THE RATIO DECIDENDI THROUGH MEXICAN LENS*

LA RATIO DECIDENDI A TRAVÉS DE OJOS MEXICANOS

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Abstract:

In March 2021, the Mexican Constitution was amended to transition to a system of precedents. This amendment mandates that the "reasons" of Supreme Court rulings will be binding on the lower courts. However, the reform is rooted in a long-standing practice of '*Tesis*', i.e., abstract statements that the Court itself identifies when deciding a case. Moreover, there is no consensus as to what these reasons are and why they should be binding. The aim of this article is to identify the possible conceptions of reasons to explore the Court's different judge-made law roles. Different common law conceptions of the *ratio decidendi* are used as "mirrors" to identify four models of judicial lawmaking in Mexican practice, namely: judicial legislation, implicit rules, moral-political justifications and social categories. Although the first model seems to prevail, the others provide means for a broader understanding of how the Court creates law depending on the interpretative context in which it operates.

Keywords:

Precedent, Holding, Ratio decidendi, Rules, Reasons, Categories

Resumen:

En marzo de 2021 se reformó la Constitución mexicana para transitar a un sistema de precedentes. Esta enmienda establece que las "razones" de las sentencias de la Suprema Corte serán obligatorias para los tribunales inferiores. Sin embargo, la reforma se enmarca en una arraigada práctica de tesis jurisprudenciales, i. e., enunciados abstractos identificados por la mis ma Corte al resolver un caso. Además, no hay consenso sobre qué son estas razones y por qué deberían ser vinculantes. El objetivo de este artículo es identificar las posibles concepciones de razones para revelar los distintos roles de la Corte en la creación del derecho judicial. Se utilizan nociones de la ratiodecidendi del common law como herramientas de introspec ción para identificar cuatro modelos de creación del derecho en la práctica mexicana, a

saber: legislación judicial, reglas implícitas, justificaciones po lítico-morales, y categorías sociales. Aunque la primera concepción parece ser la dominante, las alternativas amplían el abanico para entender cómo es que la Corte crea derecho dependiendo del contexto interpretativo en que opere.

Palabras clave:

Precedente, tesis jurisprudenciales, Ratio decidendi, reglas, razones, categorías.

I. INTRODUCTION: THE "REASONS" OF PRECEDENT

In March 2021, the Mexican Constitution was amended to establish that the 'reasons that justify the decisions contained in the rulings issued ...' by the Supreme Court "shall be *binding* for all courts" (Mexican Political Constitution, Art. 94, CPEUM from now on). Moreover, so as to strengthen the Court as a constitutional court, it was established that a single supermajority decision of eight out of 11 justices in Plenary or four of five in Chambers becomes binding precedent. Thus, the Court seems to be moving towards a system of precedent inspired by the Anglo-American tradition one where a single ruling from the highest court can create a binding standard for the lower courts, as opposed to a criterion of reiteration of cases typical of the civil law.[1]

However, there is no agreement on the nature of these "reasons" (José R. Cossío, 2008, pp. 716-718; José Vargas Cordero, 2010, pp. 170-174). In the common law tradition, the *ratio decidendi* are the reasons needed or deemed sufficient to decide on a case that becomes binding for lower courts, as opposed to non-binding statements known as *obiter dicta*.[2] Yet, there is no consensus on its meaning. In fact, Goodhart once said that the term *ratio decidendi* is the second "most misleading expression in English law" (1930, pp. 161-162). Are such reasons canonical rules? Or are they rules inferred from the ruling? Or are they indistinguishable from the moral justification underlying a decision? Some authors suggest that if *rationes* were rules, they should "bind like shackles" (H.L.A. Hart, 1994, p. 139) while others view them as flexible "examples" that guide human action (Barbara Levenbook, 2000). Perhaps the *ratio* boils down to the old joke of British judges who quipped that "if you agree with the other bloke, you say it's part of the ratio; if you don't, you say it's 'obiter dictum,' with the implication that he is a congenital idiot " (Lord J. Asquith, 1950, p. 359).

In addition to the lack of consensus on the nature of reasons in theories of precedent, the reform is framed within a predominantly formalistic precedential context. For decades, there has been a judicial culture of "*tesis*," i.e., abstract statements that the Court itself identifies when deciding a case. However, there are also those who insist on the importance of the facts

in deciding cases more than the rules (Fourth Collegiate Court in Civil Matters of the First Circuit, 2010, pp. 48-50). At the same time, some Justices assume that constitutional judgments go far beyond the specific case since the Court "shapes its judicial policy to exert its powers of interpretation of the Constitution, in order to ensure the supremacy of this norm in the legal life of the country" (SCJN, First Chamber, ADR 5833/2014, 2015, para. 33). Lastly, there are those who suspect that the prevalence of courts' "reasoning" (Ana M. Alterio, 2021, p. 133) as a legal source is nothing but judicial supremacy.

Given this context, what can be understood by "binding reasons" in Mexico? This paper aims to identify different notions of reasons to map the corresponding roles the Court can play in creating law. To do so, it uses common law conceptions of *ratio decidendi* as "mirrors" (Frank I. Michelman, 2003, p.1737). That is, foreign sources are not necessarily used as models to follow, but as tools of introspection to analyze Mexican law. Along this vein, this article contends that there are four understandings of *ratio*: judicial legislation, implicit rules, political-moral justifications and social categories. These concepts compete and sometimes converge in the Court and influence the self-perception of how it generates precedents and thus develops constitutional law.

II. *Ratio* as Judicial Legislation

> "*The rule will operate like a statute and will, like a statute, have a canonical formulation.*"
>
> (Larry Alexander, 1989, pp. 17-18)

One challenge for courts and theories of precedent is to understand or suggest how yesterday's rulings constrain today's courts. If lower courts can distinguish precedent and create exceptions, then they are not really constrained. For a system of judicial law that truly constrains to come about, Alexander suggested that rules must be clear and canonical in their formulation, but opaque or self-contained in their underlying reasoning (Larry Alexander, 1989, p. 19).

Decades before Alexander's suggestion, Mexico seems to have opted for a model of judicial legislation. Between 1919 and 1957, in view of the time lapse between deciding a case and the dissemination of criteria, as well as the overproduction of rulings, the Court chose the '*tesis*' model (Camilo E. Saavedra Herrera, 2018, pp. 311-312). Through these *'tesis'*, the Court has sought to monopolize the identification of binding judicial criteria and to publish them without having to publicize the written judgment. Up until 2019, Court opinions were 'the abstract written expression of a judicial criterion established when ruling on a specific case' (SCJN, AG 20/2013, Art. 2.A.).

The plethora of precedents and the slow pace of their dissemination was also embedded in the generalist epistemic framework allegedly typical of the civil law tradition, i.e., the

propensity of 'Roman law to abstract the typical and repeatable aspect of every human relationship' (Aldo Schiavone, 2005, p. 176). Later, a quasi-legislative process was created to produce *tesis* voted on by supermajorities of justices. Some justices even considered that *tesis* had 'a degree of autonomy from the considerations of a ruling' (SCJN, Plenary Session, Cossío, Session of April 20, 2006, p. 29). In more extreme cases, the Court held that lower courts were 'unable to question the nature, content and process of integrating *tesis'* (SCJN, Second Chamber, CT 40/2000, 2002). In a case of fraudulent use of *tesis*, justices published an opinion that protected the life of the fetus, even though the ruling upheld the constitutionality of allowing abortion for congenital disorders (SCJN, Plenary Session, *Tesis* 187817, 2002).

The model of judicial legislation, at least until recently, was not limited to the *ratio*. Some justices questioned the applicability of these concepts from the Anglo-American tradition (SCJN, Gudiño, Session of April 20, 2006, p. 21). The Court could extract *tesis* both from the 'core of the decision' (Cossí o, Session of April 20, 2006, p. 31) and from "additional reasons". The then Chief Justice stated that some judges look for a way to decide on issues by "saying the least they can." However, others introduce "a much more important issue than the one being raised" (SCJN, Azuela, Session of April 20, 2006, pp. 36 and 37). More recently, the Court has held that *dicta* can create binding case law as long as they are used in the "chain of the argument" (SCJN, First Chamber, Application for Modification of Case Law 19/2010, 2011).

Some rulings contain a wealth of opinions, regardless of whether they are *ratio*, whether they engage in varying degrees of generality, or whether they are more educational or symbolic than prescriptive statements. For instance, in A.D. 6/2008, a *trans* person sued the civil registry to obtain a new birth certificate due to gender reassignment. The court identified ten *tesis* (SCJN, Plenary Session, AD 6/2008, 2009). One *tesis* asserts that human dignity is the basis of all fundamental rights (SCJN, *Tesis* 165813, 2009); another proclaims that the right to health is not limited to the physical dimension (SCJN, *Tesis* 165826, 2009) and yet another indicates that the marginal annotation denoting a change of sex on a birth certificate is a discriminatory act (SCJN, *Tesis* 165695, 2009). Thus, the Court has accepted judicial legislation as a paradigm and adopted a maximalist view of the opinions.

More recently, the Court has adopted a new approach to the model of judicial legislation that does differentiate between *ratio* and *obiter*. As per the Court's internal rules, as of 2019, any opinion must have the structure of a rule: a factual assumption and a legal consequence (SCJN, AG 17/2019, Art. 39). Similarly, Article 218 of the new *amparo* law establishes that issues that "are not necessary to justify the decision, under no circumstance, should be included in the *tesis*." However, the Court rules establish that *tesis* must be drafted with such clarity that it is not necessary to "resort to the judgment" in abstract terms and in the case that it is considered "necessary to provide examples with particular aspects of the specific case, the generic formula should be given first and secondly, the exemplification" (AG 17/209 Art. 41 III and VII.). Although this new approach to the model seeks to prevent the publication

of *obiter* opinions, the generality of the rules over the particularities of the case is still preferred.

Furthermore, at least in some cases, the Court seems to suggest that lower courts may not challenge vertical precedent by using the technique of distinguishing. Distinguishing, in a broad sense, occurs when the facts of the case at hand are essentially different from those of the precedent and therefore the rule simply does not cover the case. In contrast, distinction, in a narrow sense, happens when the subsequent court, in view of the differences between relevant facts, creates an exception to the rule, thus restricting the scope of application of the original rule (Joseph Raz, 1979, p. 185). The Court has adopted a very ambiguous concept of "inapplicable," which occurs when "it has to do with a different human right than the one referred to in case law." But in all other scenarios, lower courts "lack the power to reinterpret its content" (SCJN, Plenary Session, CT 299/2013, 2014).

The Court's judicial legislation model is consistent with, but also differs from, Alexander's model. On the one hand, the prohibition of making a narrow distinction between cases is in line with Alexander's dream. He states that "[a]ny practice of precedential constraint that distinguishes between overruling a precedent and narrowing/modifying a precedent is not a practice of the rule model of precedent" (Larry Alexander, 1989, p. 19). According to the Court's and Alexander's judicial legislation models, subsequent courts must limit themselves to apply or invalidate rules. On the other hand, even with the new approach, *tesis* do not necessarily have the structure of a rule. Some *tesis* do not provide information on the factual information or the legal consequence in terms of permissions, prohibitions or obligations. It is paradoxical that in a civil law country where "judges are no more than the mouth that pronounces the words of the law" (Charles-Louis de S. Montesquieu, 1748, Book XI, Chap. VI), legislative language is actually the vehicle that makes the judicial creation of law self-evident.

Why did this model emerge? Perhaps justices accept the fact that the *ratio/obiter* distinction is illusory (Julius Stone, 1985, p. 33), that there is no universal way to identify it, and that there may be judgments with many *rationes*. Perhaps justices seek to move beyond common law categories (Jiri Komárek, 2013). After all, why use "foreign" concepts to understand one's own? The Court readily acknowledges that it does much more than rule on a specific case and creates rules. In this model, *tesis* are a kind of quasi-legislative provisions. With canonical statements, extracted from the facts and jurisdictional proceedings, the intention is to convey what the Court had in mind, analogous to the dissociation between the text of a law and its legislative process. Thus, it seeks to prevent subsequent courts from re-interpreting the criterion or modifying it and limit themselves to simply applying it.

This model combines formalist and realist elements. It adopts a formalist stance on creating precedent on the basis of abstract canonical statements, but implicitly accepts an interpretive realism of statutory law. The indeterminate nature of legislative sources is recognized, accepting that there are several interpretive methods and that the scope of legislative rules can be limited by restrictive interpretation or broadened by analogy. However,

back to formalism – but now prescriptive- the lower courts are ordered to adopt a strict exegesis of the *tesis* since "they do not have the authority to re-interpret their content." The interpretive order is to follow the more "literal" and immediate meaning that can be assigned to *tesis*, regardless of how unfair it may be to lower courts.

Judicial legislation is a paradigm that has been forged for a century, and it faces with alternative understandings of the *ratio*. The laws implemented by the 2021 reform do not dismiss the model, but rather update it. The new approach to *tesis* as explicit *rationes*, but limited to the facts, may serve a practical purpose. Assuming a suitable degree of generality is adopted, *Tesis* can clearly communicate the rule to subsequent courts, litigants and the general public. Moreover, it makes reasons more difficult to manipulate than leaving their identification in the hands of future interpreters. However, even accepting judicial interpretative creativity, the assimilation between judicial law and legislation is questionable. In a balanced model of separation of powers, the judicial law must emerge from a separate methodology which prevents the Court from simply establishing rules that seem appropriate to them. The casuistic and progressive construction of precedent must stand out from the radical potential of statutory law. The interpretive tendency to prefer abstractions goes deeper than the formal legislative amendment calling for the creation of *tesis* with an emphasis on the facts.

III. *Ratio* as an Implicit Rule

> "*It is by his choice of the material facts that the judge creates law*"
>
> (Arthur L. Goodhart, 1930, p. 169)

Although Mexican precedential culture is predominantly formalist, the reform seems to have encouraged a more casuistic idea of judge-made law. The new *amparo* law alludes to relevant facts as an element to any *Tesis*. The reference to facts recalls Goodhart's famous formula whereby the *ratio* is inferred from the facts regarded as judicially relevant and their outcome, not in the explicit rule formulated by the court nor in its reasoning (Arthur L. Goodhart, 1930, pp. 161,182). The canonical rule may be flawed, inconsistent with the case, or not reflect the majority decision. Likewise, the court's argumentation may be specious, politically undesirable or morally outrageous, but the subsequent court must follow precedent as if it were a rule. What truly binds the subsequent court is the choice of relevant facts.

The ideal model of implicit rules strives to recalibrate the generality-particularity relation in favor of the facts. The *ratio* has a descriptive function: to draw a distinction between the judicial creation of law through particular decisions limited by concrete facts and the arguments of the parties, as opposed to legislated law of general propositions. But it also has a normative function: out of deference to a certain understanding of separation of powers, it narrows the scope of its precedents to specific factual scenarios proven by the parties in an

adversarial trial. Moreover, it refrains from choosing a certain degree of generality of the rule, thus it avoids distancing itself from the facts. In this way, a minimalist approach is adopted for the Court in terms of developing law and a semi-formalist approach is adopted for lower courts. Although the Court does not automatically create the rule, it is open to determination by the subsequent court, albeit its level of generality may be controversial.

This emphasis on facts clashes with the generalist reasoning supposedly typical of (Konrad Zweigert and H. Kötz, 1998, pp. 69-70; Legrand, 1996, pp. 64-67; Cfr. Holger Spamann *et al.*, 2021), but it fits with the casuistic practice of procedural and evidence law. Courts, and first instance courts in particular, reconstruct and evaluate events from the parties' narratives and claims, the evidence, and the known, disputed and institutional facts (Michele Taruffo, 2011, pp. 96-104). This model also entails an understanding of *Tesis* as mere instruments of dissemination and not as autonomous rules as assumed by the judicial legislation model.[3] Without the need for an official rule encapsulating the decision in a canonical formula, or even a universally accepted methodology for inferring *ratio*, in most cases one can be reasonably deduced. In fact, litigants perhaps even intuitively infer the *ratio* when appealing a ruling in a second or higher courts (SCJN, First Chamber, AR 898/2006, 2006).

Furthermore, this model explains, at least initially, the practice of distinguishing precedent. Once the antecedent of a *ratio* has been reconstructed, it is possible for subsequent courts to create justified exceptions in light of new relevant facts. For some theorists, this practice is a basic component that every theory of precedent must contain (Robert Alexy, 1989, pp. 278-279; Adam Rigoni, 2014, p. 133). The Court itself has validated the legitimacy of this technique, understanding it as "*not applying* the rule derived from a precedent [...] when a subsequent court identifies *a new factual element* in the new case that was absent in the precedent (SCJN, ADR 5601/2014, 2015).[4]

Although this model seems promising, in practice facts are often overlooked, even in cases of concrete constitutional review. For instance, ADR 4865/2018 analyzed whether it was pertinent to provide compensation for moral damage to a person who was forced to resign from a company with Jewish executives because he had a Nazi swastika tattoo. The Court denied the *amparo* on the grounds that it was considered hate speech. However, it is not possible to infer from the ruling when, how or why the worker got the tattoo. It may well have been a tattoo gotten as a minor or without knowing or attributing an anti-Semitic meaning. This information does not appear in the body of the text, but in two footnotes (SCJN, 2019, footnotes 64 and 83). It is also unclear as to why the worker's resignation was not dated or what exactly triggered the resignation. Overlooking the relevant facts of the case complicates the future interpreter's task of inferring the background and may lead to a non-contextualized and over-inclusive rule.

On the other hand, the "facts" analyzed by the Supreme Court are quite different from those analyzed by a lower court. In cases of diffuse constitutional review, the original facts

begin to blur as one moves up the judicial hierarchy. In test cases, the parties themselves seek not only to win the case, but also to set a precedent that will transform the legal system. Abstract constitutional review cases do not even involve facts in the traditional sense; the Court analyzes provisions without any reference to people of flesh and blood. As Mitidiero says, in higher courts, even in civil law countries, 'the concrete case [is] merely an excuse [to] form precedents' (Daniel Mitidiero, 2016, pp. 261-262). The specific circumstances of what, who, how, when where or why a certain act was carried out take second place and what interests the Court is to make a normative, not an evidentiary, judgment.

Case law on same-sex marriage illustrates how the Court addresses facts in some concrete control cases. AR 704/2014 was the case that consolidated case law, establishing that:

> "[T]he law of any state of the federation that, on the one hand, considers that the purpose of the former is procreation and/or that defines it as that which is celebrated between a man and a woman is unconstitutional" (SCJN, Primera Sala, Tesis 2009407, 2015).

The ruling only mentions that the plaintiff identifies as homosexual and lives in the State of Colima (SCJN, AR 704/2014, 2015). It is not known whether she intended to marry, nor is there any information about her age or gender. Since she challenged the expressive function of the law, there is no need for specific information on the harm caused by a homophobic public civil registry officer.

After all, the judicial legislation model seems to be more faithful to the way the Court creates law. The Court abstracts the particularities of the case and encompasses millions of inhabitants who are part of the LGBTQI community. Even if the model of *tesis* were to be abandoned altogether, the Court may try to reassert its monopoly on judicial rules by consolidating dozens of overlapping arguments into a canonical rule in its judgment.

Perhaps the model of implied rules may be revisited with a different concept of "facts". The Court does not analyze particular disputed facts, but these are amplified in the light of thousands of similar scenarios that transcend the parties. The Court uses a complete factual framework[5] —perhaps made up of hundreds of precedents— to form a typical and repeatable precedent. For instance, in an *amparo* on discrimination of the right to social security for domestic workers, the Court used national statistics of millions of people to argue that a seemingly gender-neutral rule had in fact a disproportionate effect on women (SCJN, AD 9/2018, 2018). But perhaps, lest this model be confused with that of judicial legislation, the processes for making substantiated empirical statements should emerge from an adversarial proceeding between the parties, rather than being independently introduced by judges. There is still a pending debate on the deference that should be given to lower courts in assessing the facts in concrete constitutional review, as well as the weight that should be given to *amici curiae*, scientific expert opinions or proceedings to better provide empirical evidence supporting a *ratio*.

However, even rethinking an implicit rules model would still overlook one fundamental aspect of precedent-based argumentation: justification. The facts of a case are always *relevant* in the light of a goal, principle, purpose or value that justifies grouping certain traits of an event under a single category (Katharina Stevens, 2018, p. 239). Moreover, if it is accepted that the rules of precedent are not only applied and overruled but can also be extended in unforeseen but analogous cases or reduced in exceptional cases, it is necessary to provide reasons that explain the similarities or differences between the precedent and the case at hand. Hence, in addition to an antecedent and a judicial consequence, it is necessary to consider the political-moral justifications underlying the rules.

IV. *Ratio* as Political-Moral Justification

> "We can take rationes for what they are—rulings on law stated as necessary parts of justifications of decisions relatively to the cases and the arguments put by given parties."
>
> (Neil MacCormick, 2005, p. 154)

The *Amparo* Law identifies *justification* as a third element of *Tesis*, in addition to facts and consequences. Every ruling must answer why the case is treated similarly or not to the precedent. This model fits with the anti- or post-positivist position which includes principles as the justification of any rule. After all, many have recognized the role morality plays in the interpretation of precedent (Scott Brewer, 1996, pp. 959-961; Bustamante, 2012, pp. 66-67). MacCormick, for instance, holds that the theory of precedent is necessarily linked to justification, and this practice, in turn, consists of giving reasons that are consistent with moral principles (2005, pp. 100, 145).

However, the fact that the reform mentions "justification" may be a Trojan horse for the will of the Amending Power. The Court does not just safeguard the Constitution by specifying rules but incorporates its ideology into constitutional law. It is one thing, for example, to abide by a *rule* that simply prohibits heterosexual definitions of marriage; it is quite another, however, to follow the *justification* of the US Court, which stated that: [n]o union embodies is more profound that marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family." (*Obergefell v. Hodges,* 576 U.S. 644 (2015) or that of the Mexican Court, which argued that heterosexual definitions of marriage "promote and help build a social meaning of exclusion or demeaning" (SCJN, First Chamber, AR 704/2014, para. 75, 2014). Thus, conceiving justification as a constitutive element of reasons runs the risk of a government of judges.

In view of this objection, anti-positivists could say that following precedent is justified by formal principles. According to Alexy, formal principles "require that the authority of duly issued and socially efficacious norms is optimized" (Robert Alexy, 2014, p. 516) and include, *inter alia*, those of equality, competence and legal certainty (Jorge Portocarrero Quispe, 2016, p. 29). Thus, "justifications" would be specially protected arguments preventing similar cases from being treated differently, lower courts from disobeying a higher one, or the pre-existing law from being modified unless an argumentative burden is met. In this way, the formal principles serve a function equivalent to the positivist rule but making the argumentative aspect of the precedent transparent (R. Camarena González, 2021). If the Court does not identify any significant differences between the precedent and the case at hand, if it does not demonstrate that it has the authority to overrule the precedent, or even if it does have the authority to overrule the precedent but does not demonstrate that legal certainty must be affected, justifications will then operate as absolute rules.

Moreover, anti-positivists often argue that coherence constrains all judicial interpretation. Courts should not impose their convictions without demonstrating that their arguments are consistent with past decisions (Ronald Dworkin, 1996, pp. 10, 83). *Rationes* are open-ended and incomplete (Neil MacCormick, 2005, 147, pp. 154-155), interpreted as part of a set of decisions woven together by principles. Thus, even though there may be revisions to precedents by way of distinction or overruling, any such revision must be constrained by coherence.

In some precedents, the Court seems to understand its interpretative duty in coherentist terms. In the judgment CT 21/2011 (SCJN, Plenary Session, p. 54 2012), the Court admitted the "admissibility of different "interpretations" and suggested a criterion to rank interpretations according to the "highest possible degree of interpretative coherence". At times, the Court interprets its precedents not as isolated textual rules but as preliminary categories comprising a body of case law that emerges, zigzags, consolidates or collapses over time.[6] In fact, in another case, a Justice stated that:

> [C]onsistency requires that a court's precedents fit logically and coherently into a particular set of decisions so that the precedents laid down for a given problem are analogous, based on similar lines of reasoning (SCJN, First Chamber, ADR, 3166/2015, Dissenting Opinion, Zaldívar p. 5, 2016).[7]

In this understanding, coherence becomes a practical duty of the Court to demonstrate that its justifications conform to those given previously (Leonor Moral Soriano, 2003, p. 296). Thus, for instance, once the Court recognizes the right of trans people to obtain a new birth certificate on the grounds of free development of personality, it may then expand the precedent to include the right to divorce without cause or to consume marijuana. But it may also choose to exclude the use of cocaine because of the distinct harm it can cause. In non-distinguishable cases, the Court may reverse its own decisions, as long as the overruling restores coherence to its jurisprudence.

Once again, it can be asked whether coherence implies a maximalism of value judgments rather than of rules. Even if coherence is understood as the practical result of intersubjective arguments between interpreters in which the winning argument is the one most consistent with pre-existing law, there is a threat of judicial supremacy. Popular constitutionalists might ask why the Court would decide what the Constitution is (Ana M. Alterio, 2021, pp. 137-141). Some justices have even questioned the excessive power their precedents might wield, as if they possessed "epistemic superiority" (SCJN, Plenary Session, Cossío, Dissenting Opinion CT 299/2013, 2013) in determining the content of the Constitution. When all is said and done, while coherence may reduce discretion by compelling arguments that the case is or is not analogous to the precedent, it also encourages the introduction of new substantive content.

An anti-positivist court may argue that its creation of law is more democratic that rule models. This model is admittedly not as practical as that of judicial legislation in identifying a rule in a matter of seconds. But judicial practice is much more than identifying rules and applying them; it must also account for the creative role of interpretation. On the other hand, even though the Court abstracts facts from the case, it is much more transparent in its duty to justify its reasons. In the end, its role is to make interpretative judgments, not judgments of evidentiary assessment or empirical causation. At the same time, the justification given today must be framed not only by a precedent, but by a set of interrelated decisions, an argumentative constraint that models of rules ignore. In any case, the competence of the Court to make its reasoning binding comes from a substantive concept of democracy mandated by the Amending Power. Through constitutional review, the constitution withdraws certain issues from ordinary political discussion while judicial reasons enrich the debate and balance the legal sources in favor of minorities.

Although it is uncertain how a judicial system could work without a minimal commitment to precedent, popular constitutionalists could question whether the will of the people is reduced to what the Court holds. While the Mexican constitution has been reformed almost eight hundred times, sometimes overturning precedents, this does not solve the problem that the opinions of eight justices, whom no one elected, carry greater weight than the views of millions of people purportedly represented by the popular vote. Could it be that the only checks on the Court are constitutional reform or the appointment of new justices?

V. *Ratios* as Social Categories

> "[T]he meaning of a precedent is socially set and socially salient."
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> (Barbara Levenbook, 2000, p. 186)

A further approach to the reasons of precedent, which could quell the suspicion of judicial supremacy, is that of social categories.[8] Whether consciously or unconsciously, the Court

organizes and classifies the sensory stimuli of the world according to certain properties based on shared beliefs, education, ideology, interests, biases, values, experiences, etc. There may be, as Schauer says, strictly legal categories like "contract" or pre-legal categories like "railroad," but many are categories borrowed from the social world (Frederick Schauer, 2005, pp. 307-320, 312). As social constructs, their meaning and validity do not correspond exclusively to the judiciary but are created in a way that is shared by the entire community.

Levenbook proposes to understand precedents as *examples* whose meaning is controlled by society (See also H. L. A. Hart, 1994, pp. 124-126). The model of examples is similar to that of the implicit rule in its suspicion of linguistic formulations but accepts that "importance" is not only judicial or moral, but social. According to Levenbook, facts are filtered by natural language and perceptions of individuals, who collectively give them "exemplar force" (Barbara Levenbook, 2000, p. 190) to precedent. This force is relatively unconnected to moral justification and is understood in terms of social salience.

Rather than allude to examples, it seems better to refer to this model as that of social categories to stress its classificatory role. The judicial perspective is complemented by a broader framework which recognizes that the exercise of categorization interacts with cultural, social and historical dimensions in constant flux. In this model, precedents compel, not because of legal coherence, but because of the social support underlying the categories used by the precedent. Social pressure needs to be present for the targets of the precedent to feel obliged to follow it, and even shamed for not doing so. The focal point of this model is to step back from the categorization of judicially relevant facts to first analyze how these social filters are instinctively assumed or consciously chosen and how categories are constructed.

To give an example illustrating the social construction of categories in precedents, in an abstract constitutional review complaint, the Court ruled on the constitutionality of the removal of municipal officials from office due to a "permanent physical or mental disability" (SCJN, AI 3/2010, p. 19, 2012). In the ensuring discussion, justices used categories drawn from the medical model of disabilities, which views them as "ailments" (SCJN, Session of January 17, 2012, p.20), as illnesses to be cured. One Justice went as far as to declare that a "one-armed person" (p. 25) could not play the piano in a symphony orchestra, or that Stephen Hawking's lectures were so "painfully slow" (p. 17) that he should not be a municipal official. Thus, the constitutionality of the provision was confirmed with only one dissident vote, albeit disapproving of the reasoning.

Many people with disabilities refused to be labeled as "disabled." In light of the social model that sees disabilities not as individual impairments but as socially imposed barriers (Rosemary Kayess and Phillip French, 2008), they criticized the ignorance and insensitivity of the discussion and the judgment (Carlos Ríos Espinosa, 2012) and met with justices to express their disagreement (SCJN, Press Release 033/2012). As a result, the Court shifted the paradigm toward the social model of disability in subsequent cases and drafted a protocol on the subject. Perhaps most surprising, and the most important thing for this text, is that the

Court did not publish any *Tesis*, perhaps, as a tacit apology for its mistake, as suggested by Smith and Stein (2018, p. 333). Because of social pressure, the anachronistic categories of precedent became a dead letter.

The social categories model enhances the taxonomy with a less legal and more socio-political perspective. Instead of taking a stand in the debate on the separation of powers, it transcends it. The judicial legislation model is overly legalistic; it does not consider the social context or the cultural wars in which it occurs. Even if the Court does legislate, it does so checked by social as well as legal forces. The implicit rules model, on the other hand, assumes the facts picked by the judge or court to be true, but does not critically analyze the lenses through which those facts were viewed. The raw facts of the real world are perceived differently by different people. The justifications model alone does not account for how normative judgments become stronger as social attitudes change.

Think, for example, of how the positions of both society and the Court, on reflection, have changed on abortion, homosexuality or the rights of people with disabilities in recent decades. In 1942, the Court interpreted intellectual disability as a "mental abnormality" (SCJN, First Chamber, *Tesis* 307739, 1943) typical of an "imbecile". This position began to waver in the 1970s when reference was being made to "mental disability" as "an alteration in health that impairs the normal functioning of the ability to think" (Suprema Corte de Justicia de la Nación, *Tesis* 240729, 1981). Later, the social model that advocates built since the 1960s was later incorporated into Mexican law through the Convention on the Rights of Persons with Disabilities. Finally, the social model, at least in discourse, evolved into the dominant one in the Court. The social categories by which the Court views disputes are shaped by heterogeneous, conflictive and changing societies. Categories that were once hegemonic weakened to the point of abandonment, changing the perception of the facts. The Court's value judgments are not impervious to social changes, but rather reflect them. Categories do not only emanate from the judicial elite or legal scholars, but from generalized changes in social attitudes. In short, the Court is not a transformer in itself, but a social co-builder that is also influenced by social changes.

There is a dialogical relationship between the Court's convictions and those of other political and social actors (Robert C. Post, 2003, pp. 4, 7-8). As Levenbook says, this relationship may be a product of "[u]narticulated folk wisdom" (p. 225) that subconsciously encumbers the Court. But it may also be part of a broader strategy to effect social change. Collectives, movements and public actors jointly build social categories. Although the degree of relative autonomy of precedents with regard to social forces may vary, it cannot be assumed that the Court decides cases in a solipsistic manner. If it tries to establish a precedent with categories that non-judicial sectors reject almost unanimously, the *ratio* will not take root. If, on the other hand, it uses strongly internalized or otherwise latent social categories, the precedent is more likely to consolidate itself and become binding.

In light of the example, it could be argued that social categories must enter the legal world through an institutional channel other than the Court's perceptions. The Convention that introduced the social model already existed in the legal world from the time Mexico ratified it and gave it constitutional status. Hence, the precedent can be challenged without appealing to social issues; the Court's decision was plainly and simply a miscarriage of justice, *a per incuriam* precedent. However, the fact that the Court ignored a legal provision strengthens the argument of the interdependence between legal and social categories. No matter how much the social model of disability was in effect, the Court had not internalized the new categories. The strategy approach for a court embracing this model is to identify the vibrant or consolidated categories and either sow the seed of a new one or kill the dying category at the right time.

Undoubtedly, the relative autonomy of the categories is contentious. On the one hand, by interweaving social and legal concepts, it could be objected that the Court relinquishes its counter-majoritarian role. By predicting the social import to be attached to a decision and shifting positions before the precedent is issued, majorities are given tyrannical power. In the end, precedent will depend on the social pedigree of the categories. From this viewpoint, it would be just as well for precedents to be drafted based on polls. However, the Court may have a counter-majoritarian role, in the sense of majorities such as ordinary legislatures and executives, but majority on par with non-institutional social forces. This happens, for instance, when the legislature has not updated its practices to include the categories used in constitutional sources, including precedents. This interaction between social and legal elements is inevitable. The Court already creates precedents within a socio-political reality, fully aware that its precedents may go against certain sectors, but it must always have sufficient social endorsement (Barry Friedman, 2005, pp. 322-323; Michael J. Klarman, 1996, pp. 6-9, 16-17). Without this social context, no matter how divided it may be, the legal dispute would not only not be open to litigation between two opposing positions, but it would also be unfathomable unless a sizable sector of society adopts the same position as the Court.

Although this complementary model of reasons might seem attractive since it accounts for the relative autonomy of law, if the Court were to adopt it, it could turn into populism or judicial submission. It is one thing to accept that social categories influence the perception of reality, but it is quite another to subscribe to the normative premise that the Court must issue its precedents with the intention of reflecting the social sentiment of the moment. The Court can always err in its reading of what the "people" want or can listen to or ignore certain sectors as best suits its political agenda, much like traditional populism. Thus, the Court regards itself as an enlightened body capable of knowing what social sectors seek through emerging categories foreseen and institutionalized in precedents. The traditional position of the role of constitutional precedent is that it should be the best possible expression of the law in force, regardless of what other branches or social sectors hold and without making political calculations of how a ruling will be received, at the risk pain of becoming mere politics.

VI. Conclusion: *Ratio* Between Epistemic and Ideological Frontiers

This article analyzed how binding reasons can be understood in Mexico. The amendment and rules implementing it seem to promote models of implicit rules and justifications as complements or alternatives to the model of judicial legislation, perhaps in an attempt to eliminate *Tesis*. Instead of proposing a super-conceptualization of *ratio* that takes the advantages of each and surmounts their disadvantages, it is probably better to understand them as shifting and sometimes overlapping ideas, depending on the interpretative context in which the Court sets the precedent.

In some scenarios, even if *Tesis* were abolished, there may be good reasons to issue rules under the judicial legislation model. Perhaps the Court already has ample information and knowledge, precedential strength and sufficient political backing to arrive at the "typical and repeatable aspect" of a given human relationship and translate it into the language of rules. The Court captures its decision in a canonical rule that makes it difficult for subsequent courts and other interpreters to manipulate. Nevertheless, the practicality of judicial rules is gained by paying the price of accepting the language of judicial legislation that does not fit with many conceptualizations of separation of powers.

In other cases, once the facts of the trial have been given their proper place in a judgment, an uncertain scenario might dictate providing the factual clues for the subsequent court to arrive at the category but leaving the rule implicit. The Court lacks sufficient information to formulate a rule as an explicit provision in a thriving discussion within the Court, the judiciary and society in general. The Court is experimenting with different approaches, and the nuances of the facts discourage the formulation of a rule with a certain degree of abstraction. Moreover, this approach is useful when there is a consensus in the Court in terms of the rulings, but differences in the justifications, as occurs when there are numerous concurring votes. Thus, the subsequent courts re-interpret, elaborate on and clarify the Court's precedent.

The model of political-moral justifications may be present in any reasoning by analogy or distinction, but it is especially visible when the Court overrules a precedent. Neither a *Tesis* nor even a good analysis of the facts is enough to produce judicial law. The Court provides substantive reasons as to why the new judicial category is better than the previous one. It accepts that the case is not dissimilar but demonstrates that it has the power to overrule it. Moreover, its impact on legal certainty is not very serious given that the change was drawn along a parallel line of precedents. Lastly, the overruling is justified in terms of coherence; there was an anomalous precedent that must be invalidated in order to reestablish conditions of mutual support between rulings. This justification within the judiciary must be aligned with the principle of separation of powers to demonstrate the Court's cooperation or predominance with the executive and legislative branches.

Lastly, the model of social categories can shed light on the previous models, especially when there is a gap between legal and social concepts. Legal language has lagged cultural, political and technological changes. At any rate, the Court that seeks to maximize the voices of

the minorities disregarded in ordinary political processes must accept that its precedents must be firmly rooted in society if these precedents are to transform reality.

This article has sought to further the discussion of *ratio decidendi* in the context of Mexican law and the civil law tradition, albeit inspired by the common law. Adopting the perspective of the Court as a collective and institutional agent raises many questions for future research. How should the pertinent facts be revisited in light of a constitutional court's role as a "court of precedent"? To what extent is the court a collective agent and not simply a collection of individuals in setting precedent? How much power and accountability does an acting justice have to set a collective position when issuing a judgment? Does focusing on supreme courts instead of lower courts distort the understanding of creating and following precedent? Many discussions are still pending in this collective effort to understand precedent from a situated standpoint while at the same time transcending national borders and legal traditions.

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Notes

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1 The term "precedent" is usually defined as a single decision and as an institution "typical" of the common law system as opposed to "case law" as a set of recurring decisions characteristic of the civil law system. Mexican judicial practice is a combination of both, but it seems to lean towards the first, at least in the cases decided by the Court.

2 The concepts of *ratio* and *dicta* can be traced back at least to the case of *Bole v. Horton* (1673) (United Kingdom) which held that statements that were not necessary for a judgment remained as a mere *gratis dictum*.

3 The Court has held that the mandatory criterion emerges from the jurisdictional decision embodied in judg ments and not in opinions. (SCJN, Tesis 198709, 2016)
4 Italics in the original. Citing Sartor, 1996, pp. 261-262.
5 I am indebted to Marina Gascón for this phrase, as well as for the invitation to rethink the facts in this model.
6 This is the case of *Amparo* under Review 1359/2015 (Suprema Corte de Justicia, First Chamber. Amparo en Revisión 1359/2015, Arturo Zaldívar Lelo De Larrea, November 15, 2017, pp. 24-34.)
7 Citing (Michael J. Gerhardt, 2008, p. 88)
8 I would like to thank Marina and Sandra Gómora for their comments on the autonomy of this model in comparison with the three previous ones.