available for consideration in any legal setting represents, at its best, an accumulation of wisdom from the past.’³⁴ Actually, history seems to indicate that precedents in the common law and the civilian tradition, at first, emerged in accordance to the natural process of knowledge construction and acquisition. This basic function seems to be performed by past legal cases despite their recognition (or lack of it) as sources of law in a strict sense. Although the relevance of past cases in this enterprise –against other means of legal communication, such as legislation and doctrinal writings– seems to be a matter of style of each legal system.

³² See: Dan Simon, ‘A Third View of the Black Box: Cognitive Coherence in Legal Decision Making’ (2004) 71 *The University of Chicago Law Review*; Amalia Amaya, ‘Ten Theses on Coherence in Law’ in Michal Araszkievicz and Jaromir Šavelka (eds), *Coherence: Insights from Philosophy, Jurisprudence and Artificial Intelligence* (Springer 2013) 243-67.

³³ MacCormick and Summers (n 5) 1.

³⁴ *ibid.*

Similarly, in ‘Precedent and Tradition’ Kronman also seems to attribute epistemological and cognitive functions to legal precedents, although he seems to imply that precedents also help sustaining a determined legal identity. He asserts that reliance on past experience appears as a normal feature in diverse spheres of life, and that the legal past is a repository of information for judges and lawyers.³⁵ Kronman highlights the importance of the system of precedents in building an internal legal history, tradition and even a collective legal memory, as well as the learning value that past experience has for further legal practice. We are reminded that the past is worth of consideration and that acknowledging precedents is justified by the potential of the past to provide us with long standing lessons that prevents us from starting afresh. In law, the past is remembered and honoured by taking into account past cases. Nevertheless, in Kronman’s view, precedents are relevant not only because they are a source of wisdom but also because historical features claim authority. He affirms that precedents claim certain authority as a reflection of the traditionalist attitude that pervades different areas of human life.³⁶ This attitude compels future generations to respect the world that precedes them, that prevents them from starting life afresh like ‘flies of a summer’, as only in this way it is possible for a generation to surpass previous accomplishments.³⁷ In his view, the past not only provides important lessons, but as it produces the world in which we inhabit, it should be honoured. Therefore, ‘[a] failure to honour the past is thus not only foolish or imprudent – the stupidly shortsighted waste of its accumulated wisdom’, but it is also ‘supreme ingratitude.’³⁸

Kronman’s ideas point out to the epistemological and cognitive functions of precedents – i.e. the role of precedents in the construction and development of the law, and, in providing templates for future legal reasoners – but he confers a strong sense of authority to the past for the sole matter of being the creation of previous generations. This reverential attitude towards the past has the potential to become the

³⁵ Anthony Kronman, ‘Precedent and Tradition’ (1990) 99 *The Yale Law Journal*.

³⁶ He argues that ‘for most of the time that human beings have lived together in organized communities, every aspect of their communal lives – social, religious, political, and economic as well as legal – has to a large degree been organized on the assumption that the past has an inherent authority of just this kind, a sanctity that obligates us to respect the patterns it prescribes’ *ibid*.

³⁷ *ibid* 1051.

³⁸ *ibid* 1057.

‘superstitious antiquarianism’ that Kronman actually criticises.³⁹ Kronman’s perspective is, however, valuable as it highlights a very general aspect of human life, that is, the transmission of common knowledge across generations for its future use. However, this perspective seems to forget that in law not all legal information is equally useful when engaging into the legal (argumentative) practice – that is, that there are some fragments of past that are better understood as ‘legal history’ and others that constitute sound examples. The form in which legal precedents are further used by legal reasoners is something we will discuss next.

4.2.2 Models of Precedent-Based Reasoning

In most legal systems with a longstanding tradition of reasoning with precedents, legal experts seem to perform diverse complex operation with precedent cases without much problem. In fact, they seem to transfer the knowledge of how to deal with past legal decisions without trouble. Legal reasoners, thus, have generally incorporated certain models about how to do things with precedents that allow them to perform within a framework of rational regularity. Unravelling these models of precedents has been subject of multiple jurisprudential enquires; however, for legal theory, the understanding of what arguing with precedents actually means has proven a rather obscure and contested issue.⁴⁰

In general, legal theories providing an account of precedents have mainly focused on unveiling the ontological nature of legal precedents and explaining the type of authorities they represent for, particularly, judges. In this section we will present the most representative theoretical models of reasoning with legal precedents that have discussed the nature and functioning of precedents in legal reasoning – i.e. precedents ‘anatomy’ and ‘physiology’. Herein, rather than discovering the nature of precedents, we attempt to understand the influence that precedents pose on legal reasoners, and the way they make use of past cases. Most of the models to be

³⁹ See criticisms of Kronman’s account of precedent in David Luban, *Legal Modernism* (University of Michigan 1994) 93-123.

⁴⁰ In this respect, Horty has pointed out that ‘[a]lthough the techniques for arguing on the basis of precedent are taught early on in law schools, mastered with relative ease, and applied on a daily basis by legal practitioners, it has proved to be considerably more difficult to arrive at a theoretical understanding of the doctrine itself—a clear articulation of the underlying logic.’ John Horty, ‘Rules and Reasons in the Theory of Precedents’ (2011) 17 *Legal Theory* 1.

presented, picture the understandings of precedents in the common law tradition, but even then they can be seen as providing useful insights on certain aspects of the practice of reasoning with precedents in some civil law countries. The majority of the models we present, though, have been built without taking into account empirical data on how precedents work in the jurisdictions from which they derive, although some of them do aim at explaining legal reasoning as observed in practice. The last model to be presented, however, has a different origin; it derives from a posteriori empirical observations of legal systems belonging to both the civil law and the common law tradition, which grants it a wide explanatory power in different settings.

4.2.1.1 Natural Model of Precedent

According to this model courts should give precedents whatever moral weight they have in an all-considered process of reasoning and independently of any institutional requirement to follow past judicial decisions.⁴¹ This model has as a starting point that courts should not be lying down rules and that the force of precedents results only from their role in securing the values of equality and predictability. In this sense, courts should take into account precedents and the values they entail just as another reason in the evaluation of the best possible decision. Once a court decides a case, that decision constitutes just a single reason for future cases to be decided on similar grounds, which ought to be evaluated next to the overall morally relevant reasons. Since judges perform this wide deliberation every time they reach a decision, precedents do not possess legal authority. Precedents alone neither provide relevant reasons, nor limit the scope of reasons that should be taken into account in order to make a legal decision. Past decisions are only another element to be taken into account in a reasoning process that is intrinsically moral.

Alexander explains this model of reasoning with an example.⁴² Imagine that you have two children and you grant one of them permission to attend a concert at the age of thirteen. In a sense, this decision remains as a precedent for the other younger

⁴¹ Larry Alexander 'Constrained by Precedent' (1989) *Southern California Law Review* 3-62, Larry Alexander and Emily Sherwin, 'Judges as Rule Makers' in Douglas Edlin (ed), *Common Law Theory* (Cambridge University Press 2007).

⁴² Alexander, *ibid.*

child to expect having permission at the age of thirteen. Nevertheless, the parent will make a decision not only based on the fact that he has acted in a certain way in the past; he has also to analyse what is the best decision in the present case all-things considered. In this manner, the parent has to take into account if the level of maturity of his child allows repeating the previous decision, if the circumstances of safety in both concerts are equally guaranteed. The existence of a past decision is, however, an important reason in itself that has to be assessed. The past decision creates an expectation that things will be decided on similar grounds and that both subjects will be treated with equality. But the values of certainty and equality that following precedents entail can be easily surpassed if there are strong enough reasons of any nature that point towards a different decision.

The main criticism against this model has been that it relies heavily in the good judgment of the decision maker, who seems able to identify all possible relevant reasons and assess their importance. Opposite views argue that judges are not perfect reasoners, and therefore, all-things-considered models of decision making would lead to uncountable errors in real life and would most likely fail in providing an adequate basis for coordination. There are few subscribers to this model of precedent in its purest form, as generally legal precedents are seen as giving more than just another reason for a legal decision. Nevertheless, this seems to be the theory that most models of precedents as binding sources seem to be attempting to distance from. In the fact, certain models of precedents assume that an undesirable, free, all-things-considered process of reasoning arises when precedents are not understood as rules that ought to be strictly followed, that is, as formal constraints.

Proceeding in an all-things-considered manner, or in other words, taking the best morally decision entails a pure form of substantive reasoning, which does not seem to be a frequent allowance in legal systems. Generally, legal systems seem to permit some form of evaluation of precedents in accordance with substantive grounds – that is, an assessment of their moral, economic, political, institutional, or social value.⁴³ Nevertheless, the introduction of substantive reasoning is usually performed with

⁴³ Patrick S Atiyah and Robert S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (OUP 1987) 5.

more modesty than the one suggested by the natural model of precedent. Substantive considerations are generally introduced into the law in a dialogical form – that is by testing the scope of the precedent by introducing ‘what if situations’ involving moral, political, social or other values. In this sense, considering substantive reasons do not always entail overlooking the law, but it might be a form of accommodating these considerations into the law. The natural account of precedents, however, does not seem to accommodate the flexibility and dynamism that this dialogical process entails. In a way, this model presupposes that precedents are fixed rules.

4.2.1.2 Rule Model of Precedent

The orthodox view of precedents in legal theory is that they operate as rules which bind later courts. In fact, this model, together with the own biases of the local community, might also have contributed with the Mexican idealisation of a system of precedents that functions following the logic of rules. The model of rules is usually presented in opposition to the natural model of precedents, which does not see past cases as constraints but as reasons to be taken into account in an all-things-considered process of decision making. This viewpoint also contrasts with those that understand precedents as constraints of a weaker sort, departing from the idea that past decisions constitute all-or-nothing binding rules.

In this perspective, a case in which a particular matter is decided becomes a rule to deal with that sort of disputes, similarly to the way statutes lay down rules which are applied to later cases that meet certain conditions. Previous cases constitute what Larry Alexander and Emily Sherwin call ‘serious rules’, that is, prescriptions that apply to a range of cases exercising pre-emptive authority over decision-makers.⁴⁴ The courts are bound to find the applicable precedent rules to the case at hand, deduce the consequences, and decide accordingly. Positivist theory understands the essence of law to be authoritative guidance by means of source-based, duty-imposing rules.⁴⁵ Legal precedents are, thus, seen as announcing legal rules, which are

⁴⁴ Alexander and Sherwin (n 41) 31.

⁴⁵ Stephen Perry, ‘Judicial Obligation, Precedent and the Common Law’ (1987) 7 *Oxford Journal of Legal Studies* 216.

expected to be applied by future courts in similar circumstances, in order to secure the certainty of the legal system.

The primary obligation of judicial decision makers is to interpret, apply and enforce pre-existent rules of the system.⁴⁶ The consideration and application of legal precedents, thus, constitutes a legal obligation for judges, which are under the duty to apply whatever source-based positive rules are recognised in a legal system as laws.⁴⁷ Precedents, understood as rules, act as exclusionary reasons issued by authority – that is, they overrule any other reasons against rule compliance. In this sense, authoritative norms pre-empt any substantive assessment of what are the right reasons for an action. At first, legal precedents are produced as an exercise of discretion by the courts that, facing a gap in the law, needed to act in the same way that legislatures do, creating exclusionary rules for citizens and courts. However, the authoritatively enacted exclusionary rules of judicial origin ought to be applied by the judiciary in compliance with their judicial obligation. It is only by the adherence to previously enacted rules that it is possible to guarantee the high regularity in rulings that is needed to give conduct in the way that is characteristic of a legal system.⁴⁸ Precedents understood as rules are considered formally binding, thus, they cannot be weighed against another: they can only be obeyed or expressly rejected.⁴⁹

Nevertheless, the strong understanding of judicial obligation and legal bindingness that the model of ‘precedents as rules’ appeals to has led to narrow descriptions of what argument from precedent means. In this respect, Frederick Schauer, a strong supporter of this theoretical model, has advocated for a distinction between what he calls ‘arguments from experience’ and ‘arguments from precedents’ in an effort to guard the general conceptual framework.⁵⁰ For him, the main difference between the two uses of the past lies on the constraint that the past decision represents for the future decision maker. In this form, ‘[w]hen the choice whether to rely on a prior decision maker is entirely in the hands of the present decisionmaker, the prior

⁴⁶ *ibid.*

⁴⁷ *ibid* 215.

⁴⁸ *ibid* 231-32.

⁴⁹ Alexander and Sherwin (n 41) 4.

⁵⁰ Frederick Schauer, ‘Precedent’ (1987) 39 *Stanford Law Review* 573-74.

decision does not constrain the present decision, and the present decisionmaker violates no norm by disregarding it', this cannot be called an argument from precedent per se.⁵¹ As we can see, Schauer depicts precedent as a 'rule of precedent' opposed to 'non rule-governed choice' to rely in past decisions. In fact, '[a] naked argument from precedent thus urges that a decisionmaker give weight to a particular result regardless of whether that decisionmaker believes it to be correct and regardless of whether that decision maker believes it valuable in any way to rely on that previous result'.⁵² In 'Thinking Like a Lawyer' Schauer explains that 'understanding the idea of precedent requires appreciating the difference between *learning* from the past, on the one hand, and *following* the past just because of the fact of a past decision, on the other.'⁵³ Schauer, thus, affirms that learning from a previous case or being persuaded by past decisions is not precedential reasoning – since the decision to do what the court has done previously is not based on the previous case status as precedent, that cannot be considered as relying on or obeying precedent at all, it is instead an example of the human capacity to learn from others and from the past.⁵⁴

In his view, thus, using the past as template is not reasoning with precedents, but following the command established by the doctrine of *stare decisis* is. On the one hand, vertical *stare decisis* can be identified with the model of following the hierarchical 'chain of command' characteristic of military obedience and, on the other, horizontal *stare decisis* appears more like 'sticking to one's word' – but none of these types of reasons can be identified with that learning from past experience or deciding to use the past as template. In these contexts, present judges should stick to binding precedents regardless of being persuaded by them or even disagreeing with the decisions. Schauer's conceptualisation of precedents focuses on reasoning with cases when they ought to be followed in virtue of an established command articulated in the form of a rule or a doctrine. He seems to attribute the character of [binding] precedent to a case that ought to be followed in virtue of judicial obligation (derived from the doctrine of *stare decisis*, both in its vertical and horizontal

⁵¹ *ibid* 574.

⁵² *ibid*.

⁵³ Frederick Schauer, *Thinking Like a Lawyer* (Harvard University Press 2009) 38.

⁵⁴ *ibid*.

formulation). Nevertheless, adhering to the conceptualisation of precedents as rules leads to a very narrow understanding of precedent-based reasoning that might not be very useful to explain the wide scope of possibilities in legal practice. As we shall see precedents are flexible sources that often do not stand as clear chains of command to which courts are bound.

This model of legal precedents has been problematic even in explaining the common law practice of precedents for several reasons. One of the criticism to this theory has been that since the ‘ratio’ or ‘holding’ of a decision are considered binding, and these do not stand a priori, but they ought to be constructed by legal practitioner, they cannot be considered to be rules.⁵⁵ It has been argued that the model of rules follows, in general terms, the rationale of statutory rules, which contrary to precedents are canonical formulations subjected to more or less stable conventions of interpretation. For this reason precedents might appear vaguer or more indeterminate than (statutory) rules.⁵⁶ In this situation, it seems difficult to argue that a precedent provides a rule that ought to be followed by a court due to the existence of a judicial obligation, since the rule is not predetermined but subject to formulation (and reformulations). It is true that some precedents are well known to stand for certain facts, and in this way they might be similar to (statutory) rules; however, in precedent based reasoning there always stands a higher degree of flexibility.⁵⁷ In this respect, it has been argued that past decisions do not have a fixed or foundational content, that is to say, that they are not a ‘timeless what’, but that what is taken to be the content of a judicial precedents is actively and creatively built by the legal reasoner.⁵⁸ Nevertheless, in our opinion, this flexibility does not derive from the lack of literal articulation of precedents, but to the possibility of expanding and

⁵⁵ As Schauer argues, rules necessarily determine their conditions of application. Nevertheless, this does not seem to happen in the case of precedents. Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-based Decision-Making in Law and in Life* (Clarendon Press 1991) 119.

⁵⁶ Grant Lamond, ‘Precedent and Analogy in Legal Reasoning’ (*The Stanford Encyclopedia of Philosophy Fall 2008 Edition*) <<http://plato.stanford.edu/archives/fall2008/entries/legal-reas-prec/>> . accessed 15 August 2013.

⁵⁷ According to Levenbook ‘[t]rying to cast precedents, particularly legal precedents, into this mold leads to overlooking a kind of flexibility, almost fluidity, possessed by precedent.’ See Barbara Levenbook ‘The Meaning of a Precedent’ (2000) 6 *Legal Theory* 201.

⁵⁸ See: Maxymilian del Mar, ‘What Does History Matter to Legal Epistemology?’ (2011) 5 *Journal of the Philosophy of History* 383-405.

compressing their meaning through processes similar to that of analogy making and distinguishing.

Furthermore, the rule model has been problematic when explaining legal reasoning operations such as analogy and distinguishing, which are typically associated with the common law practice (but that are also operational in civil law contexts). The flexibility of precedents seems to increase by the frequent use of the methods of analogical reasoning and differentiation. In fact, in the common law tradition reasoning from precedents has been usually depicted as a form of analogical reasoning. According to psychologists the basic structure of analogical thought involves, first, a retrieval of an analog or base that shares properties with a target situation; second, mapping the relevant similarities between the target and the analog; and, third, transfer the properties from analog to target.⁵⁹ The question of how to assess similarity between past and present cases is medullar for legal professionals, and the process often involves selecting an analog or base from a variety of candidates. In the process of finding suitable analog options – that is, past cases with similar features – the ratio or holding (analog) can be object of reformulations, extensions and reductions.

However, according to Schauer precedents in law are not substantially about analogy. He points out that some similarities between the new case and the precedent result obvious and inescapable and, consequently, that precedents act as a constraint, or, in other words, constitute binding rules that ought to be followed. Any two cases can be found to be similar or different, but there are some unavoidable equations. Thus, in his view, the most striking distinction between precedential constraint and reasoning by analogy is the lack of freedom in the selection of precedents. Schauer thinks that these straightforward situations are not uncommon in the practice with precedents – for example, there is little doubt that the emblematic US case *Roe v. Wade* extended the right to privacy to a woman's choice to have an abortion under certain circumstances, and consequently a future court would be bound to decide for the unconstitutionality of any statute prohibiting abortion no matter the personal

⁵⁹ Frederick Schauer, 'Why Precedent in Law (and Elsewhere) is Not Totally (or even Substantially) about Analogy' (August 2007) in Kennedy School of Government Research Paper RWP07-036.

opinion of the judges.⁶⁰ Schauer is right arguing that some analogies are more evident and compelling than others, but the line of separation between clear and contested choices is more blurry than he might like to admit. In fact, his mention of *Griswold v. Connecticut* as a supporting precedent for *Roe v. Wade* makes us wonder if his clear-cut division between precedent constraint and analogy easily stands. In 1965 case *Griswold v. Connecticut* the Supreme Court of the United States ruled that the Constitution protected a right to marital privacy that entitles the married couple to decide about their use of contraception. This argument was later used to support the existence of a privacy right to have an abortion. However, the similarity between marital contraception rights and abortion rights is not as obvious and unavoidable as Schauer suggests; in fact, this conclusion is obtained by the process of analogical inference which allows to decide on similarities between the target and analog cases so as to extend the conclusions of the second over the first. Thus, even if precedent-based reasoning might not be all about analogy, the extension of the conclusions of a previous case by means of analogical inferences is a normal cognitive process used for constructing knowledge. Analogical reasoning is based in the human natural ability to form patterns of association. It is in fact this capacity to make analogies what allows legal practitioners to group similar cases and see more or less clear lines of decision.

According to cognitive scientist Douglas Hofstadter, analogy making is a central cognitive operation. In his view, analogy making is not just another form of reasoning, but the very basis for cognition and categorisation. All our categories (including concepts) are nothing else but ‘a tightly packaged bundle of analogies.’⁶¹ Thus our thinking process consists in fluidly moving from one analogy bundle to the others. Hofstadter argues that experts most likely will unconsciously and effortlessly identify situations where their known categories properly apply. Nevertheless, there are more complex situations where categorisation might be difficult, or will be in

⁶⁰ Ibid

⁶¹ Douglas Hofstadter, ‘Analogy as the Core of Cognition’ in Dedre Gentner, Keith Holyoak and Boicho Kokinov (eds) *The Analogical Mind: Perspectives from Cognitive Science* (MIT Press 2004) 500.

between two different categories.⁶² Hofstadter's conclusion can help us to further understand legal reasoning: when an experienced legal reasoner faces a case, he immediately will try to 'fit' it in any of the existing categories (some derived from precedents). In law, classifying whether a determinate case is a 'Roe v. Wade', or let's say, a 'Marbury v. Madison' is a basic skill. These cases constitute well known legal categories of American law. When precedents categories are applied without (much) hesitation as in cases 'in point' we could easily believe that there is no choice when identifying suitable precedents and that, consequently, precedent based reasoning is similar as pictured by Schauer. However, sometimes facts and categories might not entirely 'fit' or be in the borderline, leading to evident deliberation. Nevertheless, in this exercise of fitting facts or hypothesis to categories, the later might emerge somehow transformed. In this form, the categories set by precedents are not completely fixed – i.e. they are fluid. For Schauer, these matters would rule out considering a past case as an authentic precedent, since for him these perpetual flexibility does not constraint decision making. Nevertheless, as we have seen, with this perspective that precedents ought to perform as rules we could lose much of what goes on when reasoning with past decisions.

In the common law, analogical reasoning is said to happen between facts: practitioners compared factual situations to determine their correspondence with an already built category that also describes facts extensively. However, it is false that in reasoning with precedents practitioners just perform a comparison of facts: they draw similarities between precedents around concepts. For example, if while drinking a ginger beer (or a soda, an ale, a bottled juice, etc.) in Scotland we found a snail (or even a mouse, a beetle or other vermin), we would easily say that this is a *Donoghue v. Stevenson* situation where we can sue the manufacturer for failing to meet his duty of care. Now let's imagine that we hire a financial team to assess and investment and they give us a wrong advice that makes us lose important amounts of money, are we in a *Donoghue v. Stevenson* situation too? If we perform a simple comparison of facts we might well conclude that one situation is not remotely related to the other, however in the legal world they are connected through the concept of

⁶² Hofstadter finds 'conceptual blends' to be an evidence of borderline categorisation occurring in our minds. See: Hofstadter at *ibid*.

negligence.⁶³ In this manner, in *Hedley Byrne v. Heller*, the House of Lords estimated that you can be liable for negligent statements because ‘if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise.’⁶⁴ In this sense, for the legal world, wrong financial statements are similar to snails in ginger beer bottles, and beverage manufacturers to financial advisors. This connection, however, does not seem to exist a priori, but it is product of a posteriori ‘packing’ different situations under the same label. It is important to note that in this process of transferral also some additional characteristics contained in the cases might be reported back into the wider category allowing a dynamic enrichment. The model of precedents as rules is not only deficient in explaining some characteristics of common law precedent-based reasoning, but also the way civil lawyers deal with precedents. Even in civilian systems, legal reasoners perform analogical inferences to classify new facts and hypothesis into previously existing categories.⁶⁵ In other words, analogical reasoning is not exclusive of precedents in the common law, but it also operates in civilian systems.

Similarly to the manner in which precedents are extended by analogical inferences, they can also be narrowed down by accounting relevant differences that make a new situation different from a previously established category. In the common law world this is usually known as the practice of distinguishing. Distinguishing involves a precedent not being followed because of some relevant difference between the new case and the core of the precedent. Generally, common law countries have understood this practice as contrasting the facts of the present case from the facts of a precedent case that is similar in appearance. Apparent similarity between cases is abated when the legal reasoner argues the existence of important differences.

⁶³ As noted by Wilson and others ‘[a]nalogy is a structure-preserving map from a base or source to a target, but unless participants are given extensive training on the base analog, they tend to focus on superficial attributes rather than recognizing relations that form the deeper basis for the analogy.’ in William Wilson and others, ‘The STAR-2 Model for Mapping Hierarchically Structured Analogs’ in Dedre Gentner, Keith Holyoak and Boicho Kokinov (eds) *The Analogical Mind: Perspectives from Cognitive Science* (MIT Press 2004) 125.

⁶⁴ *Hedley Byrne v. Heller*

⁶⁵ As noted by Bell with respect to French use of precedents: ‘Every conceivable method of reasoning in relation to precedent exists in the written report and in the oral argument among judges. Distinguishing, reasoning by analogy, and overruling are devices with which the French judge is familiar. See: John Bell, ‘Book review: Comparing Precedents’ (1997) 82 *Cornell Law Review* 1249.

Nevertheless, as in the case of analogy making, reasoners do not proceed to compare facts, but they perform their analysis under the shadow of a wider category. When certain situations are excluded from a category we can say that the *prima facie* relevant precedent has been narrowed down. In the same way there are certain clear analogies, in every legal system there are some paradigmatic situations that cannot be easily distinguished. In these clear-cut cases, which cannot be easily distinguished, the functioning of precedents might appear closer to that of rules. This, however, does not exclude the fluidity of precedents' content and, thus, the potentiality of them experiencing change.

Another feature of precedents that make it difficult to be assimilated with rules is that rules are conceived as a matter of all or nothing bindingness, while precedents appear to have a levelled force, that is, they possess more or less authority according to a wide scope of factors related to the institutional setting where legal argumentation takes place. Precedents can be said to have different degrees of authority that oscillate in a 'high' to 'low' continuum depending on factors such as in-pointness, age, hierarchy, reiteration, etc. In this manner, the authority of precedents seems to be subjected to more ambiguous and flexible treatment than that of statutes. Thus, the positivist understandings of all-or-nothing binding rules run short when facing precedents multifactorial nature.

4.2.1.3 The Model of Precedents as Principles

A different perspective regarding precedents is that they should be treated as evidence of underlying principles. A court analysing a past case should identify the principles or reasons that gave rise to the decision. Resulting principles are authoritative reasons that determine the outcome of future cases. New cases should be, thus, decided in accordance with the principles held in past judicial resolutions.⁶⁶

According to Lamond, there are two versions of this model. The first approach understands principles locally, that is, it considers that the principles of single past decisions are relevant to future decision. The second version, instead, takes a global

⁶⁶ Alexander and Sherwin (n 41) 15.

view that compels legal reasoners not to the principles of a single case but to those coherently emanating from the legal system.⁶⁷ The second approach seems to be the most widespread. It is represented by the Dworkin's theory of law as a system of principles. Dworkin's perspective presupposes that the law is formed by something else than rules, that is, by a set of legal principles that aspire towards coherence or integrity.⁶⁸ In this manner, legal practitioners connect former decisions by identifying principles that bind them together, although they might also find that there are limits to the scope of certain principles. Principles do not operate in the all-or-nothing manner of rules and in case of existing contradictions a principle does not overrule other, instead they are weighted and balanced as applied to the dispute. Both, the identification and balancing of underlying legal principles ought to take into account the need of achieving systemic coherence or, in Dworkin's terms, integrity. Under the principle model, the authority of precedents is not absolute, but subjected to reconsiderations in terms of their overall coherence. Judges are not constrained by the rules of past decisions, but they are not free to decide what is best; instead, they have to find the best decision that is coherent with the principles held in previous cases.

As Alexander and Sherwin note, the model of legal principles might appear as having several advantages over that of rules. In a sense courts are constrained by law, but they still keep some freedom to evaluate the best moral decision supported by the system's coherence. Nevertheless, the authors consider that advantage is illusion and actually constitute a negative aspect. In their view 'legal principles combine the worst features of ATC [all-things-considered] moral reasoning and of binding precedent rules, while at the same time eliminating the advantages of both.'⁶⁹ On the one hand, legal principles are more undetermined, vague and value-laden than rules; a fact that potentially increases legal uncertainty. On the other, decisions on coherence and pondering conflicting principles are equally unstable, susceptible to

⁶⁷ Grant Lamond, 'Precedent' (2007) *Philosophy Compass* 702–03.

⁶⁸ For Dworkin law is an interpretative practice justified and guided by the political aspirational value of integrity. Law as integrity holds that interpreters should identify legal rights and duties assuming that their only author is the community personified; it requires that rights and duties flow from past collective decisions that not only contain narrow explicit contents, but also implicit principles and values that justify the practice. See: Ronald Dworkin, *Law's Empire* (Hart Publishing Limited 1998) 225-28.

⁶⁹ Alexander and Sherwin (n 41) 43.

controversy and error as in the all-things-considered model of reasoning. Therefore, the model of precedents as principles eliminates the certainty provided by rules and aims towards judicial decision that are morally inferior to those reached by proceeding an all-things-considered manner.

A different criticism to this perspective comes from the fact that, just as the model of precedents as rules, it understands past decisions as a 'timeless what'. That is, even if at a more abstract level than rules 'there is a fixed or foundational binding core to the precedent, or to the pool of precedents.'⁷⁰ Understanding that the authoritative core of precedents is given by principles tends to bring a static perspective of precedents and legal reasoning that might hide precedents' intrinsic flexibility.

4.2.1.4 The Model of Precedents as Examples

In this view a judicial decision performs as a precedent by being an example for officials and the population in general. Barbara Levenbook, the main exponent of this model, considers that even if precedents sometimes lay a rule, they are better understood as setting examples. Examples, unlike rules, are not aprioristically set by the officials; they are stories which meanings are socially determined. This model argues that the language of rules used in the case of precedents can be misleading. Precedents are more flexible than what the language of rules acknowledges, as their scopes are not always specified in advance. On a different level, according to Levenbook, precedents are better understood as examples as they have a psychological power that rules lack. Examples have a stronger communication power than rules; they are vivid guidelines for conduct. As the author reminds us, '[o]ne picture is worth a thousand words, and so is one example.'⁷¹ Example matters for its effects on conduct guidance and not because of its reasons. This is claimed to be particularly true for precedential systems where the description of the case is more comprehensive.

⁷⁰ Del Mar (n 58) 391.

⁷¹ Levenbook (n 57) 206.

This account argues that the relevant categories to which precedents refer are worked out in later instances.⁷² Precedents are means to test the limits of categories, allowing the formation of conceptual consensus. A past decision can account as precedent for a small aspect, but the idea of what the precedent accounts for can grow with the emergence of shared understandings. The meaning of precedents is socially set and socially salient. Thus, its future application is determined by ‘what “everyone knows” is the same, what is “plainly the same,” or what is “on all fours.”’⁷³ Precedents’ application is dependent on the assessment of relevant sameness between the facts of the past case and the new case, that is, by the determination of the circumstances where the precedent stands in all fours. Nevertheless, the meaning of precedents is independent of whatever reasons justified them in the first place. In this sense, Levenbook understand that the exemplar force of a prior resolution is unconnected to its background justification.⁷⁴ In this sense, precedential force is not linked to whether the decision is well justified or not according to law. In her own words ‘[a] decision may be wrongly decided, may even be without justification for any practical purposes, and yet function as a precedent nonetheless; and this entails that a decision’s meaning or force is independent of the existence, let alone content, of its justification.’⁷⁵

The model of examples has the advantage of recognising precedents’ flexibility, that is, their often inexistent fixed content, and their capacity to be changed. This viewpoint relies heavily in social consensus, but understands that this consensus is in flux. Fluctuations in the social understandings can lead to the extension or narrowing of the categories to which precedents refer. Therefore, the examples set by legal precedents are not static, they are in constant motion. The recognition of the fluidity of precedents is welcomed; nevertheless, the consensus over which the examples set by precedents rely appears as a contingent and undirected happening. It seems that social consensus can occur on any grounds where there is a meeting of

⁷² Precedents are seen as ‘the vehicle of a legal system ultimately working out the outlines of the relevant categories, discovering or inventing the organizing principles, the direction of sameness, over time, as unencountered cases are encountered and brought to the public arena through litigation and appeal’ *ibid* 211.

⁷³ *ibid* 227.

⁷⁴ Levenbook argues that ‘[e]xamples, in short, have conduct-guiding significance, or meaning, independent of justification. This is their exemplar force’ *ibid* 197.

⁷⁵ *ibid* 192.

understandings, regardless of the background justification of the precedent. In other words, the meaning of precedents in this account is independent from the grounds on which the prior decision was taken, that is, their aim or purpose. This allows a high amount of flexibility in the future determination of what the decision accounts for and on the grounds the precedent is considered to have force. As noted elsewhere, this account seems to picture the practice of precedents as a more or less mindless and uncreative enterprise, where subjects reproduce or, better said, imitate past decisions without considering whether there stands a justification for this action.⁷⁶

4.2.1.5 The Model of Precedents as Reasons

This viewpoint, proposed by Grant Lamond, regards precedents as decisions linked to particular factual contexts. The *ratio* of the case indicates the factual features that give sufficient reasons for the result.⁷⁷ Case-by-case decision making is the evaluation of the differences between the justificatory facts of a past case and a present case, in order to determine whether the past case should be followed or distinguished. Thus, the determination of a precedent's similarity is dependent on the significant facts that justified the conclusion. Lamond attempts to find a meeting point between a model of precedents based on the identification of facts and one based on their justifications, which creates a blend model of precedents as 'justificatory facts.'⁷⁸

Lamond explains further his view by giving an example. Imagine that there is a precedent case P_1 with the $F_1 = \{g_1, h_1, i_1, j_1, k_1, l_1\}$. The court decided that the features $\{J, K, L\}$ provided the reason to conclude C , which also means that the features $\{G, H, I\}$ do not defeat the reasons for C . In this manner, any future case that includes the facts $F_n = \{j_n, k_n, l_n\}$ will require the consideration of P_1 . Nevertheless, the court should consider if the new case includes new features that are sufficient reasons to defeat the justification in P_1 for the conclusion C . If the new case P_2 had features defeating the reasons of P_1 , the case should be distinguished, otherwise it

⁷⁶ Del Mar (n 58) 392.

⁷⁷ Grant Lamond, 'Do Precedents Create Rules?' (2005) 11 Legal Theory 2-3.

⁷⁸ This is not the terminology used Lamond, but the concept is of use for understanding his theory. See: Del Mar (n 58) 391.

should be followed. Now imagine the case P_2 with $F_2 = \{\sim g_2, h_2, i_2, j_2, k_2, l_2, m_2\}$. In this case G is not present, but the new feature M is present. These differences of P_2 with P_1 have to be assessed by the later court, which must determine if they the absence of G and the presence of M are sufficient to defeat the reasons given by $\{J,K,L\}$ for the conclusion C .

According to Lamond, the rule model of precedent is defective and is not capable of giving account of the legal reasoning operations that considering past legal cases entail. He considers that the popularity of the conventional view of precedents as rules derives from the widespread idea that the (common) law is a matter of rules, although lawyers do not fully commit to this conception in practice. Lamond argues that there are certain circumstances in which the operation of precedent might appear closer to the functioning of rules. This seems particularly true in areas of the law that have remained uncontroversial for long time, while the rule models appears more difficult to hold in areas of greater struggle and with frequent disruptions to the line of cases. Additionally, precedents might appear as rules when they are seen individually, or when what has been decided in a group of precedents is conceptualised in a more or less abstract doctrine.⁷⁹ Nevertheless, the impression that case-by-case decision making is equivalent to rule-based reasoning is just an appearance. Lamond indicates that '[c]ase-by-case decision-making, then, is not rule-based decision-making, though its operation over a long period can make its operation appear similar. Cases are context-dependent and do not purport to settle what should be done in a different context. Instead, they exercise an influence on later decisions because of the requirement that later courts treat the precedent as correctly decided. Once this perspective is taken on the doctrine of precedent, a range of features of the common law make much more sense than they otherwise would.'⁸⁰

The model of precedents as reasons allows certain dynamism that is not possible to explain with the model of rules, providing an explanation to certain features of the common law practice (i.e. the lack of canonical formulation, reasoning by analogy and distinguishing). In this view, each time a new case arises, the court in charge

⁷⁹ Lamond (n 77) 21-2.

⁸⁰ *ibid* 23.

makes an assessment of the relevant facts that justify the conclusion of a past court. In this form, the facts relevant for a decision are continuously analysed on the light of the reasons for deciding on a certain direction. Thus, future acts of evaluation of precedents are not mere applications of past decisions, but actually they add on facts to the reasons previously devised. Whether the court decides to follow or to distinguish a precedent, it will be elaborating on the case-law doctrine and, in this manner, changing the law.

For our present purposes, this model might be of limited usefulness due to its strong focus in the justificatory facts of a decision. Civil law precedents do not give the same emphasis to the factual circumstances surrounding a decision as in the common law. Therefore, the reduced elaboration on the facts of the case, characteristic of the civil law tradition, becomes problematic for this model. Lamond is obviously not concerned with this limit regarding his theoretical account, as he explicitly acknowledges that his target is to explain the common law practice of reasoning in a case-by-case basis. Nevertheless, we consider that the model does not explain well precedent-based reasoning in the common law either. As we have seen, the dynamism of precedents based reasoning provided by operations such as analogy making and distinguishing does not involve necessarily a fact comparison in the terms portrayed by this model. In fact, the process of assessing whether a precedent should rule in the future might involve a more abstract way of reasoning than mere factual analysis.

4.2.1.6 Precedents as Thick Resources with Dynamic Content

This is a novel position that does not seem to be concerned with the ontological nature of precedents, but with the way they are used by legal reasoners. In other words, rather than unveiling the nature of precedents, the focus is to understand how they matter for legal epistemology. Nevertheless, indirectly the model offers an image of precedents as highly malleable resources that, by means of *a posteriori* construction, might take different shapes.

This perspective stands in disagreement with the models that understand precedents as fixed or static features unchanged by each operation performed by legal reasoners.

This account, based in the common law practice of precedents, argues that ‘there is no set of rules, principles, reasons or material facts that constitute the fixed or foundational content of past decisions (i.e. a ‘timeless what’ that determines its own relevance), but rather that what is taken by a judge resolving a particular dispute to be the content of past decisions depends on the active and creative construal of relevance engaged in by that judge.’⁸¹ In this respect, precedents are said to be better understood as ‘thick resources with dynamic content’, constrained by a variety of stabilising practices.⁸²

This model puts into question that precedents are ready-made solutions experienced by legal reasoners as ‘unavoidably similar’ or ‘essentially identical’ to the cases at hand to the extent that the application of the precedent becomes a non-creative mechanical operation. It is then argued that what the model of precedents as rules, principles, reasons and examples have in common is that they all somehow conceive past decisions as timeless features with a fixed content, where the reasoners do not engage into any creative operation. It is noted that this form of reasoning does not seem to be consistent with the common law form of reasoning with precedents where ‘the *quality of description* that characterises common law judgements (this being also why they are here called ‘thick resources’) enables common law cases to have *dynamic content*.’⁸³ Where having ‘dynamic content’ means that there are no fixed rules, principles, reasons or facts constituting the content of prior decisions. Thus, the legal reasoner ought to engage into the active and creative task of deciding the relevant content of past legal resolutions.⁸⁴

Nevertheless, the dynamicity described by Del Mar seems to be potentially undermined when precedents are written. In this respect, Peter Tiersma has argued that the textualisation of precedents might encourage rigidity.⁸⁵ Tiersma argues that due to the textualisation of precedents in the US, lawyers are now paying more attention to the exact words of legal decisions than they used to do in the past, and

⁸¹ Del Mar (n 58).

⁸² *ibid.*

⁸³ *ibid* 398.

⁸⁴ *ibid.*

⁸⁵ Peter Tiersma, ‘The Textualization of Precedent’ (2007) 83 Notre Dame Law Review.

that, in that sense, precedents are not evidence of the law, but rigid law comprehended in more or less explicit textual articulations. The argument of Tiersma remind us that the format of legal precedents might have important consequences for the model of legal reasoning.

Del Mar is well aware that certain contextual circumstances, such as precedents format, might reduce the explanatory power of his model. Therefore, he is cautious not to make overgeneralisations that include jurisdictions where matters of legal style could prove the model untrue. Nevertheless, we consider that this model actually tells us something important about precedent-based reasoning in civil law systems. Even if precedents in civil law usually follow a different format, where they give a summary of the resolution and do not give a full explanation of facts and reasons, full-text resolutions may be later accessed. However, the summaries provided are usually enough, especially for practitioners trained in the particular legal system, to perform new connections between the relevant parts of previous cases and new facts or hypothesis; these connections involve some sort of reformulation of the meaning of the precedents, providing it with dynamicity. The reduced information available might reduce some of this dynamism, but it will not rule it out absolutely. In this form, despite the fact that civil law precedents are usually less argumentative and provide a narrower analysis of the facts of the case, it is also possible to understand these past decisions as having a dynamic content.

Another important insight of this account is the way in which this dynamism is said to be constrained. The reconfigurations of precedents are not totally free, but they are subjected to stabilising practices – that is by the compelling necessity to make things ‘fit’ with pre-established understandings. In this way ‘[t]he practice of judges is constrained by certain resources that they are obliged to relate with, that they are obliged to take into account, and this ‘taking into account’ is itself a process that may be constrained in all kinds of ways.’⁸⁶ Nevertheless, not only judges are constrained by the necessity of making thing fit together, also lawyers try to created argument that appear as making more sense or fitting better into the bulk of law.

⁸⁶ Del Mar (n 58) 401.

4.2.1.7 Precedents as Features of Various Degrees of Normative Force

Another account that has been not so much concerned with discovering the ontological nature of precedents, but more with understanding what they represent for actual legal reasoners is the one presented in the book ‘Interpreting Precedents: A Comparative Study.’ The research group known as the Bielefelder Kreis, as a result of a comprehensive comparative analysis on reasoning with legal precedents, created a framework to explain the normative force of prior cases in different jurisdictions.⁸⁷ The model provides a terminologically and conceptually sophisticated account that is sufficiently broad to explain the degrees of authoritative force of precedents in practice across legal systems. One of the most important contributions of this comparative study is the articulation of a framework in which the authoritative character of precedents is represented in a continuum, rather than in terms of an all-or-nothing bindingness. The degrees of normative force are given by a combination of several factors, from the official treatment of precedents to their strength according to a series of institutional considerations.

The model differentiates between bindingness, force, further support, and illustrativeness or other value of a precedent. The first degree of normative force that is recognised is (1) *formal bindingness*. In case a precedent is recognised as formally binding, a judgment that fails to respect it is considered unlawful and subject to reversal in appeal. Nevertheless this category of precedential force accepts further distinctions: a precedent might be (a) formally binding and not subject to overruling, being (i) strictly binding in every case, or (ii) defeasibly binding when exceptions appear; (b) formally binding but subject to overruling or modification. Secondly, precedents can be (2) *not formally binding but having force*, that is, that a decision not respecting a precedent is considered lawful but subject to criticism, and maybe of reversal. Nevertheless this force can be: (a) defeasible in case of exceptions, or (b) outweighable in case of countervailing reasons. Precedents can also be (3) *Not formally binding and not having force but providing further support* in which case precedent helps strengthening the reasons for a determinate decision showing the

⁸⁷ MacCormick and Summers (n 5).

harmony between the decision and the past case. Finally, precedents can have (4) *mere illustrativeness or other value*.

A *formally binding* precedent, thus, must be taken into account by future courts when similar cases arise or, otherwise, their decision would risk being considered unlawful. Precedents that are not formally binding but are considered as *having force* should be taken into account. Whenever a judgement does not respect the force of a precedent, it might not be considered unlawful; however, it most probably be subject to criticism and, possibly, of reversal by hierarchically superior courts. Nevertheless, the force of precedents might actually be defeated or outweighed. For instance, precedents can be defeated if there are exceptions to what they state or to the doctrine of precedents (as in for example, decisions *per incuriam*); or they can be outweighed if countervailing reasons apply. Precedents that act as *further support* do not render judicial decisions illegal when they are not invoked in similar cases; they just make decisions not as well justified as if the precedent was invoked.⁸⁸

The various degrees of normative force indicate the justificatory strength of legal precedents. The normative force of precedents is, however, a relative matter, which depends on the set of available reasons and their interrelation. Nevertheless, assessing the strength of precedents cannot be performed as an exact equation, where the relevant factors can be measured. In this respect, a statute is usually considered a stronger reason for a decision than a precedent – for which, in case of collision, the reasons given by statutes generally outweigh those provided by precedents. Nevertheless, the force of precedents is only provisionally determined. Past decisions have the capacity to change their strength or weight when cumulating with other reasons. For example, it can be said that a relatively stronger high-hierarchy precedent might be outweighed by a set of less strong, but cumulating precedents.

Reasoning with precedents, as in any kind of practical reasoning, involves the evaluating of a number of factors. According to Peczenik, ‘the role of weighting and balancing reasons is particularly clear when one considers the fact that the process of

⁸⁸ Aleksander Peczenik, ‘The Binding Force of Precedent’ in Neil MacCormick and Robert Summers (eds), *Interpreting Precedents: A Comparative Study* (Ashgate-Dartmouth 1997).

applying precedents involves an effort to achieve diachronic coherence of the law.⁸⁹ The degree of coherence that is attained by following precedents is seen as proportional to the support that the legal tradition gives to the precedents' components (rules, principles, judgements, data, theories, and etcetera). Therefore, reasoning with legal precedents is rarely a mechanical process; it requires a complex assessment or evaluation of reasons for a determinate decision.

This model of reasoning might be helpful to understand the fact that practitioners do distinguish different degrees of force when reasoning with legal precedents. Practitioners in different jurisdiction have coined terms to identify legal precedents that pose a stronger force than others. For example, certain common law jurisdictions have coined the term 'super precedent'⁹⁰ to denote cases that are so deeply embedded in the law and culture that it would be extremely hard to overturn.⁹¹ The existence of precedents and super precedents makes clear that precedents have different degrees of normative force according to a broad set of considerations. Even if precedents are considered binding because of the principle of stare decisis, they are not considered binding in an all or nothing fashion. Legal practitioners, in different contexts grasp the fact that the force of precedents depends on a set of considerations. Moreover, the force of super precedents derives from their significance within the system of law. In the United States, constitutional decisions that have been supported by subsequent lines of judicial decisions emerge as precedents with a superior normative power. Nevertheless, super precedents lose force when they are subjected to persistent reformulations granting exceptions. The power of super precedents, however, is not equal to notoriousness, or social saliency. Infamous precedents are those that become widely known, regardless of their entrenchment in the legal system, and consequently they cannot be considered super precedents.

⁸⁹ *ibid* 470.

⁹⁰ Gerhardt argues that '[s]uper precedents are not unique to the courts, but rather are constitutional decisions in which public institutions have heavily invested, repeatedly relied, and consistently approved over significant periods of time. These are decisions which have been so repeatedly and widely cited for so long that their meaning and value have increased to the point of being secured by enduring networks. They are deeply and irrevocably embedded into our culture and national consciousness, so much so that it seems un-American to attack, much less to formally reconsider them. These decisions are the clearest instances in which the institutional values promoted by fidelity to precedent—consistency, stability, predictability, and social reliance—are compelling.' See: Michael Gerhardt, *The Power of Precedent* (Oxford University Press 2008) 178.

⁹¹ Michael Gerhardt, 'Super Precedent' (2006) *Minnesota Law Review* 1204-31.

Peczenik reports a variety of relevant factors determining precedents' normative. According to the comparative study in question, the force of precedents is connected to diverse aspects such as: (a) hierarchical rank of the court, (b) whether the decision was taken by a panel or a full-court, (c) the reputation of the court drafting the decision, (d) economic, social or political changes, (e) supporting arguments, (f) age of precedent, (g) existence of dissent, (h) branch of law involved, (i) existence of precedents' trend, (j) academic acceptance of precedents, and (k) effects of legal change.⁹² Additionally, their force may be given by the precedents' 'in-pointness' and their distinctive official status.

These factors seem to be somehow present in most legal systems when assessing the force of precedents. Nevertheless, legal systems might differ in the way they consider them relevant. In this sense, it is, for example, possible to observe legal systems that privilege the hierarchical rank of the court than any other factor, and that consequently attribute a high degree of normative force to precedents coming from the highest court of the system, despite the existence factors tending to lower the normative force of precedents such as old age or the existence of dissent. It is, however, also feasible to find systems not giving so much weight to the hierarchical rank of the court where the precedent derives, and instead, giving primacy to existence of a trend of precedents.

4.3 Precedents in History

History is a useful means to understand legal theories in their right dimension. History portrays old standing practices in their most natural shape, sometimes before the emergence of certain explanatory biases. Also, studying the past shows us when and why some common explanations of these practices emerged, allowing us to see them with some form of detachment. In this sense, history helps us move out of the establishment and further explore some longstanding practical aspects, to later come back and explore how well our concepts and explanations fit in. Herein there are certain understandings with respect to precedents that we would like to take distance from and demystify: first, the assimilation of precedents use with the doctrine of

⁹² Peczenik (n 88) 478.

binding precedents, and, second, the assumption that civilian systems remained ignorant of precedent-based reasoning.

One of the most salient characteristics of the common law according to certain comparatists is that it is mainly a system of case law governed by binding precedents. Nevertheless, historians generally agree that throughout time the common law operated without a theory of binding precedent.⁹³ As noted by Simpson, a search across the discussions on the nature of the common law will most likely discover accounts of the doctrine of *stare decisis*, which, from the historian's point of view, is unsatisfactory 'for the elaboration of rules and principles governing the use of precedents and their status as authorities is relatively modern, and the idea that there could be binding precedents more recent still.'⁹⁴ Historian John Baker has noted that dependence on precedent seems always to have been one of the distinctive features of the common law.⁹⁵ Nevertheless, it is important to note that this particular form of dependence has been subject of important transformations throughout the years, or better said, centuries. The contemporary understanding of precedents as binding sources in the common law context has not been omnipresent in the history of this legal tradition. As we shall see, precedents have been used for diverse reasons, in different forms, and outside our currently widespread comprehensions.

Case-law emerged in medieval times as a by-product of the decisions of the English central courts. Judges started keeping records of the decisions reached in court for the convenience of the court itself. Even if previous judicial decisions were not regarded as binding authorities, recorded cases appeared to be powerful illustrations of the forensic custom of the courts or *consuetudo curiae*.⁹⁶ Dawson argues that the fast development of case-law could not be reached 'if the judges had not sensed the virtues of continuity, had not felt reluctance to reopen problems already solved, and had not permitted the expectations aroused by their work to become in some degree normative for themselves as well.'⁹⁷ This sense of continuity was reinforced by what

⁹³ Tubbs (n 3)18.

⁹⁴ A W Brian Simpson, 'The Common Law and Legal Theory' in William Twining (ed) *Legal Theory and Common Law* (Basil Blackwell 1986) 8.

⁹⁵ Baker (n 2) 133.

⁹⁶ Tubbs (n 3) 18.

⁹⁷ John Dawson, *The Oracles of the Law* (William S Hein & Co. 1986) 50.

can be said to be the closest to a doctrine of precedents enounced by English medieval author Bracton. He indicated that ‘if like matters arise let them be decided by like (*si tamen similia erinerint per simile iudicentur*), since the occasion is a good one for proceeding *a similibus ad similia*.’⁹⁸ By proceeding ‘from similar to similar’, normative force was attributed not to only a singular case but to a set of cases creating a practice or custom.⁹⁹ In this sense, the practice of recording and taking into account legal precedents seems to have emerged in response to the needs to keep up with the case-by-case development of the common law, and to provide a common base and continuity to legal decision making.

As early as 1180’s, precedents appeared as a major feature of the common law; the law was already described in terms of remedies introduced by case-by-case decisions to which the courts rigidly adhered to.¹⁰⁰ The first means to keep records of the decisions of the central courts were the rolls of the central courts generally known as plea rolls. The rolls were considered of high importance as they were the only conclusive evidence of what was transacted in courts; however, their content was barely more than formulistic statements recording the outcomes of proceedings, and unconcerned of the reasons or arguments for the decision.¹⁰¹ The idea of reporting the law in courts in more detail seems to emerge past the mid thirteenth century, expanding the function of precedent records as they were up to that time available to the legal community. In this form, the yearbooks – that is the earliest type of law reporting – started to circulate, giving more detailed account of the medieval legal debates. The first of these yearbooks were mainly private compilations, probably based on notes taken by listeners of court proceedings.¹⁰² Apparently, these law reports were introduced as indirect products of the educational routine: they were the product of the efforts of students and lawyers who were taking notes of the proceedings of the courts.¹⁰³ The yearbooks were not intended to become sources of

⁹⁸ Although this passage is considered the foundation of the doctrine of precedents in the common law, it actually heavily rests on Roman doctrine. See: Tubbs (n 3) 19.

⁹⁹ *ibid.*

¹⁰⁰ There was the understanding that once a form of remedy was established it was not easily to be changed. See Baker (n 2) 133.

¹⁰¹ *ibid* 134-35.

¹⁰² Dawson (n 97) 54.

¹⁰³ Baker (n 2) 138.

precedents, but started performing as such due to their more comprehensive contents (including facts, reasons and arguments) that complemented the laconic plea rolls.

Early yearbook cases were treated as illustrations of the law in action or examples (*exempli* or *ensamples*). Common lawyers recognised that ‘decisions should be rendered in accordance, not with examples, but with the laws’; thus, precedents were not considered binding or incontrovertible.¹⁰⁴ It was the general practice of the courts and not the specific decisions that established the law. Postema indicates that in this context ‘[t]he law emerged from the course of argument exemplified in the cases so reported, but it was not laid down by the courts.’¹⁰⁵ The law was the product of the discussion and practice of the forum, which constituted a common learning experience. In that manner, arguments from precedents appealed to the collective memory of the legal community rather to specific, settled past decisions.¹⁰⁶ Cited precedents, thus, were based on reported or remembered cases without being later on referred to in connection with specific chapters or verses on paper; they were recalled as common propositions that belonged to a shared stock of examples taken from learning exercises.¹⁰⁷

Nevertheless, early yearbook reports were often imprecise and omitted relevant information, possibly due to the fact that they were not intended as collections of precedents but mainly as educational materials.¹⁰⁸ As the years passed, the reporting of legal decisions improved progressively. From the Tudor period law reporters increasingly asked for reasoned decisions, which were now made available in printed form allowing the standard citations across the common law.¹⁰⁹ The new format of past decisions, combined with a more active role of the courts, and the decay of the older notion of common learning were important factors that determined the new enhanced function of legal precedent in practice. As the medieval routine of common learning was no longer in operation, law reports would constitute the main source on

¹⁰⁴ Baker (n 2) 160.

¹⁰⁵ Gerald Postema, ‘Classical Common Law Jurisprudence (Part 1)’ (2002) Oxford University Commonwealth Law Journal 161.

¹⁰⁶ *ibid* 162.

¹⁰⁷ Something that Baker recognises as ‘common erudition’ see John Baker, *The Law’s Two Bodies: Some Evidentiary Problems in English Legal History* (Oxford University Press 2001) 11.

¹⁰⁸ Baker (n 2) 158.

¹⁰⁹ Baker (n 107) 83-4.

the shelves of legal library.¹¹⁰ Consequently, case reports seem to have changed; they were no longer a set of ill-defined examples of a common legal practice, but actual literal formulations claiming the authority of law.¹¹¹ The common law came to be what the courts claimed it was, and in the way it was reported.¹¹² That did not mean that the decisions were binding in the manner of *stare decisis*, but definitely the nature of precedents had changed; they became authorities in a different sense.¹¹³

As we have seen, the common law did not develop a system of case law by articulating explicit rules regarding the authority of precedents. With the passing of years, the doctrine of precedents showed signs of hardening, resulting in the formulation of the principle of *stare decisis*. It is rather difficult to state the precise moment in which English courts adopted the doctrine of *stare decisis*. By the end of the eighteenth century there was a clear practice of following precedents, but without a clear court hierarchy it was not possible to identify which decisions were more authoritative than others.¹¹⁴ By the middle of the nineteenth century the doctrine of binding precedent was in the making. During that time, lower courts were already taking for granted that the decisions of the House of Lords were strictly binding.¹¹⁵ Additionally, the view that the House of Lords is bound by its own decisions emerged.¹¹⁶ Nevertheless, it was by the late nineteenth century that the doctrine of precedent was finally consolidated¹¹⁷ and that a system of ‘rules of precedent’ was determined, even if some details and refinements were still to be worked out during the twentieth century.¹¹⁸ There were, thus, several intersecting factors that determined the articulation and development of the doctrine of *stare decisis*: arguably, the increasing availability and the improvement in the quality of printed

¹¹⁰ Baker notes that the law school that once was the source of common erudition passed its law-making role to the judges. See *ibid* 85-6.

¹¹¹ In a sense, the previous form and function of precedents in the common law still shared certain features with the oral tradition from which it emerged. The development of literacy seems to have as a consequence an impression of being bound by the text. See Michael Clanchy ‘Remembering the Past and the Good Old Law’ (1970) 55 *History* 165-76.

¹¹² This new relationship with the text of cases can be illustrated with Coke’s claim that ‘our book cases are the best proof of what the law is.’ Coke quoted in Baker (n 107) 83.

¹¹³ Baker (n 2) 164.

¹¹⁴ Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press 2008) 17-8.

¹¹⁵ Jim Evans, ‘Change in the Doctrine of Precedent during the Nineteenth century’ in Lawrence Goldstein (ed) *Precedent in Law* (Clarendon Press – Oxford 1987) 55.

¹¹⁶ *ibid*.

¹¹⁷ *ibid* 57.

¹¹⁸ *ibid* 64.

legal records, the establishment of a clear structure of courts, but most importantly, the rise of classical positivism.

The challenges posed by positivism to the structure, functioning and method of the common law courts had important implications for the understanding of judicial precedent. Their conception of law was of a set of more precise acts created by posited act of authority, not in harmony with the idea of ‘laws coming to exist by slow customary acceptance.’¹¹⁹ The theory that held that judges merely declared the longstanding (common) law was now being persistently attacked, leading to the reformulation of the practice of following precedents in the terms more compatible to the new theoretical baggage. In this regards, MacCormick points out that ‘[t]he real reason for the modern development of *stare decisis* was the destruction of the foundation on which the old attitude to precedent rested.’¹²⁰ The practice of precedents was restructured by translating the former understandings into the language of ‘commands’ that ‘constrain’ or exert ‘binding force’. Precedents then became authoritative for the fact of being issued by a court and not so much for their position in the body of common legal experience. With the emergence of the doctrine of *stare decisis*, the authority of precedents started to acquire a formal shade. Although the appearance of the doctrine of *stare decisis* entailed a strict conception of the binding authority, previous understandings and methods were too useful and embedded in common legal mind to disappear completely.¹²¹ Actually, this seems to be the reason why positivist theories of precedents have a limited explanatory power of precedent-based reasoning.¹²²

The American form of reasoning with precedents (which, as explained in previous chapters, served as inspiration for the Mexican system of precedents) followed the English practice. Consequently, and expectedly, the American and English

¹¹⁹ *ibid* 64-70.

¹²⁰ Neil MacCormick, ‘Can Stare Decisis be Abolished?’ (1966) *Juridical Review* 206.

¹²¹ Evans (n 115) 71

¹²² Duxbury has noted that the language of classical positivism is not useful for understanding the force of judicial precedents. In this respect, he argues that the limited explanatory power of the positivist account lies in the fact that ‘precedents, unlike statutes, do not bind judges in an all-or-nothing fashion, that the binding force of a precedent is best explained not in terms of its validity (this being a non-scalar concept) but in terms of its authority (of which there can be degrees)’ Duxbury (n 114) 23.

approaches to precedents have important similarities. Initially, for American practitioners precedents were also considered to be evidence of the law and not actual law.¹²³ The development of the doctrine of *stare decisis* in this country took place around the mid-nineteenth century, due to the fact that it was only then when reliable law reports emerged.¹²⁴ In this form, in America precedents started becoming official written articulations of the decisions held by the courts. In other words, precedents developed as officially drafted judicial opinions or decisions. Nevertheless, as in the case of England, the introduction of the formal doctrine of precedent in this context did not encapsulate all practical uses of precedents.

The historical use of precedents by civil law systems is much more difficult to track due to the broad number of systems that are comprised under this label. Herein it is not our aim to present a comprehensive account of the use of past cases in each of the legal systems considered to belong to the civilian tradition. Instead, it will provide a brief overview of some relevant instances in which former cases have been used within this tradition.

Contrary to the common assumption that the civil law tradition is foreign to case-law, history evidences that use of particular previous cases was not unusual in the continent. Actually, the civilian tradition is regarded as a highly theorised and abstract body of law, unconcerned by single case particularities, but history shows that this is just partly true. Roman law, in which the civilian tradition has its foundations, originally was not an abstract and general legal corpus as it is often understood. In this regards, Harold Berman notes that '[m]odern European law students, who study Roman law as it has been systematized by Western university professors since the twelfth century, sometimes find it hard to believe that the original texts were so intensely casuistic and untheoretical.'¹²⁵ In Roman law concrete cases played an important role in legal practice and education; factual cases were the ground to discuss the applicability of more abstract legal notions such as

¹²³ Kempin has noted that the '[m]aterial from the colonial period is scanty, it is true, but tends in the direction of showing that the colonists believed the law to be something above and superior to cases.' See: Frederick Kempin, 'Precedent and Stare Decisis: The Critical Years, 1800 to 1850' (1959) 3 The American Journal of Legal History 33.

¹²⁴ *ibid* 34.

¹²⁵ Harold Berman, 'The Origins of Western Legal Science' (1977) 90 Harvard Law Review 906.

blame, damage, possession, ownership and others.¹²⁶ Dawson has pointed out that Roman jurists focused strongly in specific cases, which sometimes were real litigious matters and sometimes hypothetical.¹²⁷ Jurists were not mainly concerned with theoretical articulations, but with treating orderly and consistently a set of particular cases, that is, according to the operating tradition.¹²⁸ In this sense, '[t]he primary task of the jurists as they conceived it was to provide solutions for cases that had arisen or might arise, testing and revising their central ideas by observing their effects on particular cases.'¹²⁹

In the plurality of orders that ruled the complex medieval society it is also possible to observe that a variety of individual past cases played a relevant role. In this sense, case law was also widely used during medieval times, including decisions of cases not heard in court.¹³⁰ There was a peculiar type of non forensic case law delivered by academics, namely *consilia*, where legal principles were considered in the light of specific facts.¹³¹ Similarly, jurists made use of the *decretals* dictated by the sovereign in respect to single instances.¹³² Past decisions were considered *exempla* to be used as evidence of the forensic costume.¹³³ In this way, past cases functioned as evidence of the court's practice, but they were also used as a means to achieve consistency in the practice.

Even in countries considered as paradigmatic civil law, such as France, the historical indications we receive point to a considerable role played by past legal cases in legal practice.¹³⁴ Therefore, whereas the use of judicial decision did not rest on a theory of precedents, court decisions would be mainly used as a proof of custom and as a form

¹²⁶ Geoffrey Samuel, *Epistemology and Method in Law* (Ashgate 2003) 37-9.

¹²⁷ Dawson (n 97) 114-15.

¹²⁸ *ibid.*

¹²⁹ *ibid* 116-17.

¹³⁰ Baker (n 2) 108.

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ The professionalisation of courts created a conscious use of court's decisions. These could be cited to evidence the forensic custom, but they were not considered authorities in themselves. See: Peter Stein, *Roman Law in European History* (First published 1999, Cambridge University Press 2005).

¹³⁴ Dawson notes that it was probably the excessive power of judges under the old regime that led to a strong revolutionary reaction against the role of the judiciary and their law making. See: Dawson (n 97) 263.

of stabilising the fragmentation of local customary laws.¹³⁵ Compiling the customs in books was a frequent practice, but there were always gaps left to be completed either by courts or schoolmen. With the development of the court system, prior decisions were frequently collected for internal use of the courts. By late fourteenth century, lawyers of the Parliament of Paris prepared something resembling law reports. These did not follow a uniform style, but demonstrated an additional interest in reflecting the techniques of court room argument. Nevertheless, these reports were kept as accessible exclusively to the courts and the parties, and started becoming widely available only later in the sixteenth century.¹³⁶ In the mid sixteenth century the practice of publishing private notes and commentary on cases started spreading between both judges and practitioners.¹³⁷ By this time, French lawyers accepted past court decisions as an important piece of their practice.¹³⁸

Law reporting was also not unknown within the canonical legal context. In fact, important continental developments in the case law practice seem to be connected to the practices followed by the papal Supreme Court (known as *la Rota de Avignon*), the decisions of which were considered to be authorities.¹³⁹ The origins of law reporting in the Rota are not clear, but it appears that this practice might have resulted from the influence of law reporting in the English context.¹⁴⁰ The reports of the Rota recounted the questions submitted to its members by individual auditors who had analysed them in different stages; sometimes the reports narrated the first instance and the facts in detail, stating on occasion the arising question of law or procedure in abstract terms.¹⁴¹ The reports captured the disagreements and dissents between the deciding members of the papal audience; however, the lawyers did not

¹³⁵ *ibid* 271-73.

¹³⁶ *ibid* 290-305.

¹³⁷ *ibid* 315-38.

¹³⁸ *ibid*.

¹³⁹ Baker (n 2) 117.

¹⁴⁰ Baker raises the possibility that the early reporter of the Rota de Avignon Thomas Fastolf, an Englishman savant of the Westminster tradition of reporting cases in the yearbooks, might have influenced the first canon-law reports. Despite the fact that there are little apparent stylistic similarities between the Westminster reports and the decisions of the rota, both represent a novel methodology of reporting the arguments and opinions of lawyers in forensic cases, with the idea that what lawyers said in court possessed some sort of authority. See: *ibid* 125.

¹⁴¹ *ibid* 126

seem to have had a direct intervention in the process of argumentations.¹⁴² Later in the century the reports became generally available throughout Europe. Following the practice of the Rota, law reporting would be widely institutionalised across the continent, which allowed the dissemination of the *ius commune*. By the fifteenth and sixteenth centuries had propagated in Europe even in the secular environments of the royal conciliar courts.¹⁴³ Law reporting in both the canonical and secular environments of early continental Europe made available the practice of courts in a manner that somehow resembled the common law context.

Despite the early use of precedents, it appears that civil lawyers of the past related somehow differently to these sources of law in comparison with English lawyers. In part, this seems to be connected to the longstanding continental interest in finding general principles and in the tendency to systematise legal knowledge in a way that easily led to abstraction. This propensity towards universality and systematisation had different manifestations throughout time, but it appears to be constant in the history of the civil law – from Roman times until the rise of modernity.

Romans did not reach a point where they assimilated legal knowledge with rules and abstract concepts, but they did notice that important aspects of legal knowledge consisted in the interpretation of words and the induction of legal maxims.¹⁴⁴ Nevertheless, the strong tendency towards generalisation with which the civilian tradition is identified can be observed as emerging in the twelfth century, when the scholastic method of analysis was introduced by the glossators. The glossators went further than the Romans in the definition and the systematisation of legal notions; they aimed to create an *a priori* world.¹⁴⁵ The scholastic method emerged over the premise that certain books have absolute authority, and that these texts are to be comprehended as containing a comprehensive body of doctrine.¹⁴⁶ The jurists of these times were interested in seeking ‘elaborately reasoned justifications’ and ‘theoretical synthesis’ – that is, they have a tendency to attain a somewhat higher

¹⁴² *ibid.*

¹⁴³ *ibid* 111.

¹⁴⁴ Samuel (n 126) 38.

¹⁴⁵ *ibid* 45-6.

¹⁴⁶ Berman (n 125) 908-09.

level of abstraction that integrates the more particular laws as a whole.¹⁴⁷ The treatment given to particular cases during Roman times seems to have, thus, changed. Romans did not reduce particular cases with broader principles or a deeper set of reasons. In other words, the multiple rules and legal concepts of Roman law were connected with the specific situations from which they derived.¹⁴⁸ On the other hand, the jurist of the eleventh and twelfth centuries attempted to create a systematic whole of law, as well as to derive abstract principles and concepts.¹⁴⁹ This method helped to harmonise the law, as to make possible to begin synthesising the plurality of medieval orders, such as canon law, feudal law, and customary law.¹⁵⁰ The post-glossators worked on adapting the contents of Roman law to the political, social and economic conditions in which they lived, but they also tended towards generating an abstract legal framework.¹⁵¹ The school of natural law believed that positive law could be deduced from principles of natural law, and it consisted of an immutable *regulae* transcending time and space applicable wherever human reason governed, just as in the case of mathematical principles. The work of the natural lawyers pushed Roman law to a higher level of abstraction.¹⁵²

The Enlightenment provided new grounds for achieving the unification of European law. As noted by Watson ‘[t]he Enlightenment led to the belief that law can be established on the basis of reason, and this intellectual impetus toward reform, married with the civil law tradition, led on to official codes of law.’¹⁵³ Codification offered the possibility of conceptually systematising legal propositions in the form of

¹⁴⁷ *ibid.*

¹⁴⁸ In Berman’s own words ‘Roman law consisted of an intricate network of rules which was not presented as an intellectual system but rather as an elaborate mosaic of practical solutions to specific legal questions. Thus one may say that although there were concepts in Roman law, there was no concept of a concept’ *ibid* 929.

¹⁴⁹ *ibid* 916-17.

¹⁵⁰ In medieval times, there coexisted a plurality of orders, thus, Church courts applied canon law, feudal courts applied feudal law and traditional community courts applied local customary law. Roman law was considered technically superior to other laws; consequently, it ‘supplied a conceptual framework, a set of principles of interpretation that constituted a kind of universal grammar of law, to which recourse could be made whenever it was needed.’ The Roman law was a broad framework to which the plurality of systems could be accommodated. See: Peter Stein, *Roman Law in European History* (First published 1999, Cambridge University Press 2005) 61.

¹⁵¹ Samuel (n 144) 48.

¹⁵² *ibid* 52-5.

¹⁵³ Alan Watson, *The Making of the Civil Law* (Harvard University Press 1981) 104.

a hierarchical pyramid, without direct reference to the Roman bodies of law.¹⁵⁴ The codes guaranteed a fresh start in law by abrogating former laws. Actually, the success of the codes – especially those based on the French model of code civil – partly relies in its distancing from their historical roots.¹⁵⁵

It is, thus, possible to affirm that civilian legal viewpoint as standing in our days are to a great extent built over the rationalist dogma propagated in the times of the French Revolution. The rationalist attitude in the continent led to the rejection of the old particularistic order and the praising of an abstract codification of legislative origin. The methodology prescribed by the rationalist wave was that of the application of the precepts of law by means of a logical syllogistic operation. In this manner, the theory of the separation of powers, together with the doctrine of the sources of law in the civilian legal world, gave overwhelming primacy to the legislative sources of law, namely, statutes and codes in detriment of particularistic judge made law.¹⁵⁶ Following this line of developments, the figure of the judge became secondary in a system that claimed aprioristic completeness and coherence. Consequently, judge-made law became incompatible with the postulates of rationalism. In this manner, legal precedents were often erased from the formal listing of sources in civil law countries, and their relevance in legal practice was barely revealed.¹⁵⁷

Nevertheless, civil law practitioners do not seem to have completely abandoned precedents as a form of making sense of the law, as well as, novel factual and hypothetical situations. History of course had an important effect on the form and importance of precedents. Komarek has argued that the Continental historical experience created a ‘legislative model of precedent’, which is characterised by its formulation in general and abstract terms and where particular facts play a considerably less relevant role than in the common law. In this way, practitioners in the civil law tradition seem to be historically acquainted with legal precedents –even if these don’t look like the ones operating in the common law tradition.

¹⁵⁴ Samuel (n 144) 57.

¹⁵⁵ Watson (n 153) 118-19.

¹⁵⁶ John H Merryman, *La Tradición Jurídica Romano-Canónica* (first published in 1969, FCE 2009)

¹⁵⁷ *ibid* 75-6.

Acknowledging that precedents have been in operation in the civil law context throughout history is an important realisation, as it allows us to see that precedents can exist beyond theories of doctrines that portray them as formal sources of binding character, such as *stare decisis*.

Precedents arose in both traditions basically as means to develop a shared custom or common reason. In this sense, precedents can be seen as having a major epistemological, consisting in the building (or at least aiding in the construction) of the common set of legal understandings. Nevertheless, this similarity seems to have suffered a major disruption due the rationalist challenge of the Enlightenment. This appears as one of the decisive moments in which both traditions seem to have acquired a greater distance in their treatment of precedents. The enlightened ideas questioned the rationality of guiding human conduct by custom and tradition.¹⁵⁸ Thus, as a response to the rationalistic challenge, the law began to be understood in a restricted way: as positive law valid due to the *potestas legislatiorial* of the sovereign State.¹⁵⁹ The set of new enlightened ideas created a tension between the understanding of precedents as evidence of a shared legal custom (or common reason) and precedents as formal sources of law.¹⁶⁰ This tension led to modifications in the use of precedents in the two legal traditions, but these changes were considerably different. On the one hand, in several of the countries belonging to the civil law tradition, past legal cases were not recognised as legal sources and, therefore, they were no longer considered as legal authorities of any sort. Precedents were still used in practice, but this situation did not have official recognition. On the other hand, in the common law context, legal precedents were gradually reinterpreted through the more restricted concept of legal authority. In this manner, therein legal precedents achieved formal recognition as binding sources of law through the doctrine of *stare decisis*. Despite of the formalisation of the status of precedents, in

¹⁵⁸ As note by Hernandez Marcos during the Enlightenment the law was used as an essential tool for unification and for the rational regulation of the social life. See: Maximiliano Hernandez Marcos, 'Conceptual Aspects of Legal Enlightenment in Europe' in Damiano Canale (ed) *A History of the Philosophy of Law in the Civil Law World, 1600–1900* (Springer 2009) 78.

¹⁵⁹ *ibid* 79.

¹⁶⁰ For Fuller the above mentioned tension existing in precedents is an indication of the antinomy of reason and fiat that inhabits the law. He believes that 'the case method of developing law tends to preserve [...] the whole view, which rejects neither branch of the antinomy of reason and fiat' Lon Fuller, 'Reason and Fiat in Case Law' (1946) 59 *Harvard Law Review* 392.

practice they preserved many characteristics of the former establishment. This seems to indicate that precedents serve a very generic epistemological and cognitive function, which is fulfilled differently in each legal system, and that goes beyond the formalised requests of the legal system.

4.4 Legal precedent based reasoning in AI and the Cognitive Sciences

As we have seen, reasoning with legal precedents consists in considering in some manner past judicial resolutions. Lawyers and judges are frequently looking backwards, searching for relevant prior cases to be used in the present. According to the artificial intelligence community, using backwards-looking techniques to solve current problems does not seem to be exclusive to the law, but it is a feature of intelligence in general. In this sense, solving current problems while using past experience seems to be a commonsensical matter.

If we analyse carefully our surroundings we will probably realise that reasoning with past experience is frequently used in several professional contexts, but also in our daily life – e.g. we might decide not to take a specific route back home due to our past bad experiences with traffic at certain hours, to avoid certain food due to past allergic reactions, or to cook our stew for two hours for tender meat as past successful experience indicates. In professional contexts we might observe, for example, that doctors rely on past similar cases to elaborate a diagnostic. Similarly, architects might use past designs to replicate successful solutions relevant to a new project, or to avoid previous problems. Nevertheless, the use of the past is much more complex than in the previous examples, as it can follow various aims.

According to the artificial intelligence and the law community, reasoning with legal precedents is, to a certain extent, an instance of a wider problem solving technique namely case-based reasoning. A reasoner performs case-based reasoning when comparing a new problem to a past case in order to draw conclusions or to guide a new decision.¹⁶¹ In case-based reasoning, a reasoner solves a problem by using the

¹⁶¹ Kevin Ashley, 'Case-Based Reasoning and its Implications for Legal Expert Systems' (1992) 1 *Artificial Intelligence and Law* 114.

specific knowledge of previously experienced situations.¹⁶² Kolodner notes that CBR is a type of analogy making in the context of solving real-world problems.¹⁶³ CBR reasoning can actually be used with different aims, such as, adapting old solutions to meet new demands, explaining new situations according to previous similar experience, criticising new solutions using old cases, using past cases to understand a new situation or building a consensus based on previous solutions.¹⁶⁴

According to Kevin Ashley, a legal reasoner uses past cases for a set of quite common tasks that can be summarised as follows: (1) legal reasoners often perform comparison between past and present cases in order to classify and diagnose the case at hand. The comparison of relevant similarities and differences between cases might lead to the conclusion that the new case belongs to the same or to a different class. Diagnosis operates as a form of classification which goes beyond categorisation by justifying the categorisation; (2) past cases are often used to plan or design new solutions. Successful legal cases might be used as templates in the future, while unsuccessful ones might be avoided or used to bring an action down. Designing is a kind of planning but it involves the active adaptation of past templates to meet current conditions; (3) experts might draw comparisons to assign value to current goods or situations. Lawyers might recur to past settlements to estimate the cost/benefit tradeoffs of their chosen plans; (4) reasoners might recur to past authoritative cases to justify similar decisions on procedural or substantive matters. When domain theories result too weak to support the correctness of a decision, arguments by analogy become highly valued. Although the reasoner might often encounter that there are a number of competing analogies and outcomes; (5) decision makers might try to explain or persuade their audience by using illustrative cases. These cases might try to persuade regarding the rightness of decisions; (6) experts might use cases to help themselves in the interpretation of rules that are not well defined; (7) cases play an important part in learning and teaching. Past cases represent useful lessons from which legal reasoners can learn the existing theories in

¹⁶² Ramón de López Mántaras, 'Case-Based Reasoning' in Georgios Paliouras and others (eds) *Machine Learning and Its Applications* (Springer 2001) 127-45.

¹⁶³ Janet Kolodner, 'Educational Implications of Analogy: A View from Case-Based Reasoning' (1997) 52 *American Psychologist* 57-66.

¹⁶⁴ de Lopez, (n 162); Janet Kolodner, 'An Introduction to Case-Based Reasoning' (1992) *Artificial Intelligence Review* 3-34

a domain, and that can be used to teach novices a domain of knowledge or certain analytical skills; and finally, (8) cases are important in the process of discovering, building and testing new domain theories. Legal reasoners derive new categories by drawing analogies with past cases, and test the limits of old theories or new hypothesis against past cases.¹⁶⁵

According to Ashley, the early attempts of the AI community to built computational legal experts show that legal reasoning, despite some preconceptions, is not only a matter of deducing results from legal rules. A set of possible reasons why logic proves insufficient for giving an account of legal reasoning has been identified; the existence logical and semantic ambiguity of rules, conflicts among rules and unstated conditions of application make problems in the legal domain ill-structured. Legal experts use techniques such as case-based reasoning to deal with the legal domain's ambiguity.¹⁶⁶

As we can see, the justifications underlying the use of past cases by legal reasoners according to the AI community are basically related to the features of human cognition. In this sense, this view contrasts most of the justifications provided by legal theories, which usually consider that the reasons behind precedent use are related to the specific aims of the law (e.g. legal certainty, formal justice, etc.). Nevertheless, as we have previously seen, the first use of precedents in both the civil and common law tradition seem to have been supported by epistemological and cognitive reasons that did not coincide with the particular aims and purposes associated to law. The usefulness of precedents for knowledge building and cognitive performance might be the reason why historically legal reasoners relied in past decisions even if there was no legal imperative to do so. Also, it might be the explanation why even the legal systems that do not recognise formally or even explicitly despise past legal cases, do show a form of reliance on prior decisions. Nevertheless, it is important to acknowledge that the aims that the law pursuits and that define the rule of law as we currently understand it, might enhance the necessity

¹⁶⁵ Ashley (n 161) 114-19.

¹⁶⁶ *ibid* 169-70.

to draw conclusions consistent with the past and, thus, motivate legal case-based reasoning to a certain extent.

Despite the fact that the research on AI and case-based reasoning seems to mitigate the particularities of the law, we consider that this approach is of great use in our quest of understanding precedent-based reasoning. The AI community aims to understand the ways in which human reasoners draw conclusions from the comparison of cases in order to design computer programs that perform this operations instead of persons, or assist human reasoners step-by-step in their decision making processes. In this manner, the studies on artificial intelligence and case-based reasoning in the scope of law aim to generate representations of the operations that human legal experts undertake when using past legal cases. Even if there is not a consensus on the way these operations are performed, the blueprints articulated to represent case-based reasoning provide us with quite useful information about the uses of legal precedents. In order to provide a map of the process that CBR implicates, the AI community has recurred to the studies regarding human cognition scientists to support their computational models.

AI researchers have observed that case-based reasoning is performed by following a general pattern. Ashley provides the following description of the steps involved in the process of case based reasoning.

Start: Problem description.

A: Process problem description to match terms in case database index.

B: Retrieve from case database all candidate cases associated with matched index terms.

C: Select most similar candidate cases not yet tried.

If there are no acceptable candidate cases, try alternative solution method, if any, and go to F.

Otherwise:

D: Apply selected best candidate cases to analyse/solve the problem. If necessary, adapt cases for solution.

E: Determine if case-based solution or outcome for problem is successful.

If not, return to C to try next candidate cases.

Otherwise:

F: Determine if solution to problem is success or failure, generalize from the problem, update index accordingly and Stop.¹⁶⁷

¹⁶⁷ *ibid* 122.

Ashley's steps can be seen as broadly following Aamodt & Plaza's classic model of CBR. The model represents CBR as a "4 R's" (i.e. retrieve, reuse, revise and retain). The process involves: (1) Retrieving previous similar experience, (2) Reusing the knowledge provided by previous cases to solve a new problems, (3) Revising the solution, and (4) Retaining the parts of the experience that are likely to be useful in the future.¹⁶⁸ From the general steps above described, probably the one that has received more attention is the assessment of similarity in the retrieval of past experience. There are different models that explain how human reasoners assess whether a case is similar or different to another, but it is generally understood that the process is not as straight-forward as it might appear at first glance. The AI community has represented the assessment of similarity as a twofold process that involves the analysis of surface similarities and structural similarities. Computer scientists have noticed that in the assessment of similarity not all features are equally important. Also, they have observed that the most similar case might not result the most useful one. However, reasoners will experience more difficulties to reuse a case that has significant differences with the target case, and they will need to perform more challenging adaptations. As a consequence of CBR the system retains new knowledge, in other words, it learns – although the manner in which this information ought to be retained is also a matter of debate.¹⁶⁹

Kolodner suggest a similar model to represent the case-based reasoning cycle. (1) It starts with retrieving potentially good cases from a body of memory. Retrieval is performed by using certain features of the new case as labels to search past cases. The results of the search are narrowed down by selecting the most relevant or in point cases. The selection is, however, not straight forward; cases can be compared on the basis of particular similarities or in more abstract levels. (2) The retrieved past cases or portions of cases serve to propose a ballpark solution. (3) This solution is adapted, some of them more straightforward and commonsensical than others. (4) The new solution or interpretation is then criticised. In case it does not survive a process of criticism, it means that it needs to be repaired, that is to undergo major

¹⁶⁸ de Lopez (n 162) 128.

¹⁶⁹ Ramón de López Mántaras and others, 'Retrieval, Reuse, Revision and Retention in Case-Based Reasoning' (2006) 20 *The Knowledge Engineering Review* 215-40.

adaptation. (5) In a further step, the decisions are evaluated in real world situations to revise their goodness and draw conclusions. (6) Finally, the new experience is stored as part of the body of memory, and becomes available for future problem solving.¹⁷⁰

The CBR processes described above help us understanding certain processes that legal experts perform when using past cases. When reasoning with legal cases, human experts ought to retrieve relevant past experience that respond for a new problem. As we shall see, retrieving useful past legal cases involves an analysis of relevancy that goes beyond the mere assessment of similarity. That, however, does not mean that legal experts do not perform a comparison of the similarities and differences between the past and present case. Nevertheless, with regards to legal cases, the assessment of similarities and differences is not performed merely at a superficial level, but at a level where pre-established legal categories are taken into account.¹⁷¹ In this manner, when legal reasoners compare the facts of legal precedents, they do not compare brute facts, but the facts in the light to legal concepts. Retrieval presupposes the pre-categorisation of the new case according to previously constructed legal concepts, classes or categories, and from which previous cases can be understood. The category into which a new case falls might not be always clear; thus, some classifying acts might not be definitive. Legal cases are preliminarily understood as belonging to a category, which aids the initial retrieval of the information. Nevertheless, the legal reasoner might decide to start a new search under a different category if his first attempt fails to provide him with relevant cases that are not only similar, but also useful for his purpose.

Determining the relevancy of legal cases involves assessing different factors that range from the already mentioned dimensions of conceptual relevancy, and factual

¹⁷⁰ Kolodner (n 163) 20-7.

¹⁷¹ Works on legal case retrieval have acknowledged that human legal experts seek relevant precedents taking into account knowledge about legal concepts and contextual information about the facts of a case. In this mixed search, the legal concepts indicate the content and legal meaning of the case, while the facts show its eventualities. See: Tamisin Maxwell and Burkhard Schafer, 'Concept and Context in Legal Information Retrieval' (2008) Proceedings of the Conference on Legal Knowledge and Information Systems: JURIX; Tamisin Maxwell and Burkhard Schafer, 'Natural Language Processing and Query Expansion in Legal Information Retrieval: Challenges and a Response' (2010) 24 International Review of Law, Computers & Technology 63-74.

relevancy, but also their juristic value.¹⁷² What is considered to be of juristic value has to do with certain institutional aspects as, for example, the hierarchy of the court that drafted the decision. Finding a case of the highest court that resembles the case at hand is an indication that the new case will be most likely decided along the same lines.

The evaluation of relevancy is, however, highly dependent on the context. This means that the similarities and differences that appeared irrelevant at once might become relevant under different circumstances, and that cases of low juristic value might however become relevant at some point. The contextuality of the assessment of relevancy is connected to the legal reasoners needs when retrieving past legal cases. Sutton has argued that the notion of relevancy is a dynamic notion with deep roots on the form in which the law is practiced. In his view, relevancy is closely connected to the attorneys needs in constructing mental models or cognitive maps of the law. Therefore, whether a case is consider relevant depends on its potential to contribute to the position that the practitioner is trying to defend.¹⁷³ Relevancy has a subjective dimension coincident with the legal reasoner's particular needs; thus, sometimes the most similar or in point cases might not be relevant if they are against the reasoners' pretensions. On occasions, some distant matches might result the relevant cases for legal reasoners if they can help supporting the client's claim.

Legal reasoners have incorporated into their minds a standard map of what the law is – that is, an objective institutional model transmitted through enculturation and that is more or less shared within the relevant community.¹⁷⁴ Practitioners' professional success highly depends in their capacity to generate orderly maps with the legal information available and to determine which are the stronger and weaker criteria supported within a system of law. The cognitive maps held by legal reasoners enable them not only to give account of a determinate area of law, but also to determine the position of a client's claim with respect to the whole body of laws. Judges are expected to reach legal decisions by using the stronger and most in point available

¹⁷² Maxwell and Schafer, 'Concept and Context...' (n 171).

¹⁷³ Stuart Sutton, 'The Role of Attorney Mental Models of Law in Case Relevance Determinations: An Exploratory Analysis' (1994) 45 *American Society for Information Science Journal* 186

¹⁷⁴ *ibid.*

cases, but the case of lawyers is different. Lawyering consists in arguing that a determinate claim is strongly supported by the system of law. In this way, lawyers will make use of any means possible to try to support their claim. Thus, cases that are not conceptually or factually relevant or that have a poor juristic value might actually become relevant if they are means to support a legal claim. Therefore, cases that in AI terms are reputed as 'harmful knowledge', and that generally retrieval systems attempt to filter, might actually be relevant under certain circumstances.¹⁷⁵

The mental maps of the law become useful instruments not only when retrieving relevant information, but also when assessing the potential success of adapting and reusing certain cases. Past legal cases show previously acts of classification or categorisation, but that does not mean that the resulting categories are static. Based on their cognitive maps, human experts also are able to detect when it is proper to make analogies or make distinctions that expand or narrow the previously determined categories. Experts also know when certain adaptations or stretches of categories are more difficult to sustain than others, and that they might receive stronger criticisms or stand less chances of success. Proposed legal solutions are generally more successful if they are similar, conceptually or factually, and if they have high juristic value or, in other words, if they are in point and highly authoritative.

As we have previously mentioned, the last stage of CBR is the retention of new cases. Recent legal solutions are retained in order to contribute to the systemic learning, but with regards to law, retention is more than a function of the capability of computational retrieval systems. Different legal systems opt for different ways of incorporating this systemic knowledge. The information that is retained and becomes widely available depends on the styles of law reporting of each jurisdiction. In legal practice the authority of past cases is also connected to the means by which the information is made available.¹⁷⁶ In this sense, legal reasoners might have access to prior cases that fully match a new case and the interests they are defending;

¹⁷⁵ Lopez Mantaras and others, 'Retrieval...' (n 169) 230.

¹⁷⁶ Certain legal precedents reports seem to possess a higher authority due to its expected reliability. See: Robert Berring, 'Legal Information and the Search for Cognitive Authority' (2000) 88 California Law Review.

nevertheless, if this case has not made publicly available it might not be easy to use it as an authoritative model for decision. This does not mean that the legal reasoner would not be able to find any use in this information; he could use it as a template, instead of starting from scratch. Nevertheless, in legal practice, legal experts expect to use authoritative templates that they could present and support as the best decision in a dialectic or adversarial context, in which case private, unpublished or unapproved precedents might not be considered as having sufficient strength.

All the basic tasks of CBR above described are potentially useful to describe precedent based reasoning across jurisdictions. Nevertheless, as we have argued along this thesis, different historical backgrounds have determined the degree of reliance on past cases decided by judicial bodies, and even the form in which this information is made available. These historically constructed conditions have powerful effects on the modes of legal reasoning. Thus, legal reasoning patterns might vary with regards to the particularities of each legal system.

Most of models of legal CBR provided by the community of artificial intelligence and the law have as a starting point the practice of precedents in the common law context. Computational theories of arguing with precedents, thus, tend to picture a form of reasoning where the assessment of fact plays a major role.¹⁷⁷ In this respect, the leading legal CBR systems HYPO and CATO hold that cases are collection of factors – that is, relevant legal facts with an outcome either in favour of the plaintiff or the defendant. According to Ashley, cases are understood to reflect factors in different magnitudes, that is, to be more or less extreme examples of a set of factors.¹⁷⁸ In this way, the processes of comparing cases, making analogies and drawing distinctions are understood in connection to the factual dimension of legal cases. Nevertheless, as we have previously mentioned, not all legal traditions give a

¹⁷⁷ According to Kevin Ashley '[...] the computational models of case-based legal reasoning that have been developed in AI & Law have all been designed to model legal inferences from the kind of fact-oriented case comparisons that underlie the Fact-Based Precedent approach.' See: Kevin Ashley, 'Case-Based Models of Legal Reasoning in a Civil Law Context' (International Congress of Comparative Cultures and Legal Systems of the Instituto de Investigaciones Jurídicas, Mexico City, 2004) 6.

¹⁷⁸ Kevin Ashley, 'Toward a Computational Theory of Arguing with Precedents: Accommodating Multiple Interpretations of Cases' in Proceedings of the Second International Conference on Artificial Intelligence and Law (ACM Press 1989).

rich description of the facts of the case. Therefore, the AI and law community has acknowledged the possible limitations on the computational models that have been designed so far, and has shown interest in understanding precedent based reasoning in the civilian tradition.

The increasing attention posed on precedents beyond the common law tradition seems to have also been identified by the artificial intelligence and the law community. Ashley – taking into account the fact that civil law systems seem to be increasingly using legal precedents – has identified two potential different lines of legal precedent based-reasoning: the abstract precedent scenario or the fact-based precedent scenario. In his view, the abstract precedent scenario is useful as it indicates that another court has already established a connection between an abstract rule or principle and a particular article of a statute or code, or has formulated an abstract rule or principle in a particular manner. The abstract precedent might or might not contain a description of the facts from which the rule or principle derived; thus, the future court will be more or less uninterested in understanding the factual context when making use of the precedent.¹⁷⁹ On the contrary, in a fact-based scenario, a precedent will be a useful indication on how a different court has decided a case in the view of a certain factual context. The decision usually has a rich description of the facts of the case, and the future court is overly concerned with how they should be evaluated.¹⁸⁰ The second scenario seems to be closer to the common law model of reasoning with precedents, while the first seems to be more representative of the civilian approach. According to Ashley, the main difference between the two approaches resides in the importance granted to the factual context of the case, but both are deemed useful inasmuch as they provide influential exemplars of courts' practice.¹⁸¹ Nevertheless, he argues that precedents with rich mention of the facts are somehow superior as precedents providing more concrete information help legal reasoners to fill legal gaps with more accuracy. This consideration motivates Ashley's suggestion to civilian legal systems to expand their mentioning of the factual circumstances of the case. Herein, we do not aim to discuss

¹⁷⁹ *ibid* 5.

¹⁸⁰ *ibid*.

¹⁸¹ *ibid* 6.

the rightness of this argument, as the decision not to include facts in legal decisions seems to be strongly entrenched in certain legal systems, and such a change in the tradition would require major efforts of persuasion.

In Ashley's view, since computational models of precedent-based reasoning are, to a great extent, implementations of the model of analogy making in the context of factual circumstances, they might be of limited relevance in civil law jurisdictions. These models will be deemed useful to the extent to which these systems allow reasoning with facts. For example, they might be of aid in illustrating some basic ways of case-based reasoning, such as drawing inferences from fact comparisons, testing hypotheses about the winning argument, providing counterexamples and distinguishing cases, and increase or decrease the importance of distinctive aspects.¹⁸² In this sense, to make these computational models useful for a different context we might need to attenuate the emphasis in the factual context.

Therefore, there are some questions that we should ask. How can we understand precedent based reasoning in a more abstract scenario that seldom, if ever, provides a statement of the facts of the case? Are abstract precedents absolutely different to those that have a rich statement of the facts of the case? Are the insights about factual precedents absolutely irrelevant when attempting to understand legal reasoning with precedents of a more abstract character? We consider that many of the insights on precedents provided by the AI & law community with respect to factual precedents are actually useful to understand abstract precedents.

In abstract precedent scenarios, past legal decisions do not provide a full statement of facts. The content of precedents might, however, range from a full factual description to an absolutely abstract construct. Whether a decision has a full mention of fact or just gives hints of the circumstances surrounding the case, these information can be used by the legal reasoner to inform the more abstract deliberations contained in the precedent. The distinction between factual and abstract precedent scenarios, thus, might not be as straightforward as it appears at first glance. In fact, legal experts from a specific legal system might have at hand precedents with different degrees of

¹⁸² *ibid* 25-6.

‘abstractness’ or ‘factualness’, deriving in slightly different precedent based reasoning approaches.

As we have seen, CBR is a form a problem solving method in which a subject uses past concrete situations to solve a new problem. In this sense, previous cases appear as past happenings immerse in the factual circumstances in which they arise, for which abstract legal decisions might not be properly considered as cases for the purpose of CBR. If that is the case, CBR might not be the default problem solving method in abstract precedent scenarios. Nevertheless, some of these more abstract precedents do have some indications of the facts of the case, in which case legal practitioners engage in some sort of reasoning involving facts. However, we ought to remember that the comparison is not performed between brute facts but between legal facts – that is, facts built around legal concepts or categories.

Even in abstract cases, where factual circumstances are absent, the legal reasoner might recur to other problem solving methodologies, such as analogy making. It is important to remember that CBR is just an instance of analogical reasoning, and that reasoners are able to make analogies beyond the dimension of facts. Abstract precedents can be also used for analogy making processes in a similar manner as in CBR with factual precedents. In this sense, one of the most important problem solving methods used in precedent-based reasoning is analogy making. Analogy making is a basic cognitive process used to make sense of the world, while at the same time generating new knowledge. In this respect, Thagard and Holyoak argue that ‘the human ability to find analogical correspondences is intimately linked to the evolutionary development of the capacity for explicit, systematic thinking.’¹⁸³

Methods as analogy and CBR are used by legal reasoners to build theories (in the psychological sense of the word) of different areas of law with whatever means they have available.¹⁸⁴ Nevertheless, theory formulation in law is usually performed in a dialectical or adversarial context, which means that these theories need to be strong

¹⁸³ Keith J Holyoak and Paul Thagard, *Mental Leaps: Analogy in Creative Thought* (MIT Press 1995) 16.

¹⁸⁴ Alison Chorley and Trevor Bench-Capon, ‘AGATHA: Automatisation of the Construction of Theoris in Case Law Domains’ in Thomas Gordon (ed), *Legal Knowledge and Information Systems. Jurix 2004: The Seventeenth Annual Conference* (IOS Press 2004).

to stand after a process of disputation. This means that these theories need to be built on strong legal features, such as in-point and juristically valuable precedents.

An important realisation has been that in the construction of these theories legal practitioners need to order numerous precedents, which might actually be contradictory. For Prakken and Sartor one criterion for dealing with conflicting precedents is selecting the ones that are more in point – but besides similarity lawyers could use other criteria like determining whether the precedent comes from a higher court or it is more recent.¹⁸⁵ This process seems to be so complex that computer models have not been able to account for the multifactorial assessment performed by human experts when determining the precedents relevant from a pool of multiple and potentially conflicting precedents.

4.5 Lessons on Precedent-Based Reasoning

As we have seen, precedents have an elusive nature that has been difficult to capture by a single theoretical effort. Nevertheless, the model that considers precedents as rules binding in an all-or-nothing way seems to have particular problems to portrait several aspects of precedent-based reasoning. Our exploration of precedents leads us to the conclusion that past legal cases are better understood as dynamic and flexible legal resources that have an important role in the construction of a systemic body of knowledge in the face of legal argumentation.

Precedents are deeply connected to the dynamics of legal argumentation – therefore, there is always the possibility that they will suffer an expansion or compression to include or exclude novel facts or hypothesis. However, this enterprise does not exist without constraint. Legal reasoners need to create narratives that ‘fit’ better within the relevant normative environment, and that are considered strong according to the institutional setting. Only this way they have the potential to resist an adversarial process.

¹⁸⁵ Henry Prakken and Giovanni Sartor, ‘Modelling Reasoning with Precedents in a Formal Dialogue Game’ (1998) 6 *Artificial Intelligence and Law* 245.

Identifying connections between different legal precedents and new real or hypothetical situations seems to be at the core of precedent-based reasoning. It is by being able to see how different past decisions ‘fit’ together and with other legal features, as well as how they relate with new facts and hypothesis that legal practitioners are able to build ordered ‘maps’ of the law. In this way, the capacity to accommodate numerous (and sometimes contradictory) legal precedents in an orderly map of the law is one of the main competences of legal practitioners of both the common law and civil law traditions. As we have seen the evaluation of precedents entails dealing with multiple factors, than range from the substance of the case to formal institutional features, such as hierarchy, age and so on.

Mexican (federal) legal precedents also may be assessed according to multiple factors. Precedents in that context do not follow a consistent format yet; thus, they range from formulistic and abstract statements to discursive formulations that include a description of the factual scenario of the decision and the reasons behind it.¹⁸⁶ In this manner, the assessment of in-pointness may be performed attending to the available facts and the established legal concept of category. Mexican practitioners also need to assess the formal characteristics of precedents: their rank according to the federal court hierarchy,¹⁸⁷ their age,¹⁸⁸ the jurisdiction they emerge from,¹⁸⁹ their category (according to the *jurisprudencia* and isolated thesis classification)¹⁹⁰ their

¹⁸⁶ It is true that the form of delivering precedents in the Mexican context is more consistent with those used in civil law jurisdictions than with the common law – although the legal ‘irritation’ analysed in previous chapters has somehow unsettled the form of articulating precedents, that now tend to be formulated within a more or less wide range of argumentative and factual detail. The unsettledness of precedents form is a fact that can open more possibilities in the use of past judicial resolutions, and, consequently, it might be convenient to address it as a potentially destabilising feature. Nevertheless, this thesis does not aim to engage with matters entailing judicial policy making, but more concretely with the ways legal users can make use of the available information in a somehow organise and predictable form.

¹⁸⁷ Federal precedents can be published by the Supreme Court of Justice (functioning as a full court or in benches), Circuit Plenaries or Collegiate Tribunals. The SCJN is the highest court, followed by the Circuit Plenaries and finally by the Collegiate Tribunals. Articles 215-217 Amparo Act of 2013.

¹⁸⁸ Precedents are classified in 10 epochs according to their time of publication. The precedents published during the first four epochs are considered as historical. Nevertheless, apart from the official classification, practitioners ought to mind the age of precedents in relation to other precedents.

¹⁸⁹ Federal precedents can emerge not only from the analysis of federal law, but also from the analysis of the law of the states. In this way, a precedents dealing with laws of the same jurisdiction as the case in hand, may be more authoritative.

¹⁹⁰ Mexican formally distinguishes between binding *jurisprudencia* and isolated thesis. *Jurisprudencia* emerges from (1) the reiteration of five uninterrupted precedents, (2) the resolution of the procedure to

relationship with other precedents,¹⁹¹ and so on. An important particularity of the Mexican system of precedents is the historical distinction between *jurisprudencia* and isolated thesis. The first are considered to be binding legal criteria, while the others are considered persuasive. Nevertheless, the fact that the legal reasoner needs to take into account a plurality of considerations dilutes the strong division between binding *jurisprudencia* and isolated thesis.¹⁹²

In this sense, Mexican legal practitioners, in the same form legal professionals in other legal systems do, need to be able to see and assess all relevant aspects affecting precedents. In our view it is this competence what Mexican legal practitioners are lacking of. That is why they are not able to see ordered patterns arising from a body of numerous precedents. In this manner, this is the expert knowledge that we need to help legal practitioners develop. This competence, however, requires the development of an embodied ability that goes beyond the acquisition of propositional knowledge regarding precedents.

cancel or dissolve contradictions between precedents, and (3) the deliberate substitution of precedents by the authorised tribunals. Articles 222-230 Amparo Act of 2013.

¹⁹¹ The reasoner needs to determine if there is a clear gravitational centre of previous decisions.

¹⁹² For example, *jurisprudencia* might lose force if it is not in-point with the case at hand or if there is a more recent and higher hierarchy precedent contradicting it.

5. Learning Precedents through Computer Assisted

Visualisation

“In the midst of chaos, there is also opportunity”

Sun-Tzu, The Art of War

5.1 Introduction

Experiencing challenges often leads us to reconsider some aspects of our practices. However, changing our practices and building new ones might require the acquisition of different knowledge. At such junctures, inquiring about the forms in which the new and necessary knowledge can be acquired or developed becomes of extreme importance. New knowledge might dawn spontaneously into an individual once he has realised the novel trends and needs that are transforming his practice. However, individuals might take time to arrive to such an acknowledgement, and they might take even more time to make these insights the new shared establishment. In fact, not even the passing of time can guarantee that the members of a certain community will be able to conquer this understanding or that they would be able to develop a more functional knowledge framework.¹

In this sense, the process of transition from one knowledge framework to another might be a long and uphill endeavour, as understanding, operating under and embracing the new schema in full can prove to be quite a challenge. In the case of revolutionary changes in the knowledge structures of particular communities, difficulties might be experienced on two levels: change might hit those deeply embedded within a specific tradition or framework, but it might also bring forward questions regarding the knowledge that should be transferred to future generations.

¹ Generally the existence of cognitive conflict or dissonance would be enough to consider changing the knowledge structures ruling a certain activity; however, emotional, social, motivational and other factors might also play an important role in delaying or stopping change. See: Janice A Dole and Gale M Sinatra, ‘Reconceptualizing Change in Cognitive Construction of Knowledge’ (1998) 33 Educational Psychologist 109-28.

Newer generations are ‘destined’ for a different *modus operandi* – that is, a framework which has yet to be mastered. In this way, after a major disruption, a community of practice will most likely need some time to recover; time for those members of the community who were bred into the former tradition to build new knowledge and to introduce future practitioners to it. For Holyoak and Thagard when the familiar patterns of action are broken and understanding of our surroundings becomes difficult, the mind needs to make new connections; in other words, it requires making a leap.² Facing the potential risk that this spontaneous process might not take place at all, it might not always be possible to wait for gradual processes of knowledge construction to take place. In this way, we might need to inquire if there are forms that facilitate directly the process of knowledge construction so as to increase the possibilities of a successful transition, as well as speeding up this process. This chapter aims partly at investigating the way in which tradition-bound Mexican legal practitioners can make the required ‘mental leap’; but beyond that it will also explore how to form practitioners with the necessary mindset for performing under changing circumstances.

In a legal system – where practitioners should at any time be able to account for what the law stands for, and securing a certain level of predictability is seen as a major aim of the legal enterprise – not seeing clear patterns arising from previous cases can turn into an important source of problems. Legal practitioners need to be able to analyse legal information in past legal decisions, in order to evaluate the legal scenario and assess the possibilities of certain arguments to succeed. Delay in the acquisition of this expertise does not only cause detriment to legal professionals, but it also undermines the possibilities for developing relationships of mutual trust between citizens and authorities. Therefore, waiting for a natural process of knowledge acquisition – that might be time-consuming or might actually never occur – seems to represent a burden to legal practitioners and to those citizens expecting to be living under a predictable system of law. With these considerations in mind, our analysis will additionally look into ways for speeding up the process of change and

² Keith J Holyoak and Paul Thagard, *Mental Leaps: Analogy in Creative Thought* (MIT Press 1995) 1-2.

guaranteeing that the community in transition develops accurate knowledge structures fitting the new set of needs.

This matter points us to an often overlooked topic in both comparative law and jurisprudence; that of the processes through which legal knowledge develops and becomes shared establishment at a certain place and time. In comparative law, the work of Pierre Legrand heralded a ‘cognitive turn’ that identified legal families and legal systems by the unique ‘legal mentality’ of their members.³ In legal theory too, certain cognitive structures shared by a group feature prominently in a wide variety of theoretical accounts of the notion of ‘legal system’, from the systems theoretical account of Gunther Teubner to the ‘interpretative community’ of Ronald Dworkin. However, while the emphasis on the cognitive-affective traits shared by the legal community confers an important insight, there exists little analysis on how these shared understandings arise and become a common knowledge background, over which practice is built. Seemingly, the knowledge structures that make a group of legal professionals a more or less cohesive community of practice are usually taken for granted. Moreover, the legal systems considered by theoretical accounts are typically mature systems that have evolved over several years or even centuries, and accumulated in the process a rich stock of knowledge and problem solving methodologies.⁴ Most importantly, these legal systems are regularly understood as developing under normal circumstances; that is, as following a progressive evolution, where the shared knowledge framework is not subjected to major challenges, revisions or accommodations, and no cognitive problem needs to be addressed.

The question we are left with is where these cognitive-affective features come from in the first place and how can we alter their course when they seem insufficient. For example, in Dworkin’s theory the legal system is already mature, its interpretative communities well established and benefiting from an abundance of data points. Even if not all judges and lawyers are demi-gods as Hercules, they seem to be working under a fair understanding of several aspects of their practice.⁵ In Legrand’s

³ Pierre Legrand, ‘How to Compare Now’ (1996) 16 *Legal Studies*.

⁴ Pierre Legrand and Antonio Machado, ‘Are Civilians Educable?’ (1998) 18 *Legal Studies*.

⁵ Dworkin’s interpretative legal theory recognises the important role of a community of practice conformed by a group of like-minded professionals. His theory relies on the fact that legal

approach, the common lawyer and the civilian lawyer are equally already ‘fully formed’, and so ingrained in the cognitive paradigm of their respective systems that they may well be ‘uneducable’ in principle, and unable to ever develop a true understanding of what it means to be a lawyer in a different legal system.⁶ In Legrand’s account, the cognitive-affective maps shared by a legal community appear as immutable structures deriving from nowhere. As a consequence, these theories are not designed to analyse and understand legal systems in radical transition, to the point that Legrand seems to deny that deep cognitive change is even possible.

The missing element in all these accounts, in our view, is legal education. Civilian and common lawyers are not born, they are made. Many of the mental frameworks shared by specific legal communities can be seen as the product of a number of socialising interactions or exchanges, from which legal education emerges as the most important process in forming the legal mind. Legal communities exist because of the relevant communications that provide them with a set of common values, beliefs, concepts and ways of doing things, or in other words, due to a communal set of cognitive-affective traits that characterise them. These communications are actually educational experiences through which a series of social communalities are transferred across generations. From all possible educational social interactions affecting legal professionals, the process of formal education seems to be particularly powerful in structuring the legal mentality. It is mainly in the process of formal schooling that lay minds are turned into legal minds or, in other words, where students learn the art of ‘thinking like a lawyer’ in that particular context.

Studying legal education and the way in which it imparts certain cognitive traits on its ‘raw material’ should therefore be, in our view, integral to both the jurisprudential question pertaining to the nature of legal knowledge and the comparative legal

practitioners form a community of practice that operates more or less consistently under a certain cognitive framework. Not only he relies on the fact that generally legal practitioners will arrive to similar interpretative solutions, but also in the fact that they have a clear common idea about what practices are considered legal practices. In this respect, Dworkin’s account depends in the existence of a strong procedural or methodological agreement about the law, which allows engaging into the legal practice consistently. Additionally, he considers that the long standing judicial history of a legal system will act limiting the interpretative solutions considered rational by the legal community. See: Ronald Dworkin, *Law’s Empire* (Hart Publishing 1998).

⁶ Legrand and Machado (n 4).

question regarding the most basic differences and commonalities between legal systems. From this it follows that to understand and to support the cognitive transition of a legal system such as Mexico, we need to look at the dimension of legal education much more urgently than at reforms of the legal framework (e.g. statutory indications on the use of precedents, as requested by the Mexican practitioners). It is through legal education that a different mental framework has to be delivered to both already formed professionals and new generations of legal practitioners. It is here that we encounter, of course, some systemic difficulties: educators that developed their own skill sets and cognitive schemata under one system are charged with imparting radically different modes of thinking to their students. At the same time, practitioners are often outside the reach of intensive educational measures, and tend to expect consistency in the knowledge displayed by younger generations.⁷ This tendency to reaffirm cognitive schemata by reproducing certain communications reminds us of the systems theory account of Luhmann and Teubner, and their emphasis on the tendency of systems to replicate themselves and their underlying conceptual orderings.⁸ To break this circle, we need therefore to enable cognitive schemata outside the established training pathways, and to address directly the development of cognitive skills, not just to introduce additional factual information (as in the above mentioned case of statutory indications). On the contrary, if we addressed the problem by drafting new explicit legal rules regulating how to deal with precedents (regardless of the fact that their operation does not communicate well by means of explicit procedural indications), they would eventually be ‘filtered’ through the same body of knowledge deriving from a rigid approach to law. This is the reason why our target should be to reach the deeply engrained cognitive-affective structures operative within that specific context.

In Mexico the legal community has been keen on thinking that legal education needs to be reformed to complete the transition started by the rule of law reformation program. While the most frequent argument is that Mexico needs to transit towards some pedagogical methods characteristic of the American legal education, this

⁷ It is for this reason that Dewey referred to education as the means that allows social continuity of life. See: John Dewey, *Democracy and Education* (Penn University 2001) 6.

⁸ See: Gunther Teubner, ‘How the Law Thinks: Toward a Constructivist Epistemology of Law’ (1989) 23 *Law and Society Review*.

statement is regularly not fully informed on educational, cognitive and jurisprudential research, and it does not tend to target particular regional deficiencies.⁹ In this context it has been missing a close exploration into the broad range of possibilities that educational research offers, which could be used to reform practice according to certain legal theoretical insights, and attending to particular local needs and circumstances.

Therefore, our following examinations will finally reflect on ways that could break that circle and aid the transition towards more functional knowledge structures, which allow legal practitioners (both present and future) to engage consistently in precedent-based reasoning. Supporting the cognitive transition of the legal community is likely to reduce the time of groundless practice that is producing the complaints of local professionals, and also to diminish the chances of holding conflicting ideas regarding practical matters. Herein, we aim to suggest a practical solution for the specific legal system, which not only helps the acquisition of abstract understanding with respect to the intrinsic flexibility of legal precedents, but also prepares legal practitioners to operate with full competence under the new framework. Therefore, we will discuss the potentially useful educational methods that could support developing the knowledge framework that the legal community needs.

5.2 Form an Substance in Legal Education

Education is often offered as the key to solve any sort of problem; however, it cannot be used just as an open discourse attempting to meet any kind of needs. Educational experiences need to be meaningful in different levels so that they have an important impact. Therefore, they need to be mindful of a set of several factors that have an important effect in the learning process. Educational solutions need to look not only at the knowledge that is to be learned, but also at the pre-existing cognitive biases held by the learners, the methods and even the learning platform that would best develop that particular knowledge. Education entails rich interactions that transport

⁹ See for example: José M Serna de la Garza, 'Apuntes sobre las Opciones de Cambio en la Metodología de la Enseñanza del Derecho en México' (2004) 111 *Boletín Mexicano de Derecho Comparado*.

much more meaning than the one expressively intended – thus, it is very important to be mindful of not only the substance that is aimed to be transmitted, but also of the forms in which it is delivered. In fact, when thinking about education, communication has to be understood broadly as the forms constitute meaningful messages in themselves. In this way, in educational interactions, the form or method is closely intertwined with the substance or subject matter.

Certain branches of educational research have extensively explored the numerous factors affecting the teaching-learning process – that is, the set of substantive and formal features that play a role in education. Legal education, thus, can benefit from the wider research of educational psychology and sciences education, where supporting the acquisition of new knowledge and generating conceptual change, seems to be a major concern. Herein we will attend to a series of considerations noted by the broader educational research. Additionally, we will take into account some perspectives developed concretely by researchers on legal education, which are potentially suitable to solve the problem of knowledge experienced by the Mexican legal community. Herein we will explore different considerations regarding the process of teaching and learning, which can help designing a functional platform to support the learning process of the Mexican legal community.

5.2.1 Pre-existing Cognitive-Affective Structures

To assist the transition of the entire Mexican legal system we ought to think that there are two different types of subjects that need to develop new knowledge structures: fully formed legal professionals and young law students who have not yet acquired a legal mind. At first, the distinction might appear irrelevant, but for educational purposes it is significant in the different approach called for each group. As we shall see, the knowledge structures of fully formed professionals are different than those of students in their formative years. This has important consequences for the process of teaching and learning. Educational solutions ought to be mindful of the previous knowledge schemata carried by potential learners in order to secure a good understanding and command of new knowledge.

The areas of psychology and education have for a long time recognised that the minds of learners are not empty vessels, but, on the contrary, they are naturally loaded with representations of the world.¹⁰ These pre-existing structures affect the reception of new knowledge: they might act as assets or liabilities, depending on their potential to impede or draw back learning. The previously loaded cognitive information determines the strength and difficulty of the learning experience. Understanding what learning might mean for a subject has an important educational effect; it determines the support that ought to be provided to the learner and the manner in which its previous knowledge needs to be addressed.

There are reasons to believe that the learning experience in young students and full formed members of a professional community is not exactly one and the same. Educational psychologists have argued that any subject engaging into a learning experience is actually going through a set of cognitive changes.¹¹ Nevertheless, fully formed professionals possess a set of more cohesive and deeply engrained structures, while early learners regularly have more scattered fragments of 'naïve' understandings that might be easier to change. In this respect, students in the process of formation might not have held yet structured cognitive-affective maps on a determinate subject domain. Thus, we can assume that early law students, who have not been provided with the cognitive framework that allows them to think as lawyers, do not have deeply embedded theories of what law is and what thinking as a lawyer means. Law students most probably will not hold strong pre-conceptions about the law, and most importantly what reasoning with precedents entails; therefore, to them, the introduction of this new knowledge most probably will not deliver a revolutionary shift, but just a more mundane form of knowledge acquisition.

¹⁰ For example, Ausubel noted that '[t]he most important single factor influencing learning is what the learner already knows. Ascertain this and teach him accordingly.' David P Ausubel, *Educational Psychology: A Cognitive View* (Holt, Reinhart, & Winston 1968) 18.

¹¹ Educational psychologists have frequently drawn on the insights of the history and philosophy of science to understand conceptual change in young students. They argue that conceptual change in students is similar to that happening in the minds of scientists during the so called scientific revolutions. The research on science education and pedagogy has frequently claimed that children held naïve theories of the world that often clash with the scientific concepts and theories that they learn at school. In this view when students are forced to change this previous framework through formal education, they undergo a radical paradigm shift similar to that happening during scientific revolutions. George J Posner and others, 'Accommodation of a Scientific Conception: Toward a Theory of Conceptual Change' (1982) 66 *Science Education* 211-27.

Nevertheless, it is important that educators identify the pre-loaded cognitive-affective structures held by law students and to directly address any problematic feature.

Fully formed professionals will most likely hold stronger cognitive-affective structures that would appear more difficult to change. Legal professionals do not hold 'naïve' assumptions, but a more developed and coherent framework of knowledge over which they operate in practice. Legal practitioners have a default form of understanding and for carrying on legal tasks. The possibility of changing their legal ways might even be perceived as a threat to their character of experts, and thus face some kind of opposition, not only cognitive but also of an emotional kind. Changing the minds of professionals is a more radical cognitive learning experience. Already formed legal practitioners are the ones that live an authentic cognitive revolution when attempting to change their minds. Therefore we may argue that the introduction of new knowledge needs to have a strong cognitive impact that is able to generate the needed gestalt-shift.

In essence there are no impediments to using the same learning platforms for both early legal learners and fully formed professionals. However, it is important to acknowledge that legal professionals might need to receive more assistance with what in their case becomes apparently a more difficult learning experience. In this respect, we might need to reflect if additional educational methodologies might be needed to aid the transition of fully formed professionals. According to educators, those difficult learning experiences resulting from the existence of pre-charged biases might benefit from the introduction of meta-learning strategies.¹² These strategies generally are used when previous beliefs or values clash with the new (to-be learned knowledge) in a way that might hinder the acquisition of knowledge. Meta-learning involves an active reflection by the learner on the limits of their previously held knowledge in contrast with the new knowledge.¹³ We consider that this type of methodologies might help enhance the learning of those individuals with a heavier bias. This thesis, however, will focus on the design of a main educational

¹² See: Richard T White and Richard F Gunstone, 'Metalearning and Conceptual Change' (1989) 11 *International Journal of Science Education*.

¹³ Posner (n 11)

platform that could be used by both types of learner, both law students and fully formed practitioners. In any case, we acknowledge that there are some peripheral activities to be developed in the future towards enhancing the educational experience of different types of learners.

5.2.2 Computer Assisted Education

Delivering a different cognitive-affective framework to that which has been circulating in and outside the law schools in Mexico can be somehow tricky. The usual problem in such transitions is who can deliver the novel form of knowledge: that is, who can actually stand out of the establishment and start drawing on something different. Neither developing knowledge in a group of educators, nor bringing educators from outside to, later on, educate the quite big group of Mexican legal practitioners and law students, seem like feasible measures towards introducing change. Moreover, the knowledge that the legal community needs to develop is mainly of tacit character, and, consequently, communicating a set explicit concepts, beliefs and procedures might be of limited use. Expository ‘transfer’ of knowledge does not appear as the adequate means to achieve a good understanding of precedent-based reasoning, as this type of procedural knowledge is not easy to enclose by means of explicit directions. What this legal community needs is to develop a type of embodied knowledge that is only possible by practically engaging in precedent-based reasoning.

Legal artificial intelligence systems (legal AI) meet these criteria. At their best, they are build on sound cognitive science principles and therefore particularly suitable for the type of cognitive change discussed above.¹⁴ Japan, a country that also faced an important legal transition from a passive role for the lawyers towards one more active and creative, considered computer assisted legal education as a prime enabler to bring about the necessary change to legal education.¹⁵

¹⁴ John R Anderson and others, ‘Cognitive Tutors: Lessons Learned’ (1995) 4 *The Journal of the Learning Sciences*.

¹⁵ Hajime Yoshino and Seiichiro Sakurai, ‘A Knowledge-Based Systems Approach to Educating Creative Legal Minds’ in *Proceedings of the ICAIL-05 Workshop Artificial Intelligence and Law ICAIL-2005* (ACM Press 2005); Takahiro Tanaka and others, ‘Case Based Online Training Support

Additionally, computer assisted educative systems allow the building of interactive scenarios where learners can develop ‘hands on’ knowledge. Legal AI allows the active involvement of the learner in relevant activities designed to develop embodied knowledge.¹⁶ In this form, legal learners are enabled to develop their capacity to identify patterns and awaken their professional intuition. An advantage of computer assisted platforms is that they allow active interaction under controlled circumstances. Learners might not yet be ready to engage in the chaos of real life, where there usually exists a much broader information load. Nevertheless, a somehow simplified environment allows them to build the necessary knowledge to ‘see’ patterns in more complex scenarios.

5.2.3 Visualisation

A way to help ‘seeing’ the emerging patterns of law displayed by precedents could be achieved by using the method of visualisation. The graphical representation of argumentation has often been considered as an important tool for exploring and assessing arguments. Therefore, computer scientists have developed automated tools to assist with the graphical representation of arguments. These tools – which usually produce ‘box and arrow’ graphs – have often been created to ‘map’ an argumentative field; however, some others have been built with the educational purpose of teaching critical and argumentative skills. The general premise underlying these educational platforms is that the user will improve his hands-on knowledge. The analysis of the empirical evidence regarding the use of this kind of support software has not yet been able to provide a definitive conclusion regarding the benefits of such platforms; however, the overall positive results can be seen as sufficient reasons to believe that computer assisted visualisation does help in improving argumentative related skills.¹⁷

System for ADR Mediator’ In *Proceedings Of The Tenth International Conference On Artificial Intelligence and Law ICAIL-2005* (ACM Press 2005).

¹⁶ Wouter van Joolingen, ‘Cognitive tools for discovery learning’ (1999) 10 *International Journal of Artificial Intelligence in Education*; Cristina Conati and Kurt van Lehn, ‘Toward Computer-Based Support of Meta-Cognitive Skills: a Computational Framework to Coach Self-Explanation’ (2000) 11 *International Journal of Artificial Intelligence in Education*.

¹⁷ Susan van den Braak, ‘A Critical Review of Argument Visualization Tools: Do Users Become Better Reasoners?’ in *Workshop Notes of the ECAI-06 Workshop on Computational Models of Natural Argument* (2006); Oliver Scheuer and others, ‘Computer-Supported Argumentation: A Review of the State of the Art’ (2010) 5 *Computer-Supported Collaborative Learning*.

Visual maps have also been frequently used in the area of law, where several AI expert systems have been proposed to represent legal argument. While it is not uncommon to promote this type of expert systems for use in legal education, few of the existing approaches have been designed with an educational purpose in mind; they have instead tended to emerge as decision support tools, which are then assigned a secondary function as teaching or training aid. Kevin Ashley's LARGO ('Legal ARGument Graph Observer') system deviates from this pattern.¹⁸ The LARGO system has been built as an educational tool that helps students reconstruct examples of hypothetical reasoning by representing these in simple diagrams. LARGO is based on the landmark HYPO expert system.¹⁹ The actual follow-up to HYPO, CATO, was already an educational aid and not just a reuse for a secondary market.²⁰ Consequently, the system has been built taking into account insights coming from educational theory. Unlike many other AI and law systems promoted as teaching tools, both CATO and LARGO have been subject to some empirical evaluation of their efficiency; the fact that in this respect the picture remains ambivalent is in itself an important finding.²¹

The hypothesis behind the program was that students who used LARGO to diagram hypothetical reasoning would learn and acquire skills better than learners not using the expert system. Therefore, the hypothesis was evaluated by two successive experiments: one in 2006 and another in 2007, which included first year students of the University of Pittsburgh. The initial group using the system in 2006 showed signs of having benefited from the use of LARGO, but the larger sample of students using the system the following year was not able to reproduce the same results.²² Other

¹⁸ Kevin Ashley, 'Teaching a Process Model of Legal Argument with Hypotheticals' (2009) 17 *Artificial Intelligence and Law*.

¹⁹ Kevin Ashley, *Modeling Legal Argument: Reasoning with Cases and Hypotheticals* (MIT Press 1990)

²⁰ Vincent Alevan, *Teaching Case-Based Argumentation Through a Model and Examples* (PhD Dissertation, University of Pittsburgh 1997).

²¹ Vincent Alevan and Kevin Ashley, 'Evaluating a Learning Environment for Case-Based Argumentation Skills' in *Proceedings of the 6th International Conference on Artificial Intelligence and Law ICAIL-97* (ACM 1997); Kevin Ashley, Ravi Desai, and John M Levine, 'Teaching Case-Based Argumentation Concepts Using Dialectic Arguments Vs. Didactic Explanations' in *Proceedings of the 6th International Conference on Intelligent Tutoring Systems ITS 2002* (Springer 2002).

²² *ibid* 350-55.

studies have provided similar inconclusive results regarding their capacity to help improving the learner's performance.²³

As Larkin and Simond noticed 'a diagram is sometimes a thousand words'; however, that is not always the case.²⁴ The possibilities for a diagram to succeed as a communicative or educational tool depend on a set of factors, a point also raised by Cox who distinguished three of such grounds: 'a) the cognitive and semantic properties of the representation; (b) the match between the demands of the task and the type of information read-off afforded by the representation and (c) the effects of within-subject factors (e.g. prior knowledge, cognitive style).'²⁵

For these reasons, even if LARGO is a good starting point, we must build a system that meaningfully represents the particular features of precedents which seem to cause doubts in the Mexican community and, also, that targets the cognitive style of these users. Our limited reuse of the LARGO system, thus, responds to the fact that it does not reflect many of the features of precedents that are problematic for the Mexican legal community and that need to be directly approached by our educational platform. In addition, diagrammatic representations along the lines of the LARGO system might be somehow sterile as communicative tools. Therefore, we propose a different form of visual tool that distances from the arguments as 'box and arrow graphs' design commonly used in legal AI. In this particular case we consider that a visual metaphor might be worth a thousand words. This tool might help 'seeing' different aspects of precedents (beyond those represented by LARGO), and, also, it might aid activating certain emotional dispositions in our learners that prepares them for a different form of legal practice.

²³ Bart Verheij, 'Argumentation Support Software: Boxes-and-Arrows and Beyond' (2007) 6 *Law, Probability & Risk*; Burkhard Schafer, 'Can You Have Too Much of a Good Thing? A Comment in Bart Verheij's Legal Argumentation Support Software' (2007) 6 *Law, Probability and Risk*.

²⁴ Jill Larkin and Herbert Simon, 'Why a Diagram is (Sometimes) Worth Ten Thousand Words' (1987) 11 *Cognitive Science*.

²⁵ Richard Cox, Representation 'Construction, Externalised Cognition and Individual Differences' (1999) 9 *Learning and Instruction*.

5.2.4 Analogies and Metaphors

When we face novel material, one basic human reaction is to search for similar experiences that give an explanation to the new one. In other words, we attempt to understand the unknown by creating parallelisms or correspondences with experiences stored in our memory. This process of comparison and transferral of knowledge is what resides at the core of analogical reasoning. Analogy is a basic cognitive tool that allows us to see relational patterns or ‘sameness’ connecting two or more experiences, and in that manner, it helps us to expand our knowledge. In analogy making we can distinguish two elements: a target, which is the phenomenon that needs to be explained, and the source, which is the previously known phenomenon that serves to reveal some characteristics of the target. Identifying resemblance between a source and a target allows us to transfer some knowledge from one to the other.²⁶

Some analogies result spontaneously in our quest to understand the world that surrounds us, but some others are deliberately created to communicate complex ideas and emotions. Certain forms of analogies, such as metaphors, connect targets and sources that seem quite remote from each other.²⁷ In literature it is very frequent to find metaphors comparing people or sensations with objects of nature or human artefacts, in order to express people’s qualities, appearance or feelings. It is often the case that a good metaphor more easily transfers complex situations than a simple description. Due to their evident expressivity, analogies and metaphors are no surprising a common educational resource used to communicate and create familiarity with new material. For example, explaining to young learners that ‘an atom is the basic unit of an element’ might be less complicated if we analogise atoms with Lego blocks. Atoms and Lego blocks are, at first glance, very different; one of them is very visible toy that comes in different colours and the other one is an invisible to the eye piece of matter. Nevertheless, both of them have a similar function: they are basic pieces that serve to build different structures. In this way,

²⁶ Holyoak and Thagard (n 2).

²⁷ Dedre Gentner and others, ‘Metaphor Is Like Analogy’ in Dedre Gentner, Keith J Holyoak and Boicho K Kokinov (eds), *The Analogical Mind: Perspectives from Cognitive Science* (MIT Press 2001) 199-254.

communicating to learners that atoms, like Lego blocks, are elemental structures that make everything around us, might actually help them expand their understanding of atoms. Educational analogies and metaphors can be a very important means in enhancing learning experience, but they have to be carefully selected in order to be effective.²⁸ Meaningful analogies and metaphors have to show that there are relevant parallelisms between the source and the target, which justify extending certain piece of knowledge from the one to the other. The research on educational metaphors and analogies has indicated that good metaphors have an important value for learners, but that they risk being misleading if not carefully selected and properly introduced.²⁹ Therefore, it is highly important that our metaphors, verbal or visual, have strong similarities with the subject to be explained. This is due to the fact that analogies and metaphors are more than communication devices; they actually possess the capacity to shape our understanding of a determinate matter.³⁰

The law has repetitively recurred to metaphors in order to understand more complex phenomena. Actually, several metaphors have marked the way we think about different legal issues.³¹ The learning platform we propose uses a metaphor to deliver a general understanding of the functioning of legal precedents. We use the image of the battle to represent the elusive nature of precedents. In fact, the law holds an intimate relationship with war that can be traced back through centuries. In this way, the similarities between law and war might well go beyond a simple metaphor. We prefer to use the image of war in a metaphorical way due to the fact that the historical link is not felt strongly in our days. Nevertheless, building on the historical connection between law and war allows us to understand the soundness of the comparison.

²⁸ As noted by Ortony '[t]he great pedagogic value of figurative uses of language is to be found in their potential to transfer learning and understanding from what is known to what is less well-known and to do so in a very vivid manner.' Andrew Ortony, 'Why Metaphors are Necessary and not Just Nice' (1975) 25 *Educational Theory* 53.

²⁹ Hugh G Petrie and Rebecca S Oshlag, 'Metaphor and Learning' in Andrew Ortony (ed) *Metaphor and Thought* (first published 1979, Cambridge University Press 1993).

³⁰ George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press 1980).

³¹ For example, certain legal developments have been marked by the metaphor that assimilates the corporation to the person. See: Linda L Berger, 'What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law' (2004) 2 *Journal of the Association of Legal Writing Directors*.

Trial by combat or judicial duel was a common method to settle disputes both in Britain and the continent. The battle could involve a duel between individuals, but also a fight between entire groups. In Britain, the formal trial replaced gradually the combat, and slowly the crown started gaining monopoly over the use of violence – although this process was seemingly longer than the one taking place in the continent. An important fact connected to this development was the emergence of the legal profession as a powerful independent body, which created in the process a set of complex arguments and fictions. The common law professionals seem to have perpetuated their historical legacy in a stronger form than their continental counterparts; it is in their history the reason why their model of legal practice and education prepares them to encounter war.³²

The image of the law as a battle is quite common in common law systems, where there seems to exist a deep understanding that the trial process involves some kind of duel between the parties; where the lawyers perform as the ‘seconds’ and the judge as the neutral arbitrator. Karl Llewellyn, one of the most influential advocates of legal realism, was well aware of the war-like nature of the law when he described the ‘duelling cannons of interpretation.’ He clearly saw that the law was struggle when he argued that every ruling could be rightfully ‘knocked out.’³³ Nevertheless, not only the common law is the product of war. In ‘The Struggle for Law’ Jhering argued that:

‘The end of the law is peace. The means to that end is war. So long as the law is compelled to hold itself in readiness to resist the attacks of wrong – and this it will be compelled to do until the end of time – it cannot dispense with war. The life of the law is a struggle, – a struggle of nations, of the state power, of classes, of individuals. All the law in the world has been obtained by strife. Every principle of law which obtains had first to be wrung by force from those who denied it; and every legal right – the legal

³² For a fuller account on the historical similarities of war and law see: Burkhard Schafer and Panagia Voyatzis, “‘The End of the Law is Peace, the Means to this End is War’”: Jhering, Legal Education and Digital Visualisation’ in Eric Schweighofer and others *Zeichen und Zauber des Rechts – Festschrift fuer Friedrich Lachmayer* (Weblaw 2014) 127-52.

³³ Karl Llewellyn, ‘Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed’ (1950) 3 *Vanderbilt Law Review* 395.

rights of a whole nation as well as those of individuals – supposes a continual readiness to assert it and defend it. The law is not mere theory, but living force.’³⁴

This last image is particularly sound as it portrays the law as an ongoing battle taking place with every legal trial. The law appears as a particularly dynamic and unsettled enterprise. In this form legal contents appear as being permanently negotiated upon each legal encounter. This picture puts into perspective the enlightened portrait of law as a set of certainties definitely settled in advance; an image that has resounded strongly in the minds of several generations of Mexican practitioners. Understanding the idea of law as a constant struggle might help this legal community feel more at peace with the absence of fixed certainties, and lead them to find securities and opportunities in war-time.

However, we must be alerted to certain possible implications of the use of the war metaphor in law. In some adversarial systems, it has been noted that metaphors like that of law as battle might take law’s combative aspect too far.³⁵ Nevertheless, we limit our war to the ground of reasons, where the only weapons are legal arguments. Therefore, in this way we limit the metaphor from reviving the violent characteristics of trial by combat. In fact, the platform we propose shows only argumentative opposition, without bringing the belligerent personal attitude that the in-class Socratic Method unfolds. Moreover, we believe that emphasising the struggle between legal reasons is an important deterrent from actual violence.

Another important implication of our metaphor is that it reminds us that war is not usually a reckless enterprise; that in war there is restraint. People usually assess carefully the scenarios they might face when going to battle. Before going to war, it is necessary to evaluate the strength of our troops – our soldiers, their ranks, their weapons and skill – opposite to our adversary’s artillery and advantages. War is complex and involves the assessment of a broad scope of eventualities (let’s not forget that Napoleon lost the Battle of Waterloo due to unforeseen weather conditions) but good strategists know well their chances. Our position might

³⁴ Rudolf von Jhering, ‘The Struggle for Law’ (Callahan and Company 1879) 1.

³⁵ Elizabeth G Thornburg, ‘Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System’ (1995) 10 *Wisconsin Women’s Law Journal*.

sometimes call for riskier moves. For example, if in the middle of a battle we cannot get out and our possibilities of winning are minimal, we might send our only soldier in hope that he turns into a mythological hero and defeats a whole army. But hoping that a hero will make us win a difficult battle does not mean we do not know where our chances stand. When sending a lonely soldier to fight a war we must know that we are defying what it is most certain to happen. The same holds for those that have the best soldiers and the most technologically-advanced weapons: they must know that even if there are no absolute assurances, they most certainly will succeed. This realisation is equally useful for the litigating warrior and for the impartial judges. Judges also need to be able to understand the battleground and where the strongest factors reside. Knowing the battle-ground allows judges to assess the arguments of the parties and their own posture on the matter.

5.2.5 Reaching Emotions

An important matter regarding analogies and metaphors is their power to unleash emotional reactions; that is, they can persuade about the emotional attitude that should prevail in a specific situation. Thagard's recent analysis of the emotional dimension of cognition has suggested that by using analogies we are capable of transferring or generating complex emotional states.³⁶ In this respect, the use of metaphors cannot only help us in communicating a new idea or a 'cold' description of a phenomenon, but also in delivering a 'hot' emotional message.

The metaphor that we suggest is an emotion-triggering device. The use of the battle to teach the Mexican legal community how to reason with precedents aims also to carry on some emotional changes. With the images of war and battles we aim to activate legal practitioners into engaging with the ongoing 'struggle for law.' Instead of being passive recipients of fixed authoritative orders, we would like them to engage in a more active process of meaning construction: in other words, we want them to 'join the fight'. This image has also important implications regarding the

³⁶ Paul Thagard and Cameron Shelley, 'Emotional Analogies and Analogical Inference' in Paul Thagard, *Hot Thought. Mechanisms and Applications of Emotional Cognition* (MIT Press 2006).

moral life of the law and the role of legal practitioners in this enterprise, which we will not be able to discuss as it goes beyond the scope of the present thesis.³⁷

Another important emotional state that we are willing to impart with our battle metaphor is the feeling of certitude in flexible, changing and contested environments. As we have seen throughout this work, the uncertainty experienced by the legal community with regards to having a plurality of precedents was mostly ‘sensed’, rather than factual. In this way, we aim not only to deliver a ‘cold’ cognitive understanding on how to build certainties by creating orderly maps of legal precedents; we also aim to build a different affective framework. We may be able to create a different emotional state in the recognition that practitioners are able to find certainties even in less straight-forward legal indications, and despite the fact that these certainties are at imminently defeasible.³⁸

5.3 The Battle of the Precedents: Facilitating Legal Education with Computer Assisted Visualisation

In the previous chapter we explained how a system of precedents provides a more or less wide range of past decisions of a certain degree of authority that can be evaluated according to a set of complex considerations (e.g. precedents of lower courts are trumped by precedents of higher courts; new or old; in point or tangential; decided by majority or unanimous decisions; line of precedents or isolated precedent; etc.).

The metaphor or the battle is a semantically rich resource to understand these characteristics of legal precedents. Precedents are actually marks of previous legal battles, and consequently they might show traces of the struggle in their argumentative part or in the dissenting opinions. Also, precedents are context-sensitive sources of law, which, like soldiers, they possess a rank and other

³⁷ For example, according to Lon Fuller ‘partisan advocacy plays a vital and essential role in one of the most fundamental procedures of a democratic society.’ See: Lon L Fuller and Kenneth I Winston, ‘The Forms and Limits of Adjudication’ (1978) 92 Harvard Law Review 384.

³⁸ MacCormick stated that ‘the certainty we can have in law is, at best, [...] defeasible certainty.’ Neil MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning* (Oxford University Press 2005) 33.

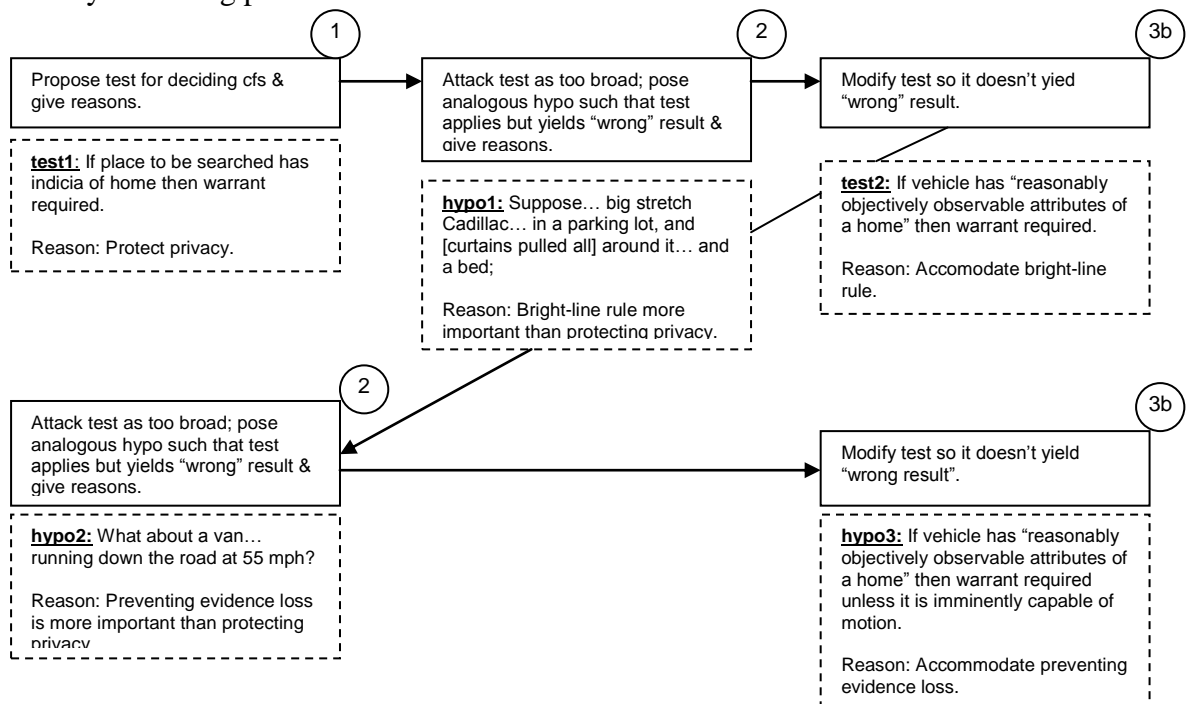
characteristics that determine their overall strength. Similar to troops, precedents stand in groups that reinforce their strength and combat during attacks. As the legal war is regularly an ongoing one, our soldiers and troops can always suffer new and unexpected attacks that might harm or eliminate them. Using this metaphor we would like to introduce a computer assisted visualisation platform that should allow its users to understand legal precedents along these lines and, additionally, to acquire the necessary expertise.

5.3.1 The LARGO System

First we would like to have a closer look at the LARGO system, from which we take some inspiration. LARGO focuses on one aspect of case-based reasoning: testing the applicability or ‘in-pointness’ of a precedent to a given scenario by means of hypotheticals. Hypotheticals are ‘what if’ situations that challenge the substance of the precedent and might lead to either its expansion or its narrowing. Hypothetical reasoning is an exploratory tool to look into the meaning of concepts, rules and doctrines and draw their possible limits. This system reinforces the dialectical model of dispute that characterises precedent-based reasoning, and which was also the core of the earlier systems HYPO and CATO. The system was designed to have early (common) law students engaging with this dialectical interplay, but a similar system can be imagined to aid fully formed lawyers that have not developed fully the necessary adversarial skills.

LARGO uses U.S. Supreme Court’s oral arguments to show how judges constantly perform an assessment of similarity between previous rules, doctrines or principles and hypothetical situations that are somehow ‘disruptive.’ This assessment necessarily entails narrowing or expanding the rule, doctrine or principle to stabilise the disruption. This constant dialogue between the settled certainties of the law and factual or hypothetical situations is what keeps a legal system from stagnating. Nevertheless, as we have seen throughout this thesis, this mode of thinking about the law has not been properly reinforced in the minds of Mexican legal practitioners, which makes this feature of LARGO particularly attractive to accomplish our purposes.

An illustration of this system might, however, help to understand it even better. In the case *California v. Carney*³⁹ (used by Ashley and a series of works in the field of AI and law)⁴⁰ the general rule involves that the search in a person's dwellings requires a warrant. In the case at hand Mr. Carney had a motor home. The question is whether motor homes can be considered dwellings for the law or they are cars? According to the prosecution: If the place that is searched has indicia of mobility and is self-propelling, then no warrant is required, it is a car. According to the defence the test should be different: If the place to be searched is a motor home, then it has to be treated as a dwelling compartment and warrant is needed. The judge uses hypotheticals to question both sides. He asks the prosecution: If the vehicle has a camper's tent attached to it, would this be a home? The prosecution can either stick to their initial assertion (but knowing that it is under attack) or try to offer a narrower test by excluding problematic situations.



5.1 LARGO Reasoning Diagram Source: K Ashley 2009, 329

³⁹ California v. Carney 471 U.S. 386 (1985)

⁴⁰ Ashley (n 18).

These diagrams aim to introduce the dynamic and defeasible nature of legal reasoning. Drawing on insights from the ‘Best Practices for Legal Education’, Ashley argues that reasoning with hypotheticals is particularly suitable ‘to demonstrate complexity and indeterminacy of legal analysis.’⁴¹ In this respect, the use of hypotheticals might help in attaining some of our purposes, especially that of introducing the idea of law as a complex and undetermined enterprise in the Mexican context. As we have argued before, one of the major misunderstandings regarding the use of precedents in that particular context is that they are expected to operate as clearly determined, settled rule statements. Arguing with hypotheticals allows legal practitioners to come into terms with the idea that legal certainties are not static but they can always suffer revisions according to others considerations. Such revisions are performed along the lines of broader principles or policies; consequently, reasoning with hypotheticals allows the incorporation of broader social and political considerations into the process of legal reasoning.⁴²

Although the model of hypothetical reasoning captured by the LARGO system has been created according to common law understandings of legal practice, that does not exclude its potential usefulness in the civil law world.⁴³ In the comparative research of the Bielefelder Kreis it was observed that ‘[i]n performing their roles as organizers, rationalizers and critics of precedent, academics in some systems in the study make extensive use of hypothetical cases in their work [...] Indeed, it is a major technique used in the United Kingdom and in the United States, and also in most civil law countries.’⁴⁴ The use of hypotheticals is then seen as having a series of potential uses in legal reasoning:

⁴¹ Roy Stuckey and others ‘Best Practices for Legal Education. A Vision and a Roadtrip’ (Clinical Legal Education Association 2007) 214.

⁴² Trevor Bench-Capon and Giovanni Sartor, ‘A Model of Legal Reasoning with Cases Incorporating Theories and Values’ (2003) 150 *Artificial Intelligence*.

⁴³ This expert system and ones following the HYPO-CATO tradition tend to think about hypothetical reasoning necessarily in factual grounds – i.e. they understand new hypothetical situations as a set of highly detailed facts to be assessed in relationship to a determined rule, doctrine or principle. Nevertheless, we should not be deterred to use this sort of platform in a civil law system as there hypothetical reasoning is also of high importance. As the civil law mind is well known for preferring more abstract discussions, which means that even if they use a factual style of hypothetical reasoning considerably less often than common law practitioners, they also follow a form of hypothetical reasoning of higher level of abstraction.

⁴⁴ Neil MacCormick and Robert S Summers (eds), *Interpreting Precedents: a Comparative Study* (Ashgate-Dartmouth 1997) 528-29.

1. ‘construction of clear cases to which a code section, statute or doctrine must apply if it is to have any rational application;’
2. ‘the construction of *reductio ad absurdum* arguments demonstrating the unsoundness of proposed applications of code sections, statutes or doctrinal formulations;’
3. ‘the elaboration of coherent patterns of applications of authoritative language and demonstrations of how proposed or possible applications would not be coherent;’
4. ‘the formulation of paradigm cases so as to display a policy rationale in its clearest application;’
5. ‘the articulation of distinctions between paradigm cases and borderline cases;’
6. ‘the creation of conceptual bridges between cases along a continuum;’
7. ‘use [of] a well-designed hypothetical case to help justify extending a rule;’
8. ‘use of a hypothetical case ... to help justify rejecting the application of a rule in a precedent to the case ... about to be decided.’⁴⁵

Of these points, 3, 4, 5, 6, 7 and 8 entail important procedural knowledge that ought to be mastered by anyone engaging in precedent-based reasoning, and that need to be particularly reinforced in the Mexican legal community.

The LARGO system aims to address all these points by engaging students in particular reasoning processes. The system is intended to help students identify examples in real oral arguments, represent them graphically in the terms of the process of hypothetical reasoning, and reflect about the examples according to the feedback provided by the program. The learners’ diagrams help to target good and bad performance, introducing expert’s guidance towards improving. In this sense, when the diagrams created by a learner are incomplete or considered not standard according to the model, LARGO takes advantage of the pedagogical opportunity, invites the learner to reflect on this matter and gives suggestions.⁴⁶ Due to its graph form, LARGO can compare the learner’s diagram with standard solutions, on the basis of which it provides some kind of tailor-made feedback. Nevertheless, LARGO does not target other features of precedent-based reasoning that the Mexican legal community needs to master.

⁴⁵ *ibid.*

⁴⁶ Ashley (n 18) 342.

5.3.2 Battle Maps as Visual Facilitators

As we have previously explained, the Mexican legal community has particular problems with understanding that it is possible to have a plurality of precedents (with repetitions and contradictions) and that the authority of precedents authority is graded and dependent on a relatively large set of features. Practitioners, in particular, seem to have difficulties understanding that it could be possible to have an ordered and non-arbitrary system of law under these conditions. With our educational platform we aim to change this intuition; thus, we will introduce both early students and ‘reforming practitioners’ to a different form of thinking about and engaging into precedent-based reasoning. In this way, the system should help its users finding a way to reason with and about the various degrees of ‘authoritativeness’ of precedents; finding ways to order a plurality of precedents; and reaching an acceptable equilibrium between conflicting precedents. Legal practitioners need to be prepared to perform in this way in order to avoid the historical temptation of reducing the complexities encompassed in different legal reasoning processes to simpler calculations.

LARGO, like other diagrammatic legal AI systems, is not particularly dedicated to represent argumentative strength. Systems like HYPO and CATO understand the degree of authoritativeness of precedents as derived from them being in-point. In this sense, the assessment of the relevance and value of a precedent seems to be determined by the substantive comparison between cases. For example, HYPO is built over a theory of precedents that assumes that reasoning with past legal cases can be understood as an assessment of ‘factors’, where factors are collections of facts that favour or hurt the arguments of one of the parties.⁴⁷ The weight of these factors is a measure of the support it gives to the claim of one of the parties. In this way, this account does recognise that some precedents might be stronger and better to cite than others in certain circumstances, but it does so considering a single legal feature: their relevant (factual) similarities and differences. In this respect, the evaluation of

⁴⁷ Kevin Ashley, ‘Toward a Computational Theory of Arguing with Precedents: Accommodating Multiple Interpretations of Cases’ in *Proceedings of the Second International Conference on Artificial Intelligence and Law* (ACM Press 1989).

precedents is limited, as it does not allow other legal criteria ‘like the recentness of precedents or the pedigrees of the deciding courts.’⁴⁸

The omission of this element might actually lead to a reductive idea of the legal reasoning process that precedents involve. Ashley was aware that his computational theory of arguing with precedents did not include all evaluation criteria used in legal practice; thus, he explicitly stated these limitations of his account and compromised with including the missing criteria in the future.⁴⁹ Nevertheless, the AI community sometimes finds it difficult to represent in computer terms certain complex human processes. As AI systems regularly have very specific aims, such as solving a case or, as in LARGO, giving students automated feedback to their answers, they need to operate under a more simple rule-like logic, in order for the data to be understood and processed by the computer. Therefore, the computational design might eventually lead to the simplification of complex processes performed by human reasoners.

This is nothing but an expression of a broader dilemma: the more we expect from the computer programme to do, the more prescriptive it is going to be. For example, mind maps allow the user almost unrestricted freedom with how to arrange the information, LARGO imposes considerably more constraints in order to allow more computational functions, and CATO as well as Verheij’s ArguMed impose still more restrictions, as to enable the computer to suggest feedback, and on top of that to identify and correct mistakes.

In this respect, in order to design our computer-assisted tutor we not only need to take into account the nature of the task that will be represented, the needs of the learner and the pedagogical soundness of the diagram, but also the artificial representation that could best fit all these characteristics. In fact, it has been noted that ‘[a] problem in developing intelligent tutoring systems (ITSs) in law is the need to represent legal problems and arguments in artificial terms an ITS can analyze.’⁵⁰ A

⁴⁸ *ibid* 97.

⁴⁹ *ibid*.

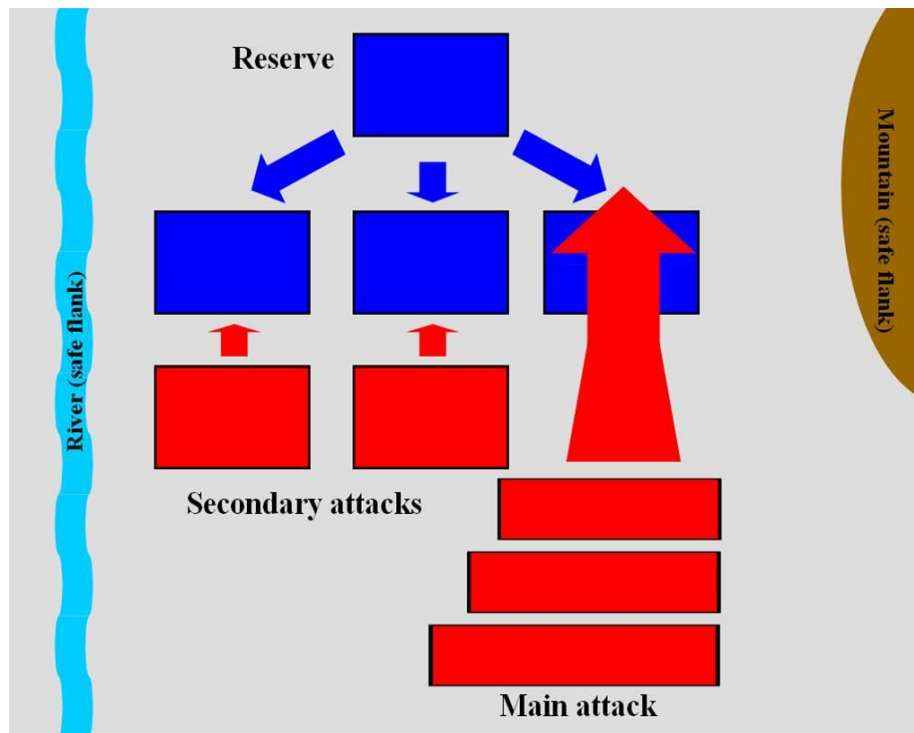
⁵⁰ Kevin Ashley and others, ‘Learning by Diagramming Supreme Court Oral Arguments’ *Proceedings of the 11th International Conference of Artificial Intelligence and the Law ICAIL-* (ACM Press 2007).

full reflection on the architecture of this program is beyond the scope of this research. However, on the basis of what we have been discussing in this chapter, we will propose an alternative way in which precedents-based reasoning can be represented, and which would be more suitable for the purposes of the present thesis.

Our visualisation tool needs to communicate the following features: a) that precedent have viable strength or force; b) that the strength of precedents is given by a set of features; and c) that precedents might 'cluster' or form a 'front' that cannot be reduced to individual support relationships. Additionally, we aim to provide the user with enough flexibility to adjust the representation to his legal role (e.g. arguing for the plaintiff or for the defendant), and also to his cognitive style. We find that the maps used in military history possess some characteristics that fit these criteria. Battle maps follow a semantic style that is sufficiently standardised, but at the same time is open to allow dynamicity and flexibility. Additionally, battle maps use the metaphor of war, and as we have discussed earlier, they are richer means for transmitting ideas, dynamics and emotions that are not immediately connected with the single activity of precedents.

A typical battle map usually depicts the troops of both sides (including e.g. their numbers and weapons) and their actual or possible moves. The maps are helpful to depict historical battles, but they are also used to train officers in the art of recognising the strengths of each army. The skill that the individual officer takes from this is the ability to see, immediately and without the need for precise calculations, how a combination of factors creates a winnable or an indefensible position. It is this quick recognition skill (which is crucial for legal practitioners) that Mexican law professionals are lacking of, and that we consider can be developed with a similar visualisation tool.

In our representation the size of the boxes and arrows is used to show the strength of a unit and the power of the attack it. A typical battle map looks as follows:

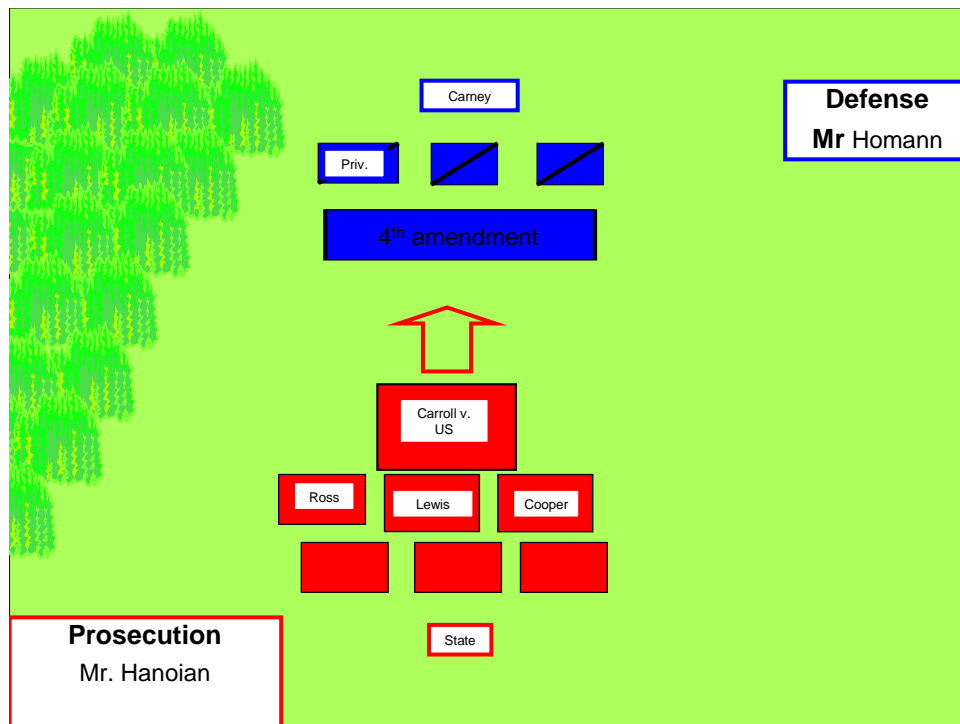


5.2 Attack in Oblique Order Source: the Art of Battle website⁵¹

In the legal setting battle maps can be used to represent precedents as individual units. Each box represents a precedent. The size of the box represents the force of a precedent according to formal considerations, such as the hierarchy of the court from which it derives or the age of the precedent. The size of the arrow expresses the strength of the precedent due to its substantial in-pointness in a particular factual situation. As any expert in precedent-based reasoning might know, an objectively powerful precedent – for example, a precedents issued by the Supreme Court – might become weak and easy to defeat if it is not in-point. On the other hand, an in-point precedent that was only held by a hierarchically lower court a long time ago might not be a very strong ‘ally’ to fight in the battle. Nevertheless, precedents might group together and form a cluster. In this case all units can be seen as holding mutual support relationships that make them a cohesive front; this form of support cannot be understood linearly (as usually represented in diagrams), but as a synergetic union. Also, the visualisation of the battle ground helps in identifying subdivisions within a side, which could at some point be understood as possible weaknesses of the

⁵¹ <http://www.theartofbattle.com/tactics-tutorial>

opponent. In the same way, certain precedents from other jurisdictions can be marked up as ‘auxiliary troops’ helping the coalition.



5.3 Battle map of Carney v. US

On figure 5.3 we represent how the case used as an example to explain the LARGO system can be translated into the semantics of the battle map.

Carney is hiding behind the 4th Amendment, which secures the right to privacy. The social and doctrinal value underpinning the 4th Amendment is indicated by the boxes with a cross bar. The prosecution is using *Carroll v. US*⁵² as a lead case. In this case the court held the ‘automobile exception’ which can be seen as opening a gap to the operation of the right to privacy behind which the defendant is hiding. This case is represented with a big block leading the attack because of its high hierarchical origin and its landmark status. Their case is supported by a number of ‘smaller’ precedents (for example, *United States v. Ross*,⁵³ *Cardwell v. Lewis*⁵⁴ and *Cooper v. California*⁵⁵), which altogether are helping the attack. By this moment Carney’s

⁵² *Carroll v. United States* 267 U.S. 132 (1925).

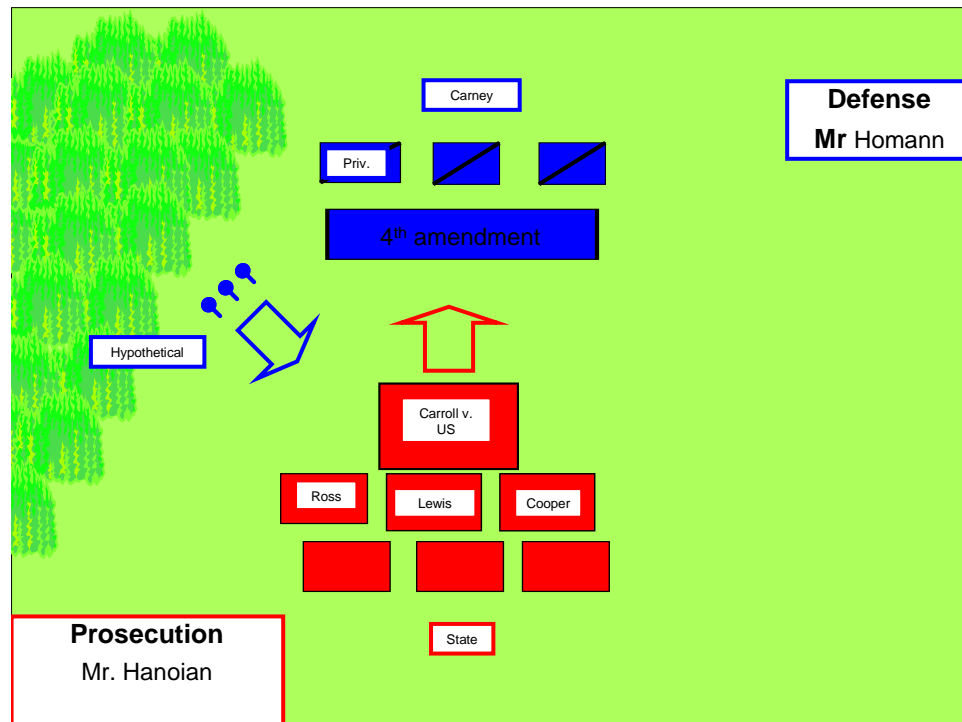
⁵³ *United States v. Ross* 456 U.S. 798 (1982).

⁵⁴ *Cardwell v. Lewis* 417 U.S. 583 (1974).

⁵⁵ *Cooper v. California* 386 U.S. 58 (1967).

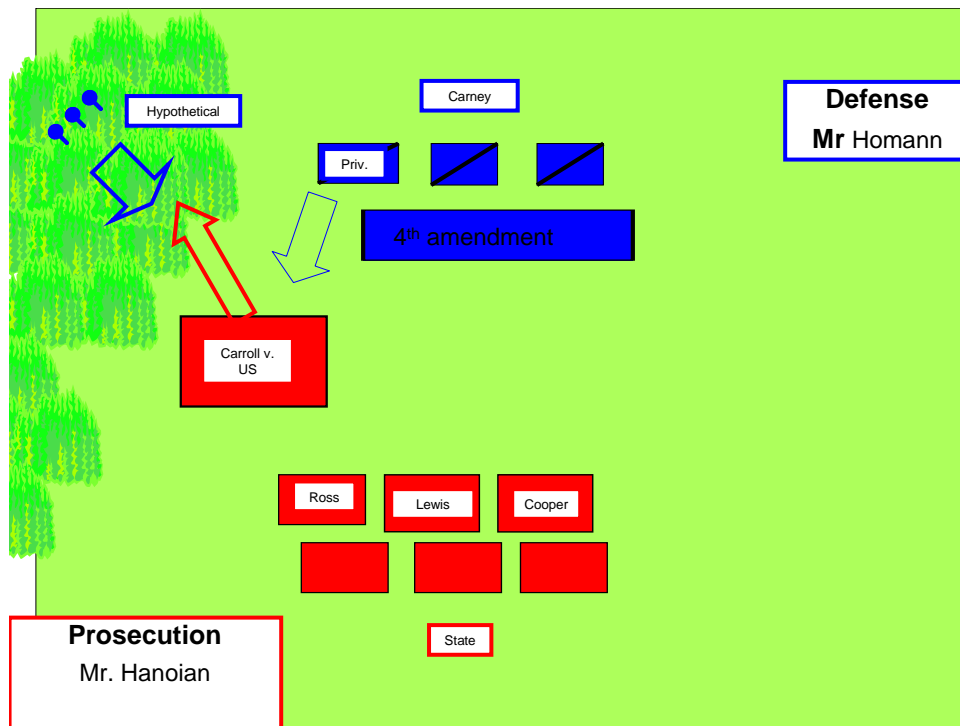
lawyer should have already seen that the battle ground does not look favourably and that he owes to reinforce his defence by any possible means.

At this point, the defence launches a counterattack in the form of a hypothetical: What would be the case if a motor home had a tent attached to it? Would the tent be protected by the right to privacy but the car would be not?



5.4 A hypothetical attacking a precedent

As there were no more cases to favour the defence, the lawyer had to devise a hypothetical to attack the leading case. The hypothetical – as it is not a precedent – is represented in the shape of blobs. The aim of preparing an attack against *Carroll v. US* by a hypothetical is to overextend the strongest unit and find an unprotected gap where the enemy forces could filter. In real life the tactics of Carney’s defence did not succeed, since the hypothetical lacked the strength to accomplish its mission. Nevertheless, if Carroll had taken the bait, overextending itself and finally getting defeated by a reinforced right to privacy, the map would have looked somehow different.



5.5 A hypothetical isolating and destroying a precedent

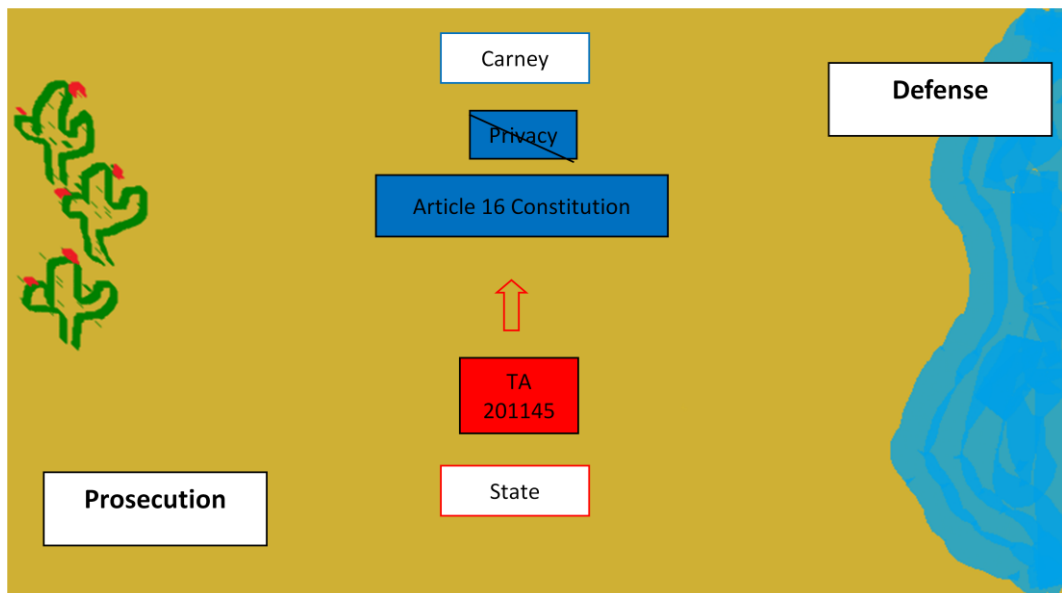
5.3.3 Representing Mexican Precedents

Battle maps are flexible and semantically rich tools that allow the representation of a plurality of factors and scenarios. We would like to try the soundness of our visualising method by representing a set of Mexican precedents. As we have explained before one of the problems that we might encounter, contrary to the general perception of legal practitioners, is that the number of precedents available as data resources is still reduced. In this respect, our maps could appear as not having recruited many troops. Nevertheless, when the reasoners face a shortfall in precedents, our maps have the flexibility to widen battle fronts with different types of allies. In this form, we may add extra considerations – such as constitutional principles, values or doctrines – and try to work out solutions on the basis of all these extended resources. In countries like Mexico, where judicial precedents are just starting to line up for battle, it is important that reasoners know that they can count with further support.

First, we would like to represent what would be a Mexican form of *California v. Carney*. In Mexico, there has not been an equivalent to this case yet, probably

because motor homes are less common than in the United States. Nevertheless, we can easily imagine a neighbour American (called Carney) who, while living and travelling in his motor home around the Mexican territory for over a year, has finally found himself in trouble with justice. In our example, the police found different types of guns and big amounts of cash in Carney's motor home when performing a search without a warrant – just after receiving information from a snitch about Carney's guns distribution enterprise. Carney is now fighting his case at the Mexican tribunals, asking to expand the protection given by the right of privacy, in order to consider his motor home as dwellings for the purpose of law, and to consequently declare unlawful the unwarranted search.

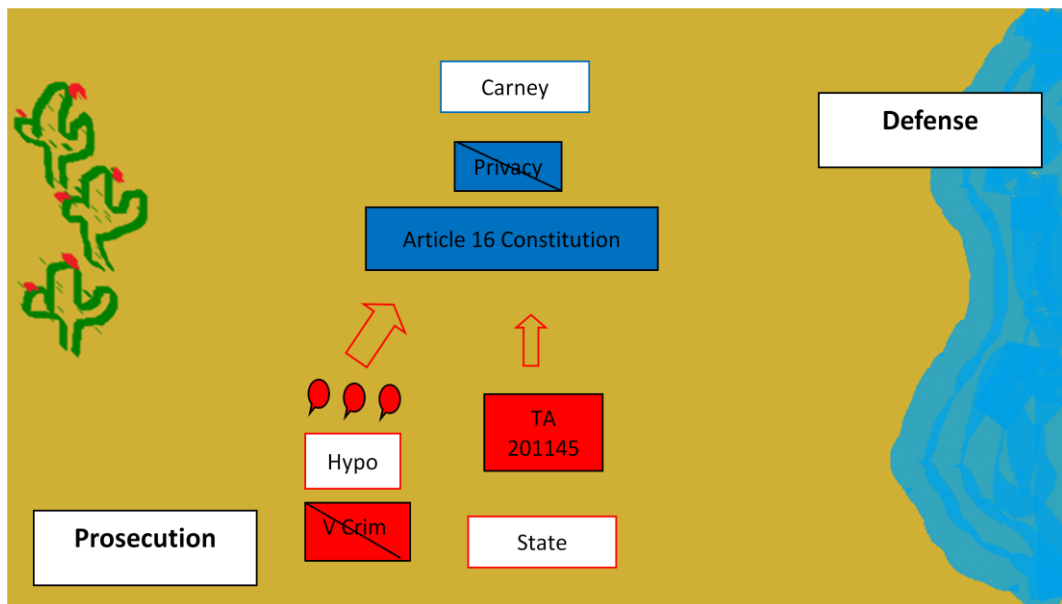
In Mexico there have not been many cases deciding on the privacy protection that a vehicle should be granted. There is only a single precedent from a collegiate tribunal that develops the 'automobile exception' regarding the right of privacy – that is, a Mexican *Carroll v. US*, but in this occasion decided in 1996 by a low in hierarchy court. According to the precedent, which in Mexico would be named *Tesis Aislada No. 201145*, a car cannot be considered an extension of a person's dwellings and consequently there is no need for a warrant to search it. Generally, in Mexican precedents we do not find a full description of the facts, although we could always find the full resolution describing them if we have doubts about the matter stated in the precedent. In this particular precedent the court held that a search (without warrant) performed by the federal police on a vehicle where drugs were found, was not against Article 16 of the Constitution, because vehicles are not the extension of a person's dwellings: they are just means of transportation and not where the person lives. This precedent opens a small gap to Article 16 and the right to privacy by narrowing its protection to actual fixed houses, which the prosecutor might find useful in defending the police's unwarranted search. This scenario might look as follows:



5.6 Representation of Carney if happening in Mexico

We do see how Carney is comfortably hiding behind a thick wall erected by Article 16 of the Constitution and the praised value of privacy. Against him he has just a small precedent sending a weak attack. The prosecutor knows that his attack has little chances of succeeding if performed in this manner – not only the precedent has not a strong ‘objective’ authority, but also its substance could be easily distinguished. According to the precedent the test to consider something as dwellings is living there. Carney’s car is not only ‘an extension of his home’, but it is his actual home. The defendant could then easily claim that the precedent does not apply to him because he does live in his motor home.

Therefore, the prosecutor needs to reinforce his lines if he wants to have a successful attack. He decides to send a hypothetical to the front: what if the motor home was running down the highway? Could it still be considered a home under the protection of the right to privacy? The reason underlying this different treatment is preventing Carney’s escape with the evidence. Prosecuting crimes is also a value that can be used to strengthen the new attack – especially since it seems to be a very important one for the tribunals in these days’ wars against organised crime. The new scenario would look as follows:



5.7 Carney using a hypothetical and value

The battle starts looking more even and therefore more difficult for Carney. In fact, the prosecutor might even remember the original case *California v. Carney* and bring it in as a weak yet, still, useful ally from comparative law. In Mexico, the resolutions of foreign and international courts are sometimes cited by the Supreme Court of Justice to point out a tendency in legal developments. Therefore, legal practitioners might be able to introduce some of these cases to make their armies appear larger and stronger. In the absence of a very clear ‘gravitational centre’ we can assume that the battle is not going to be such an easy win for any of the parties, and for that both the defender and prosecutor ought to prepare their best war tactics.

As we can see, the semantics of the battle maps allow us to represent situations where there are not many precedents, and yet communicate a clear understanding of the scenario by introducing more considerations. We consider that this is an important feature of our platform, as Mexican practitioners are likely to encounter situations where precedents are still scarce and that require taking into account other considerations to start building a gravitational centre. Mexican legal practitioners, however, did not complain about too few precedents, but, on the contrary, of too many precedents being available. For this reason, we need to make sure that our system works equally well for introducing legal professionals to the dynamics of

more complex battles. In other words, we need to devise maps that allow them to see what to do with numerous precedents, and that instruct them on how to deal with a multitude of these and potential conflicts within. For this, we will represent a situation that matches these characteristics.

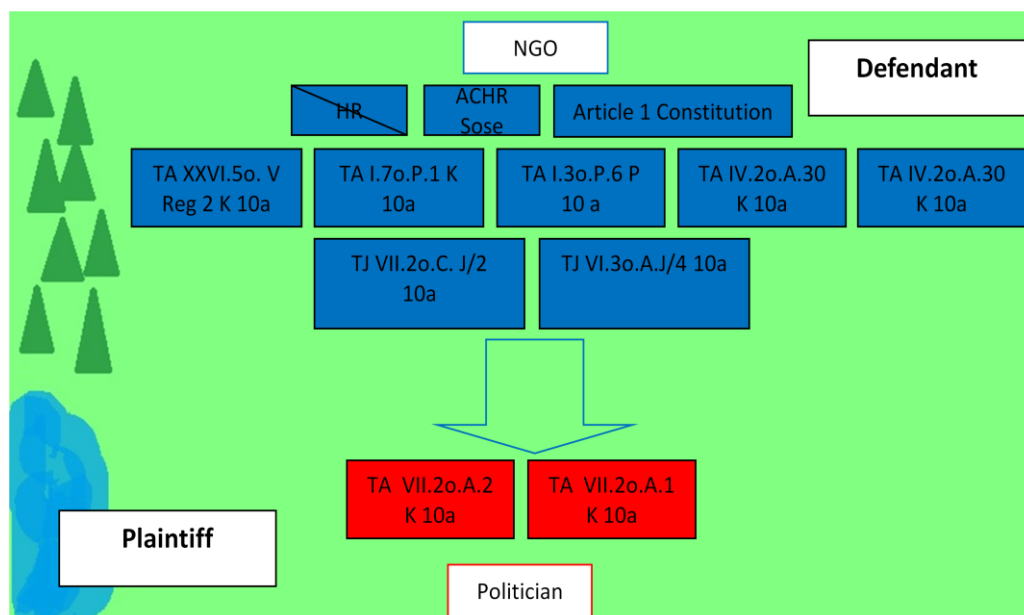
The precedents we will analyse now have to do with the human rights protection provided to a corporation (or artificial person). It is important to mention that currently there is a ‘complaint of contradictory precedents’⁵⁶ to be solved by the Supreme Court.⁵⁷ According to the complainant, there are two contradicting precedents: one granting human rights protection to artificial persons and the other one denying it. However, as we will see, the ‘objective’ strength of the precedents and the existence of a broader consistent line of precedents pointing to one direction allow us to see a clear image of the battle ground, in which the contradiction becomes less disrupting. Our following representation will help us ‘see’ that despite this contradiction there is still an ordered map of the law. We expect that representing legal precedents in this way will allow legal practitioners to intuitively recognise steady patterns even when there are unresolved contradictions.

Herein we will imagine a case involving these two different viewpoints on the same legal subject. We will assume that there is a NGO set up for environmental defence purposes. They have been delivering leaflets and posters exposing the actions of a local politician, which they claim are causing environmental harm. The politician has sued them, claiming that this is defamatory speech that should be considered unlawful. The NGO is trying to defend their actions under the right to freedom of speech, but the plaintiff is arguing that artificial persons do not enjoy human rights protection. The plaintiff is using two precedents: ‘*Tesis Aislada No. VII.2o.A.2 K (10a)*’ and ‘*Tesis Aislada No. VII.2o.A.1 K (10a)*’ to support his claim. The precedents, which were both drafted by the same low in hierarchy court, have declared that human rights only protect individual persons and not artificial persons. Nevertheless, the NGO is defending the extension of human rights to artificial persons by using article 1 of the Constitution, the American Convention of Human

⁵⁶ The complaint of contradictory precedents is a request to start an analysis of a potential contradiction between precedents and decide in favour of one of the criteria.

⁵⁷ Contradiction No. 360/2013 to be solved by the Supreme Court of Justice in full court.

Rights and a series of precedents held by different courts. This battle ground looks as follows:



5.7 Battle map of multiple precedents in Mexico

The NGO's claim that, as an artificial person, it is under the protection of human rights seems an overwhelmingly strong argument. It is grounded on a set of diverse considerations, including a strong body of precedents from different courts. Some of these precedents are even considered 'binding' *jurisprudencia* for determined territorial circumscriptions, which means that the criterion has been held at least five times by the federal tribunals of that territorial jurisdiction. We represented these bigger units at the front of the defendant's army, reinforced by smaller units at the back. Some of these precedents are backed by the dispositions of the American Convention of Human Rights and the 2002 case *Santos v. Argentina*, solved by the Inter-American Court of Human Rights. It is important to mention that the Mexican Supreme Court has declared that the precedents of the Inter-American Court, in which human rights are expanded, should be considered as authoritative.⁵⁸ All these features together form a quite strong gravitational centre that should be clear enough for legal practitioners and judges.

⁵⁸ Contradiction No. 293/2011 solved by the Supreme Court of Justice.

In this context, the politician's claim as it stands seems rather weak. The plaintiff needs to think of forms to reinforce this argument if he wants to stand a chance of winning the battle against the NGO. He might, then, call for the help of a hypothetical that narrows down the protection of human rights to artificial person. Nevertheless, the need of extra help should appear almost intuitive for the lawyer handling the case. He must see very clearly that the existence of a contradiction, and therefore, of a section of judge-made law standing on his side is not something to rely on in this war.

With this example we aimed to show how the users could potentially benefit from the visualisation tool we propose when dealing with diverse and contradictory legal precedents. We expect that, as in the example, legal reasoners will learn to see established patterns that allow them to plan their legal battles with a fair amount of certainty, without the need of having to wait for univocal signs given by the authorities. In this sense, we hope that this educational tool helps future and present legal practitioners, and consequently the legal system, to recover the certainty that seemed lost due to the development of judge-made law.

5.3.4 Further Considerations

These battle representations are visual tools easy to adapt to different precedent-based reasoning scenarios. Consequently, we consider that this platform could equally help students and practitioners in understanding precedent-based reasoning and developing the tacit knowledge behind it. There are still several features to be analysed with respect to our learning facilitator.

The representations could benefit from different upgrades. For example, battle maps are commonly compute animated representations. What computers also add in value is their ability to incorporate them into animations. Particularly good examples can be found at the Art of Battle⁵⁹ which also provided the blueprint for the above illustrations, History Animated⁶⁰ or the Discovery Channel⁶¹ websites. The animation

⁵⁹ <http://www.theartofbattle.com/ancient-battles>

⁶⁰ <http://www.historyanimated.com/newhistoryanimated/>

⁶¹ <http://dsc.discovery.com/convergence/rome/battlemaps/battlemaps.html>

will, hopefully, include a dynamic element that helps the legal transition from a more static form of legal practice towards another one involving mobility. As a next step, though, we hope to represent a number of interesting cases both as animated and static battle maps, using a variety of representation forms.

In the future, we hope to test these on large groups of law students and of fully formed professionals, both performing as passive consumers and, at the same time, as active creators of these maps. Should there be indeed a measurable benefit, the issue of balancing the demands of computer readability with the desirable freedom of the map users to develop representations that suit their personal cognitive style would have to be addressed. Also, the efficacy of the platform in assisting the learning process of two distinct groups – students and formed professionals – should be assessed to determine the conditions under which the platform gives the best results. As mentioned above, practitioners who are already ‘charged’ with previous knowledge might be more difficult to educate. Therefore, we need to make sure they can also have a meaningful learning experience when using the platform.

Another important point that will need to be analysed is the form of making the platform available to both students and professionals. What we learned from the evaluation of LARGO is that we could probably obtain better results if we secure a high engagement with the platform. This could be easier if it is made available through a formalised educational setting. Therefore, reaching students, still under the formal educational model, might be easier than engaging professionals. What makes particularly difficult to reach fully-formed legal practitioners is the lack of a bar association in charge of accrediting the Mexican legal profession and providing further training. Nevertheless, we could probably reach professionals participating in university seminars or in training courses provided by the ‘The House of Legal Culture’ institute which is directed by the Supreme Court. Professionals participating in a more or less formal educational program might show more motivation and commitment to use the platform, allowing more learning benefits.⁶²

⁶² Motivation was one of the main factors determining the success of LARGO. See: Neil Pinkwart and others, ‘Re-evaluating LARGO in the Classroom: are Diagrams Better than Text for Teaching Argumentation Skills?’ in *Intelligent Tutoring Systems* (Springer Berlin Heidelberg 2008).

We also need to determine the best timing for using the platform. Students could interact with the program during their first year, as part of their ‘Introduction to Law’ course, just like in the case of LARGO. Practitioners could be introduced to the platform when taking one of the currently popular courses or seminars on legal argumentation, which despite their good intentions have not yet been dedicated to develop the intuitive competence that precedent-based reasoning requires. However, we must be mindful that in the classroom law students and practitioners might be receiving different theoretical knowledge about legal reasoning, especially regarding precedent-based reasoning, which could affect the potential benefits of the platform.

Therefore, our next steps are designing the platform, determining the circumstances of use and evaluating its performance in different contexts. We are well aware that our educational suggestion is modest and that many other efforts might be needed to secure a full transition in the different areas of practice that is changing (for example, the introduction of oral trials). In any case, for the above mentioned reasons we consider that computer assisted tutors designed according to the insights of educational and cognitive studies are a good candidate to perform this transition, by reaching to the minds and hearts of legal practitioners. The educational platform we suggest in this chapter is a small contribution on this direction.

6. Conclusions

This thesis presented a multidisciplinary approach that brought together comparative law, legal theory, legal education, legal AI and some insights from cognitive sciences in order to account for the relatively broad cognitive-affective dimension behind legal practices, which goes beyond the understanding of law as text-based rules. Our aim was to understand and suggest solutions for the (knowledge) problems experienced by legal practitioners in systems in transition, although most concretely for the problems of legal professionals in the Mexican legal context with respect to legal precedents. The present work, thus, expects to have made some contributions to the theoretical debates regarding legal knowledge and legal transitions, but also to the practical debate regarding the particular transition of the Mexican legal system.

We expect that this study showed that addressing the matter of legal knowledge in legal studies is a fruitful enterprise. According to Paul Thagard, currently we are experiencing ‘the brain revolution’; in other words, now more than ever science is being able to report research about the human brain and, consequently, of the cognitive and affective framework surrounding human life.¹ This is not to say that we should accept any scientific (and pseudo-scientific) output as indisputable truths, but that in these developments we can expand our interests and engage into legal philosophical debates that are informed by this sort of scientific research. What Thagard himself is seemingly doing is finding intersections or meeting points between philosophical enquiry and the latest developments regarding human cognition. In law, and especially legal philosophy, there is also room for such an enquiry.

¹ Paul Thagard, *The Brain and the Meaning of Life* (Princeton University Press 2010)

A cognitively informed enquiry can develop in different areas of law. In this work it emerged as a reflection regarding legal change. One of the major debates taking place in legal comparative studies has to do with the manner of accounting for legal change, and especially for the changes that derive from the transposition of legal features. This thesis, indirectly contributes to this debate inasmuch as it discusses the cognitive implications of legal change. Despite the fact that certain comparative lawyers seem to be taking a ‘cognitive turn’ in their way of approaching different traditions and legal systems, there is still a long way to understand the relationship between legal change and the reorganisations on the legal knowledge structures held by legal practitioners of a determined legal community. We consider that our cognitively-informed account on legal transfers as ‘cognitive irritants’ capable of unleashing simple epistemic changes or authentic knowledge revolutions offers a method to revise and assess the magnitude of legal change in different contexts. This approach could potentially lead to unlocking the current impasse that the discussion about the possibility or impossibility of legal transplants seems to be facing in the past years.

We consider that our cognitively informed approach unlocks yet another discussion; that of legal knowledge acquisition. One of the major contributions of legal comparative studies has been their focus on ‘legal culture’ and ‘legal traditions’, which assumes that each legal practitioner participant of a determinate legal system possesses a ‘cultural’ cognitive load. Acknowledging that complex knowledge structures lie behind legal practices leads to asking where do these come from, which eventually pushes our focus to legal education processes (either happening at the law school or outside it) and their impact on that fuzzy ‘cultural’ legal knowledge. In this sense, legal transfers are often seen as external disruptions to the normal development of this cognitive framework. We consider, that legal education must be brought into the discussion in order to analyse its capacity of generating internal deep cognitive changes that may bring considerable shifts in legal style.

We also expect that our work draws attention to the fruitfulness of using legal theoretical perspectives in understanding the teleology and function of legal features. Nevertheless, we do not suggest these to be used as all-or-nothing indications, but to

be treated as means from which it is possible to derive meaningful lessons. We, thus, hope to motivate legal theoretical enquiries as means of understanding local problems and build ad hoc solutions. In a way our approach reminds Martin Krygier's assertion that to reform the law (and introduce a proper rule of law regime) one should start with teleology.² We consider that understanding the teleology and way of functioning of legal features one can use legal theoretical insights. Legal theories somehow compile the experience of others and through others we can learn and become a better version of ourselves. Of course, one must always be mindful of not overgeneralising; that is, of turning contextual traits into general traits. Most importantly, one must use theory to learn deep and meaningful lessons and not just to mindlessly following what others seem to be doing.

In fact, legal changes (both discursive and cognitive) may better arise from the internal reflection regarding the local needs and problems in the light of foreign theories or sociological experience, than from the un-reflected subscription to international policies and reform programs. This particular point does not feature strongly in the present work, but it somehow underlies it, as we think that in the present case the rigidity of the Mexican approach to law was problematic in itself; it was detrimental of 'the moral life of the law.' In this sense, the ideas feeding the rigidity of the local framework of law may not have been only undesirable according to the rule of law ideal pushed by international reformers. As the present research progressed, our interest in this subject has become more pronounced and seems indicate the development of our future work. Our future research will feature more prominently questions regarding the architecture of 'good law and working arrangements.' Fuller called this enterprise 'eunomics' having in mind the idea of analysing the architecture of legal features according to their ethical function within society. We, however, do not abandon the lessons learned in the course of this research; that is, that human minds and hearts matter. Therefore, we consider that cognitive sciences research can be used in yet another way: to inform future legal developments in order to make them more meaningful for human life.

² Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in Gianluigi Palombella and Neil Walker (eds) *Relocating the Rule of Law* (Hart 2009).

Nevertheless, apart from the top-down interest in the architecture of legal features we will continue our research regarding the bottom-up development of professional competences that support the good functioning of legal systems. As we have seen, educational experiences can only be meaningful if they are informed in sound cognitive sciences that address the mental and affective development of the learner. We expect that featuring prominently the fact that the law is put forward by actual heart and minds and in service of hearts and minds mobilises legal developments in a more humanly conscious direction.

In practical grounds, we expect that the present work contributes to the debate regarding legal reform in Mexico. It brings to the attention of legal reform partisans the importance of focusing on the pre-existing knowledge structures of the legal community when aiming to attain practical legal change. Since legal practices are connected to the shared body of knowledge, to be able to achieve change in practice we need to reach and modify the embedded cognitive structures over which it was built. In this sense, modifying discourses is not enough to accomplish deep legal changes; we need to follow a bottom-up approach that addresses the particular cognitive-affective load of legal practitioners. In fact, changing discourses without approaching the operative cognitive structures opens the gate to experiencing knowledge problems, as in our case study.

The advocates of legal reform in Mexico need to be mindful of the fact that legal change cannot be taken lightly, especially those changes that involve revolutionary cognitive reconfigurations. In the Mexican context we have observed a marked inclination towards reformation, but what it is lacking is a strong reflection on the knowledge held by the local community and the manner in which it can change towards the desired direction. Legal transitions need to be cognitively-supported. This matter leads us to be observant of the processes of knowledge acquisition, and most particularly to the process of legal education. In this particular context, it has been noted that legal education has to be reformed to be consonant with the new needs of the profession. Nevertheless, legal education must be approached in depth: it ought to go beyond the level of discourse and beware of introducing 'educational transfers' that do not match the style and needs of the learners. Legal education needs

to be informed by research in pedagogy and psychology to secure that the learning experience is meaningful and develops the knowledge that is intended. Also, it must be jurisprudentially informed, to secure the construction of the best possible legal practice in accordance to particular legal aims.

This thesis offers an educational platform to support the learning of a different precedent-based reasoning style by the Mexican legal community. The platform is designed to meet specific challenges being experienced in the context and is mindful of the legal community's cognitive cargo. This is the most practical contribution of this work, as this educational tool is ready to be implemented. Although the platform still needs to be used and its success in developing a particular legal reasoning style requires to be assessed, we consider that actions in this direction have the potential of bringing the aimed changes in practice in a less problematic manner than the mere top-down change of legal discourses.

The platform might be a small contribution in the light of the massive cognitive change being experienced by the Mexican legal community. In this sense, many more analyses and educational platforms might be needed to deeply reform the local legal practice, but we expect that our quest to understand and reach the minds and hearts of legal practitioners in these difficult transition times helps drawing a path, or maybe, a shortcut for the future.

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