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Critical legal studies and coherence in the decision-making process: the Brazilian case*

Estudos Jurídicos Críticos e coerência das decisões: o caso brasileiro

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Abstract

This article suggests that a critical approach as the CLS could have deeper and stronger impact on the transformation of reality if it embraced a concept of linguistic coherence on a basic level. It presents a general critique of Brazilian Courts decision-making process and a claim that in cases in which evaluative words and expressions are at stake, there is an implicit duty of using an extra step on the reasoning in order to translate those words and expressions into descriptive ones. That practice permits accountability and transparency of the use of power by judges and decision-makers in general.

Keywords: Critical legal studies. Coherence. Decision-making process. Brazilian Courts. Law on books. Law in action.

Resumo

Este artigo sugere que uma abordagem crítica como o CLS poderia ter um impacto profundo e forte na transformação da realidade por abranger conceito de coerência linguística em nível básico. O presente artigo apresenta uma crítica geral ao processo de tomada de decisão dos Tribunais Brasileiros e uma reivindicação que, nos casos em que palavras e expressões avaliativas estão em jogo, há um dever implícito de ir além na argumentação, a fim de traduzi-las em palavras descritivas. Tal prática permite exigir transparência no uso do poder por juízes e decisores em geral.

Palavras-chave: Estudos Jurídicos Críticos. Coerência. Processo de tomada de decisão. Tribunais Brasileiros. *Law on books. Law in action*.

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1 Introduction

This article will explore the self-declared limits of the Critical Legal Studies Theory – CLS. CLS is a movement that took place in the United States during the late 1960s and early 1970s[2]. The ideas were later formalized by David Trubek and Duncan Kennedy at the University of Wisconsin-Madison in May of 1977, when they outlined the theory's major tenets of criticism toward liberalism and formal positivism.[3] The theory intends to reveal and ultimately denounce the underlying power relations in decisions, denying any possibility of examining decision correctness. I think it is possible, however, to go beyond this point through an analytical, theoretical instrument; I would suggest the possibility of decisions analysis using the concept of *coherence*, as used in the prescriptive language theory. Despite its theoretical specificity, the argument fits into a broader spectrum of ideas, leading toward social *status quo* transformation. This explains the interest in the CLS.

Is it possible to reveal and denounce power relations present in the judiciary deciding practices using an analytical instrument of formal logic? This question delineates the paper's scope.

The idea is to advance a participative democratic idea, enhancing accountability in the judiciary and revealing inconsistencies in the decision-making process that weaken its transparency, and therefore impeding criticism.

I assume that there is, in Brazil's case, a deficit of democratic participation in public institutions, and specifically that such a deficit occurs in relation to the performance of the judiciary. Thus, the main point of interest here is the work of judges from a critical perspective.

The political inspiration for the argument is the idea that transformation implies individual consciousness[4]; this requires access to information and demystification of rhetorical discourses. The present undertaking is, thus, the attempt to demonstrate that decisions could be more transparent, something that would facilitate discussion about their political nature.[5]

2 A word on the concept of accountability

The importance of applying the concept of coherence to judicial decisions refers to the possibility of their critical analysis. Public examination of decision rationales is one of the most effective ways to permit interaction between judges and society. Publicity of all decisions allows social control of the decision-making power. The idea that decision makers have to follow the principle of coherence is also tightly bound to transparency and accountability[6] of the actions of those who retain power by delegation. What judges and politicians do has be susceptible to collective knowledge and, therefore, to criticism, for the sake of public accountability.

Although the concept of accountability is mostly applied to the executive and the legislative powers, its applicability to the judiciary power is well recognized. Accountability is an important and essential requisite of the Rule of Law, which holds that those who occupy offices must account for their actions through pre-established juridical rules and legal provisions that determine the State organs' limits of the exercise of power.[7] The judiciary is, therefore, a central institution regarding the concept of accountability, since it is responsible for controlling the legality of other branches of State power. The judiciary itself, though, must also account for its decisions in a public manner, since it exercises power in the name of

2 GORDON, Robert W. Unfreezing legal reality: critical approaches to law. *Florida State University Law Review,* Tallahassee, v. 15, n. 2, p. 195-220, Summer, 1987. p. 196.

3 UNGER, Roberto Mangabeira: *The critical legal studies movement*. Cambridge: Harvard University Press, 1986. p. 1.

4 TRUBEK, David M. Where the action is: critical legal studies and empiricism. *Stanford Law Review*, Stanford, v. 36, n. 1/2, p. 575-622, Jan. 1984. p. 608.

5 Law application implies choices that have significant impact in social allocation of material, political cultural and symbolic resources. SANTOS, Boaventura de Sousa; RODRIGUES-GARAVITO, Cezar A. *Law and globalization from below*: towards a cosmopolitan legality. Cambridge: Cambridge University Press, 2005. p. 29.

6 "The requirement for representatives to answer to the represented on the disposal of their powers and duties, act upon criticisms or requirements made of them, and accept (some) responsibility for failure, incompetence, or deceit." MCLEAN, Ian; MCMILLAN, Alistair. *The concise oxford dictionary of politics*. New York: Oxford University Press, 2003.

7 "Judicial Independence and Judicial Reform in Latin America". DOMINGO, Pilar. Judicial independence and judicial reform in Latin America. In: SCHEDLER, Andreas; DIAMOND, Larry; PLATTNER, Mark F. (Ed). *The self-restraining state*: power and accountability in new democracies. Boulder: Lynne Rienner, 1999. p. 151-175.

the whole society. It has the duty to act with transparency and responsibility.

It is also socially expected that a democratic and independent judiciary system be impartial and that the decisions observe a minimum standard of rationality. Thus, ideally, a decider should not pass dubious or senseless judgments[8] and should consider the basic principles of logic and relevant facts.

Accountability is, therefore, an antidote against judicial arbitrariness, given that the judiciary holds enormous power and must respond[9] for how this power is used.[10] Although there are many ways to hold the judiciary accountable, such as inspection by higher courts in the hierarchy, my particular interest in this paper is the possibility of unveiling the rationales behind decisions and the consequent possibility of criticizing them.[11]

3 Critical Legal Studies

Judicial decisions criticism is only fully possible if the decisions are sufficiently clear and criticizing a political aspect embedded in a judgment presupposes its adequate and public justification. My argument in this article is that CLS' criticism of judicial verdicts can be strengthened by assuming a critical concept of coherence, since the informative use of language[12] entails a minimum of rationality. Coherence, thus, serves as a criterion for the appreciation of rationality in argumentation. I find it possible, in this sense, to utilize a theoretical-analytical tool along with Critical Legal Studies.

CLS had two distinct lines of thought: criticism of the alienation brought on by juridical doctrine, and deconstructivism based on North American realism, a combined critique that results in the idea of "indeterminacy."[13] What makes CLS important to the present analysis is that not only does it present itself as a theoretical movement, but also as a political one,[14] with the intent to transform the individual and social perceptions of consciousness.[15] That gives CLS a politically emancipative character. The movement did not purport a new pre-conceived model of social and political arrangement, but defended a constant critical surveillance of what the courts do with the law. In that sense, one can say that the revolutionary aspect of CLS is of a procedural nature.

CLS may be viewed in four different perspectives: a) the *movement*; b) a *school of thought*; c) a *theory* and d) a *mediatic factoid* called "CLS".[16] My specific interests here are the *movement* and of the *theory* called "CLS." The movement, because of its collective-action sense with an intent of *status quo* reform, and the theory, because the set of ideas helps explain the phenomenon of norm application and because it delineates an identifiable set of propositions that are constitutive of a specific theoretical field.[17]

Although the CLS tradition has been quite successful in demonstrating the asymmetries of power among social actors reflected in normative, cultural and

8 This does not mean that a certain court may never change its understanding toward a certain judicial matter. A court may modify its understanding, but such a change has to be accompanied by valid arguments that support what has been decided.

9 PEREZ-PERDOMO, Rogelio. *Latin american lawyers*: an historical introduction. Stanford: Stanford University Press, 2005. p. 130.

10 ROSSEN, Keith S. The protection of judicial independence in Latin America. *Inter. American Law Review*, Miami, v. 19, n. 1, p. 1-35, Oct. 1987. p. 6.

11 GARDNER, James A. *Legal imperialism*: american lawyers and foreign aid in Latin America. Madison: University of Wisconsin Press, 1980. p. 122.

12 The *informative* use of language is different from the *poetic* use.

13 GABEL, Peter. Law and hierarchy. *Tikkun,* Berkeley, v. 19, n. 2, p. 44, Mar./Apr. 2004. Research Library Core, p. 48

14 "we are united in that we would like our work, in so far as it is possible, to help in modest ways to realize the potential we believe exists to transform the practices of the legal system to help make this a more decent, equal, solidary society – less intensively ordered by hierarchies of class, status, 'merit', race, and gender – more decentralized, democratic, and participatory both in its own forms of social life and in the forms it promotes in other countries." GORDON, Robert W. Unfreezing legal reality: critical approaches to law. *Florida State University Law Review,* Tallahassee, v. 15, n. 2, p. 195-220, Summer, 1987. p. 197.

15 "The project of CLS is quite different: While Critical legal scholars seek to show relationships between the world views embedded in modern legal consciousness and domination in capitalist society, they also want to *change* that consciousness and those relationships. That is the Critical dimension in Critical legal scholarship. In this scholarly tradition, the analysis of legal consciousness is part of a transformative politics. This is what distinguishes CLS from traditional social science." TRUBEK, David M. Where the action is: critical legal studies and empiricism. *Stanford Law Review*, Stanford, v. 36, n. 1/2, p. 575-622, Jan. 1984. p. 591.

16 KENNEDY, Duncan. *A critique of adjudication*: fin de siecle. Cambridge: Harvard University, 1997. p. 9.

17 KENNEDY, Duncan. *A critique of adjudication*: fin de siecle. Cambridge: Harvard University, 1997. p. 10.

institutional dimensions, another analytical dimension of an instrumental nature may be added: a *propositional* objective.[18] Hence the idea that the theory of language and formal logical principles may be useful instruments to show the argumentative inconsistencies in judicial decisions, which would further judicial accountability.

4 CLS and coherence: external perspective

There are two possible ways to analyze a certain ruling: substantive and formal. The substantive evaluation of the "correctness" of any given opinion is very problematic, because we would have to admit some moral universal principles. A formal analysis, however, requires the use of logical principles applicable to language in general, as a precondition to communication intelligibility.[19] Two principles that give consistency to communication among subjects, and which are "constituent" of language, are the principles of *non-contradiction* and of *identity*.[20] The principle of non-contradiction determines that the same individual cannot say distinct and conflicting things about the same object, risking the compromise of coherence of language. The principle of identity relates to the fact that an object can only be itself and nothing different from itself. This way, coherence is a principle of prescriptive language.[21]

Transparency of judicial decisions implies the public elaboration of the reasons that led the judge to decide in a determined way, allowing verification of the rationality of the decisions. Such rationality relates to the plausibility of the argument through the use of an intelligible and adequate form, as well as of reasons considered adequate to justify a certain decision. It is the idea of *coherence* that allows us to determine the logical plausibility of a given speech. "Coherence," though, can be applied in more than one sense, so it is necessary to define it here in the sense I intend it.

The concept of coherence has two different dimensions: internal and external.[22] From the internal perspective, which is therefore prescriptive in accordance with the interpretive tradition of authors like Robert Alexy, Ronald Dworking and Neil MacCormick, coherence plays a central role. In contrast, under a critical perspective, the idea of coherence is a myth, and the concept is considered a rhetorical device for decision legitimacy.[23]

I do not use the concept of coherence in the same way those authors do, as they propose a certain methodology for the production of decisions that imply some degree of normative objectivity. Alexy[24] works with a set of methodological control norms for the decision making process that, although formal, involve an ethical compromise of the decider with a universal minimum such as, for example, the supposition of good faith while judging. This is incompatible with the critical propositions of CLS.

Dworkin[25] envisions an axiological minimum, expressed within the compromise of integrity, which

18 Perhaps the reason for which the CLS have not had the repercussion that its representatives hoped for may be the lack of a theoretic instrumental apparatus to cope with the concrete dimension of the judicial decision. "CLS no ha eleborado un nuevo programa politico y no ha influido ni en la vida politica americana ni en la vida interna de la profesion juridica." KENNEDY, Duncan. Notas sobre la historia de CLS en los Estados Unidos. *Revista Doxa*, São Paulo, n. 11, p. 283-293, 1992. p. 287 (CLS has not elaborated a new political program and has not influenced either American political life or the internal life of the juridical profession.)" Another explanation may simply be that, within the ideological dispute, the CLS representatives were won over. "Born of the social movements of the 1960's, Critical Legal Studies launched a powerful critique of law and legal education as institutions that actually legitimized the injustices of American society. However, like so many of the radical attempts of that time, it was largely defeated by the conservative forces whose ideas dominate law and society as a whole today." GABEL, Peter. Law and hierarchy. *Tikkun,* Berkeley, v. 19, n. 2, p. 44, Mar./Apr. 2004. Research Library Core, p. 43.

19 Such method does not imply any substantial content of universal moral rules.

20 ARISTÓTELES. *Organon*. São Paulo: Edipro, 2004.

21 An important point is the impossibility that any method of decision appreciation, in which universal principles are adopted, may be used in combination with a critical perspective, because the latter denies any possibility of universal values.

22 Hart proposes that the law possesses an internal dimension, according to which the individual has a perception of duty in relation to the existence of a normative juridical order. This internal perspective is, according to the author, constitutive of the law and distinctive in relation to other normative orders. The use of the concept of "internal coherence" does not refer here to Hart's concept, but to a logical-linguistic one. HART, Herbert. *O conceito de direito*. Lisboa: Fundação Calouste Gulbenkian, 1996.

23 CLS can be qualified as a skeptical theory, as its theoretical proposition is deconstructive and denunciatory of a state of things, even though it does not propose a form of optimization of norm application. In this sense, in some way, CLS stands in oppositions to the traditional and analytical hermeutics.

24 ALEXY, Robert. *Teoria da argumentação jurídica*. São Paulo: Landy, 2001.

25 DWORKIN, Ronald. *Levando os direitos a sério*. São Paulo: M. Fontes, 2002.

must be accepted as a precedent condition to come to a "correct" decision. Finally, MacCormick[26] works with a descriptive method of the decision making process that, although formal, encourages discussion of the material "correction" of the decision. CLS rejects entirely any discussion of decision "correction," which makes the two theoretical perspectives antagonistic in that sense. The use I make of the concept of internal coherence bears no relation either to the idea of a "correct" decision or to an axiological minimal content (or any "substantive" correction) of the decision. My use of the concept relates to the conditions of language intelligibility at a much more basic level than is seen in an analysis of the above mentioned authors.

CLS's criticism of the concept of coherence is not addressed to the principles of the consequent utilization of language. That makes it possible to attune that concept, on a fundamental level, with a critical approach, while accepting the principle of indeterminacy.

The concept of coherence that is criticized by CLS derives from the development of the "science of law" (juridical science) in the German theories of the nineteenth century. According to that, there would be general principles in law that could be known through scientific methods (induction and deduction) and that would consequently be coded in such a way that law could be expressed by means of systematic and coherent codes. This notion of coherence relates to the ideal of a coherent normative system, the most fundamental norm being more general and the most specified ones being more specific. The theory aims at providing a method for the decisions to be "correct," something radically denied by the CLS.

It is important to say that a "scientific" idea of law is foreign to the North American tradition, although this idea influenced the juridical teachings in the United States at the end of the nineteenth and beginning of the twentieth centuries.[27] For Americans, the "science of law" is something distant from their reality, because in the North American tradition, the primary protagonist in law is the judge, who is a problem solver, not a theorist. The tenets of the "science of law" -- emphasis on the creation of a juridical cohesive "system," formalism, and limits to the application of equity -- are all factors that in theory limit the judge's activity as a problem solver, and therefore are not welcome in that tradition.[28]

For the purposes of this paper, therefore, I do not want to use the concept of coherence in the same way the interpretive authors do. I also do not want to combat the concept of coherence that CLS criticizes. From the CLS point of view, coherence is a myth that serves to support the idea that the judicial system is a logical self-referential system, in which there would be always a correct answer to whatever legal dispute.

CLS is critical of coherence in the first sense that I use the concept. According to this idea,[29] contradictions in the predominant legal doctrine, the one that advocates the existence of logical coherence and of a normative "system," result in the concept of "indeterminacy." Hence, no *correct answer* or *correct decision* for a legal problem exists. The concept of Rule of Law,[30] according to CLS, does not exist in the manner that the dominant legal doctrine intends it. What exists is a *Political State*, meaning that all decisions are substantially political. The notion of Rule of Law serves to legitimize a state of oppression and domination, as it reinforces the deciding manner generally accepted as valid. Another attack by CLS relates to

26 MACCORMICK, Neil. *Legal reasoning and legal theory*. Oxford: Clarendon Press, 2003.

27 The adoption of the method of case solving is the fruit of this influence. "The introduction to case method in the teachings at Harvard Law School during the 1870's was partially grounded on assumptions of juridical science." MERRIMAN, John H. *The civil law tradition*. Stanford: Stanford University Press, 1985. p. 79.

28 MERRIMAN, John H. *The civil law tradition*. Stanford: Stanford University Press, 1985. p. 67.

29 Andrew Altman holds that there are two tendencies within CLS, one radical and one moderate. According to the author, the radical tendency is associated with deconstructivism and advocates a lack of objective structure in law or any other social institution. Law would be a conjuncture of words void of meaning to which anyone could place significance that seems more suitable to them. The moderate tendency rejects the affirmation of the radical theory that there is no structure of objective reality in law or society. This tendency affirms that words do have a nuclear meaning, but that the interpretations given to them are subject to moral and political beliefs. In the present paper, the distinction bears no greater significance, as the principles that unite both tendencies are sufficient to identify them as a sole theoretic movement. It appears to me, however, that the moderate school more adequately describes the judicial phenomena. ALTMAN, Andrew. *Critical legal studies*: a liberal critique. Princeton: Princeton University Press, 1993.

30 The expression "Rule of Law" has no precise meaning, implying a set of conditions such as independent and steady institutions, democratic government, civil and procedural rights, accountability etc.

the law's capacity to coerce the application of power. The idea that power can be limited by law is a fetish, since law is not created to limit the power of those who themselves created it. Rule of Law serves to take power away from individuals, and therefore must be attacked.[31]

In prescriptive language theory, under a formal logical perspective, coherence is a concept that implies the application of the identity and non-contradiction principles to the arguments of any given sender. The CLS definition of the notion of coherence is what I call the idea of *external perspective coherence*. I think acceptance of that critique does not preclude the use of the internal perspective of coherence as a linguistic tool to expand the critical power of CLS.

The CLS critical-theoretical project has four basic principles: indeterminacy, antiformalism, contradiction and marginality.[32] The principle of *indeterminacy* is the one according to which law is not systematic and does not provide normative answers to all situations. There is a certain degree of indeterminacy in legal norms that has necessarily to be fulfilled by the judger's subjectivity.[33] The *anti-formalism* principle refutes the pretense of "rational neutrality" in the decision making process. Formalism is intended as a decision making method, according to which it is possible to decide by means of formal logical deduction.[34] The principle of *contradiction* means that legal practices reflect the ideological battle to gain prevalence of a certain perspective of human relations. Finally, the *marginality* principle proposes that law is not a key factor in determining social behavior.

The principle that should be analyzed specifically is that of indeterminacy, because from it derives the proposition that decisions are incontrollable. It is with this principle that coherence must be compatible for my intentions in this paper to make sense.

One of the central CLS arguments to the criticism of coherence in law is that judicial norms are expressed in natural language, therefore in polyssemic, imprecise, inherently undetermined language. When a norm has to be applied, the decision making process through which this is done is never a purely rational process, so it is ideologically conditioned.[35] If words are, to a certain extent, undetermined, so are laws. From that derives the idea that there is no logically correct decision, and, consequently, the conclusion that judicial decisions are a product of judges' personal choices. If there is no way to determine the "correctness" of a given decision, and if judicial decisions are always the expression of the judges' personal views, the decision will always be the result of a political option. "Coherence" is criticized by CLS based on the fact that it is a false and mystifying declaration that a judicial system can be coherent, and that this coherence is related to the possibility that a given decision is received as "correct" (= coherent).[36]

The assertion that judicial decisions are the expression of political options has, to CLS, a denunciatory character. The idea of correctness works as a strategy of mystification of the judicial discourse, and CLS emphasizes the fact that juridical decisions are a product of the

31 ALTMAN, Andrew. *Critical legal studies*: a liberal critique. Princeton: Princeton University Press, 1993. p. 15/16.

32 TRUBEK, David M. Where the action is: critical legal studies and empiricism. *Stanford Law Review*, Stanford, v. 36, n. 1/2, p. 575-622, Jan. 1984.

33 The notion that judges make the law and do not merely apply it, according to CLS, has its roots in North American judicial realism. They presume that deduction with a mathematical style is a myth that serves to legitimize a model of judges' actions. TRUBEK, David M.; SANTOS, Alvaro. *The new law and development:* a critical appraisal. Cambridge: Cambridge University Press, 2006. p.5.

34 "The second major impact of the welfare state on law is the turn from formalistic to purposive or policy-oriented styles of legal reasoning and from concerns with formal justice to an interest in procedural and substantive justice. Before further discussion, these terms should be defined. Legal reasoning is formalistic when the mere invocation of rules and the deduction of conclusions from them is believed sufficient to form every authoritative legal choice. It is purposive when the decision about how to apply a rule depends on a judgment of how most effectively to achieve the purposes ascribed to the rule. The difference between these two types of legal reasoning is one between the criteria thought appropriate to the overt justification or criticism of official decisions; it does not pretend to describe the actual causes and motives of decision." UNGER, Roberto Mangabeira. *Law in modern society*: toward a criticism of social theory. New York: The Free Press, 1977. p. 194.

35 An interesting and contemporary example of the concept of indeterminacy is Mark Tushnet's commentary on the *Bush v. Gore* decision. TUSHNET, Mark. Renormalizing Bush v. Gore: an anticipatory intellectual history. *Georgetown Law Journal*, Washington, DC, v. 90, n. 1, p. 113-125, Nov. 2001. p. 113.

36 TUSHNET, Mark. Renormalizing Bush v. Gore: an anticipatory intellectual history. *Georgetown Law Journal*, Washington, DC, v. 90, n. 1, p. 113-125, Nov. 2001. p. 100. Although it can be a perspective that may be criticized as reducing the CLS pretensions, it was disseminated in such a manner that today, this theoretical principle identifies them.

judges' will and, therefore, the idea that there is a neutral outcome of the decision making process is false. CLS uses the concept of coherence as a rhetorical instrument to show discrepancies in the predominant judicial theory.[37]

From a theoretical standpoint, CLS criticizes the North American liberal project and states that the accepted and reproduced legal doctrine – called the "dominant doctrine" – serves to alienate both the practitioners and the individuals. The "dominant doctrine" functions as an instrument to selectively stop the discussion of certain themes and social plans different from the established one. For CLS, the questioning of this dominant line of thought and judicial practice has become necessary.[38]

From a political point of view, the CLS project affirms a program of social transformation, and so proposes the demystification of judicial discourse as something not purely rational and which legitimizes a deciding scheme that, in the final analysis, serves the political purpose of maintaining the domination of one social group (the ones who hold power) over another (the ones who do not hold power).

One of the constant statements of the so-called "crits"[39] is that law and the "political sciences" do not possess an ensemble of techniques and institutions that can resolve the problem of social domination. They also maintain that the predominant legal theory, which grounds itself on the concepts of technical rationality, efficiency and inexorability of the political and economical order as it is, is a device of the exercise of power.

Legal culture is imposed by means of an institutional structure that allows the use of force, and it is a prerogative for those who know how to operate such discourse. This makes it excluding and instrumental.[40]

The CLS theoretical project that accompanies the political one supports itself on the notion of "indeterminacy" and on the necessary interrelation between the interpreter and the norm, which could approximate it from a hermeneutic perspective. However, the complexity of the relationship between interpreter and text is not seen as a matter to be investigated with the perspective of the outcome of such an interaction, nor is it seen as a starting point for the investigation into the decision making method.[41] The idea of indeterminacy works, therefore, as a denunciatory vehicle for the inherent politicization of the deciding act, since the judger inexorably applies his ideology in the process of arriving at a decision. That practice is part of the "deviationist doctrine".[42]

Indeterminacy can also be explained by the statement that predication, the act of judging, is always a strategic act, regardless of whether it searches for a normative sense within a framework of possible meanings[43] or in a penumbral area.[44] The matter of predictability of the decisions is not fundamental to the CLS critical project, but the idea that law is an arena for political struggles in which different ideologies compete is. The task of defining the normative sense of any given norm is a political task and must be explained as such.

It is ethically unacceptable to deny the political dimension of legal practices. Not only norms, but law itself is undetermined because both the normative meanings and the ideology of those who determine them are undetermined as well.[45]

Even if CLS has firmly attacked legal formalism, the critique of the notion of coherence does not depend on the type of reason applicable to a decision, and it is aimed at the argument posed in a deductive form. The possibility of a "correct answer" is denied because decisions are expressions of a political project and do not come about as acts of "pure deduction".

CLS critique is also aimed at the "correct policy"

37 Trubek cites Mensh's example (The History of Mainstream Legal Thought, in The Politics of Law: A Progressive Critique – D. Kairys e. 1982) TRUBEK, id. p. 594

38 The dominant doctrine conforms to the paradigm, according to Kuhn. KUHN, Thomas. S. *The structure of scientific revolutions*. Chicago: University of Chicago Press, 1962.

39 Abbreviation of "critics," a notion associated with the political posture of theoretic contrast and deconstruction of the liberal values and arguments respectively.

40 The concept of symbolic power in Bourdieu expresses the second kind of power referred to. BOURDIEU, Pierre. *O poder simbólico*. Lisboa: Difel, 1989.

41 There is no similarity between the CLS proposal and a hermeneutic proposal, such as Gadamer's. GADAMER, Hans George. *Verdade e método*. Petrópolis: Vozes, 1997. v. 2.

42 UNGER, Roberto Mangabeira. *The critical legal studies movement*. Cambridge: Harvard University Press, 1986. p. 15-42.

43 KELSEN, Hans. *Teoria pura do direito*. São Paulo: M. Fontes, 1991.

44 HART, Herbert. *O conceito de direito*. Lisboa: Fundação Calouste Gulbenkian, 1996.

45 KENNEDY, Duncan. A left phenomenological critique of the Hart/Kelsen theory of legal interpretation. In: CACERES, Henrique et al. (Coord.). *Problemas contemporaneos de la filosofia del derecho*. Mexico: Universidad Autonoma de Mexico, 2005. p. 371-383.

argument, according to which the correct decision is the one that maximizes certain consequences that will probably appear as a consequence of the decision. If those consequences accomplish a certain purpose in public policy, then the "right answer" has been found. In the policy argument, deduction beginning with a given norm does not resolve satisfactorily the matter pending on decision, so considerations of non-deductive reasons, standards and collective objectives must enter the decision making process.

Dworkin, for example, proposes a decision method that is highly criticized by CLS because it suggests the notion of a "correct answer."[46] The figure of a Herculean judge is condemned by CLS because it is taken as an inadequate tool to explain the decision making process since, in reality, deciding the best outcome is not an exclusive product of rational ponderings, but instead, expression of political idiosyncratic preferences.[47] Consequently, both in a deductive argument and a policy argument, a false presumption of implicit ontology would exist. It is precisely against the idea of an essential "correctness" of decisions that CLS manifests itself. It is not the affirmation that judicial reasoning follows a deductive form that is contested, but the idea that there is a systematic coherence in law that can be evaluated with the result of the decision making process.[48]

The concept of coherence used by CLS is related to the idea that a supposed judicial system would provide "correct" decisions if the "correct" aspects involved in a certain matter pending decision were taken into consideration. Coherence is, in this sense, a concept relative to a normative system that has a logical sense that must be observed, if the correct method is applied.

The CLS criticism seems correct, but it does not imply an absolute denial of rationality in legal practice. CLS adopts a methodic doubt about the empirical possibility of "correctness" of judicial decisions or any sort of universalization of values, but it does not propose radical skepticism. Although the critical posture means a constant attempt of demystification of the discourse and judicial practice, the idea that decisions must be passed by the judiciary seems to be institutionally the less imperfect alternative.[49]

If the application of legal norms is a political act, is it possible to demand of the judiciary some sort of coherence for the sake of rationality and predictability of the normative sense of decisions? Is accepting indeterminacy the same as accepting the impossibility of any kind of control over judicial decisions? If the answers to these questions are that there is no possibility of any controlling or rational appraisal of decisions, and that it is not possible to expect rationality from the judiciary, then the CLS project will have exhausted itself with its own limit of denouncing the *status quo*.[50] I do not think this is the case.

46 Dworkin's ideas are condensed in three of his most famous works: Taking Rights Seriously, A Matter of Principle and Law's Empire

47 Dworkin's project is inspired by the same humanistic orientation as the CLS project, and it seems wrong to think that a simplistic opposition between their goals exists. The most widely disseminated idea of opposition between the projects is that Dworkin believes it is always possible to obtain a definite answer, while proponents of CLS think that no exact answer is ever likely. Despite being inserted in the field that CLS calls liberal legal theory, Dworkin concerns himself with the individual rights of the subjects in law. See KENNEDY, Duncan. *A critique of adjudication*: fin de siecle. Cambridge: Harvard University, 1997. p. 129.

48 KENNEDY, Duncan. *A critique of adjudication*: fin de siecle. Cambridge: Harvard University, 1997. Especially chapter 5.

49 "I think of my own initial faith in legal reasoning as like the religion of eighteenth-century intellectuals who believed that there were good rational reasons to think there was a God, that the existence of a God justified all kinds of hopeful views about the world, and that popular belief in God had greatly beneficial social consequences. But they also had confirmatory religious experiences that were phenomenologically distinct from the experience of rational demonstration."KENNEDY, Duncan. *The critique of rights in critical legal studies. in left legalism/left critique.* Durham: Duke University Press, 2002. p. 192. In an earlier work, however, Kennedy seems to think in a different way. It possibly can be explained by the fact that the previous article was a manifesto rather than a theoretical paper. In his words: "The outcomes of struggle are not preordained by any aspect of the social totality, and the outcomes within law have no 'inherent logic' that would allow one to predict outcomes 'scientifically', or to reject in advance specific attempts by judges and lawyers to work limited transformations of the system." KENNEDY, Duncan. *Legal education and the reproduction of hierarchy*: a polemic against the system, a critical America. New York: New York Press, 2004. p. 41.

50 Some critics of CLS demand from the movement an answer to the question about what they would substitute for the system they criticize. The question, as Fischl pointed out, makes no sense, because the project is critical and does not point to a moral content or a ready plan of social order to replace the existing one. FISCHL, Richar Michael. The question that killed critical legal studies. *Law & Social Inquiry*, Chicago, v. 17, Issue 4, p. 779-820, Oct. 1992.

5 Internal perspective of coherence

I think there are three possible answers to the question about the existence of rationality in judicial decisions: 1) Decisions are totally controllable and rationally based; 2) Decisions are absolutely irrational and a product of mere personal preferences; 3) Decisions are produced with some constrictions to the absolute irrationality, as norms allow some extent of predictability and are based on rational arguments.

The third answer explains in a more precise way what occurs in a judicial decision. There is a way to check the rationality in judicial practices, although they are not only the product of acts of rational exercise. A second conceptual perspective of coherence is turned toward the conditions of rationality of the *use of language*. The language used in an *informative sense* (not the poetic use) has in coherence a principle that constitutes the possibility of successful inter-subjective interaction. The one who states something (the emitter) keeps in mind that the one who receives the message (the receptor) understands what is being said because they generally share the same knowledge of the words being used in a certain message (semantics) and also share the knowledge of how words are being used in that specific speech (grammar).[51]

Internal coherence is, therefore, that which is expected of an emitter who professes messages and who wants to be understood in a satisfactory way. Thus, the more precise the use of words and grammatical organization of the message, and the more pleasant the style, the greater the chances of success in communication. For example, if one names an object a *book*, one cannot simultaneously name it a *glass* without the perception of incoherence in the message. Obviously, sometimes the concept will be debatable or the insertion of the item in one class of objects or another will be a highly questionable procedure and will depend, to a great extent, on the general system construed by a certain community of communicating individuals.

In a quite synthesized way, a person who calls a certain object *x* cannot state that the object is a *non-x* or any other object. Simultaneous contradictory pronouncements are incoherent and erode the sense of communication according to the logical principle of non-contradiction. The same occurs when someone suggests that a certain object, in a given situation, must be subject to a certain attribute and, at the same time, suggests that the same object cannot be subject to the same attribute. This only makes sense in a situation in which one (or some) condition taken into consideration changes, but it must be announced for the sake of message intelligibility. The internal coherence of language use is, therefore, a condition for intelligibility of the informative discourse.

6 Compatibility of the internal perspective of coherence with the critical theory

What is the benefit of the use of the concept of internal coherence in the scope of a critical theory like CLS? What is the significance of the conceptual differences of external and internal coherence for such a theory?

The concept of coherence, from the internal perspective of language, is perfectly compatible with the critical theory. As a formal concept, internal coherence serves as a logical criterion for evaluating the isonomous use of concepts in the judicial discourse, and it is not vulnerable to the criticism of the idea of correctness of decision results. Internal coherence refers to a level of linguistic rationality that is in a meta-critical position relative to the criticism of normative systematic coherence, which is the target of CLS attacks. Internal coherence, besides not being incompatible with the critical project, can be a powerful revealing instrument of the political practices of judges, as it renders possible the analysis of the discourse of justifications for a decision.

The growing complexity of ways through which social relationships express themselves indicates the also growing use of semantically open concepts that allow the decider, in the concrete case, to adapt to factual circumstances. Because language is imprecise and the law undetermined, it is impossible to establish a single sense of the words with which the norms are composed. It is for this reason (and not *despite* it) that the concept of internal coherence is useful to a theory that aims at denouncing power relationships expressed in judicial decisions, since, while expressing norms meanings, a judge will be expressing his preferences.

[51] Evidently there will always be borderline situations in which using a certain name to speak of something will not be so simple. Someone might have difficulty in calling a clock and a watch by the same name. In reality, in some languages there are different words to express similar objects. In any case, what matters is that language implies coherence as an essential requisite to its successful utilization.

CLS defends the idea that if the theoretical and political contradictions and incoherencies embodied in the arguments of those who retain power can be brought to light, it would facilitate the process of social transformation toward a more fair distribution of power, social resources and democratic participation. This would take place as consciousness of power relations is acquired and, consequently, discussions about the allocation of such power occur. One practice that a judge can use to conceal political motives is deciding by means of evaluative (prescriptive) concepts, as though they were descriptive. This allows the judge to avoid the duty of grounding decisions by merely mentioning an evaluative concept present in a norm, as if such a concept has an evident descriptive sense.

An example of a daily use of language that illustrates such a process is someone saying that a football player is a "good player." If we all, as receivers of this message, had the right to know all the criteria that determined the valuation of the player, something that happens in the case of judicial decisions, the message's emitter should say what *descriptive criteria* led to such an affirmation. The reason why the use of an evaluative concept is not admissible to justify a certain decision is that the emitter is making a petition of principle, in saying, to continue the illustration with our example, that football player *x* is good because he "passes well." But what does "well" mean? Someone who wants to check the coherence of the valuation made by a football commentator about two players has to know what criteria were used to arrive at that conclusion, and those criteria must be descriptive, or the valuation would be subject to criticism because it is based on not entirely revealed elements.

The emitter would have to say that the player is good because, for example, a) he is faster than the others; b) plays more games than the others because he suffers fewer injuries; c) scores more than the others; d) makes better passes than the others, etc.[52] Publicity of the descriptive criteria for the judgment about the one who is under analysis is necessary to allow for verification if another player, submitted to the same judgment, is to be judged impartially or, in other words, isonomically. Otherwise, nothing would prevent a football commenter who is unsympathetic to a certain player from stating that he is not a good player, even if he obtains results similar to the player who was initially evaluated as a "good player."

The fact that ruling is a political act, and that the decision making process is subject to political and idiosyncratic influences, can lead a person who deals with law to become skeptical, in the sense that if ruling is merely an act of will without any kind of rational control, there is nothing to do but play "roulette" with judicial decisions, and ultimately to distance oneself from this field of results that reflect the personal choices of the deciders. On the other hand, a theoretical tool for optimizing the law (at least from a formal standpoint) can be used in a combative way, as it is theoretically powerful and politically active.

What I state is, hence, the possibility of joining an analytical approach to the critical nature of CLS, with the purpose of responding to the criticism that CLS offers no practical applicability resulting from its theoretical goal of denouncing the power relations that underlie judicial decisions.

7 Evaluative words and their political dimension

The theory of language with which I think it is possible to advance the CLS critical project is Universal Prescriptivism. This theory was developed by Richard Hare[53] during the second half of the twentieth century and aims to explain prescriptive language, especially differentiating between two kinds of words and their logical meanings: descriptive words and evaluative words. The core of the theory points to the reasons that ground human actions and seeks to investigate reason's role in evaluative judgments.[54]

[52] The criteria used for such a valuation would be arbitrary to a certain extent, and one way to question them is an ideological discussion on what concept of "good player" can be seen as correct. Coherence guarantees us the internal possibility of verifying rationality in the use of language by an emitter when he holds forth about objects in similar conditions.

[53] The four books in which Hare constructs and develops his theory are: HARE, Richard Mervyn. *Freedom and reason*. Oxford: Oxford University Press, 1963; HARE, Richard Mervyn. *Moral thinking*: its levels, method and point. Oxford: Oxford University Press, 1981; HARE, Richard Mervyn. *A linguagem da moral*. São Paulo: M. Fontes, 1996; HARE, Richard Mervyn. *Ética*: problemas e propostas. São Paulo: UNESP, 2003.

[54] *Metaethics* investigates where our ethical principles come from, and what they mean. Are they merely social inven-

Moral language is prescriptive, as is juridical language. The imperative form, typical of prescriptive language, is expressed through commands, a characteristic which approximates the relationship between moral language and legal language. The utility of Hare's theory for the purposes of this paper is that it helps identify the problem of decision reasoning complexity, especially when applied to expressions with large semantic imprecision in its evaluative sense.

The central point in universal prescriptivism is that words' meanings are linked to how they are used in prescriptive discourses. *Meaning* is not only the link between a description and an object (the relation between something and what it means), but it is also determined by the rules that regulate the use of words.

In natural language, words[55] possess an "open consistency," and the application of legal norms reveals the complexity that derives from this characteristic. The logical linguistic rules provide words stability in their practical use, allowing for intelligibility among speakers.[56]

Indeterminacy is an inherent feature of the problem of norms application, a natural derivation from linguistic polysemy. Hare, however, identifies a specific type of word that has a particular function in prescriptive discourse, since it implies a positive or negative quality of the object: the so-called "evaluative word." [57]

Judging is an extremely complex procedure for various reasons, including those presented by CLS in relation to indeterminacy. The complexity of judgment elaboration procedure is increased when the applicable norms are expressed through words that have evaluative functions. Words and expressions like "excessive" and "good-faith," for example, do not have stable descriptive meanings because they do not refer to any physical-molecular phenomena. The meaning of those words change as they refer to different situations.

Decisions in which evaluative words are used are more prone to bring to light judges' political stances, because the judger must opt for certain meanings related to concepts such as "justice," "market," "merit," etc. An example of this is the contractual idea of "good-faith." To perform a contract in "good-faith" is something difficult to identify precisely. If the judge does not make his evaluative options adequately explicit while applying norms with evaluative words, a deficit of reasoning would exist in the decision. In other words, to say, for example, what is a "consumer's contractual clause in accordance with good faith," is to implicitly assume a concept of *market*, *consumer* and *behavioral expectancy* of contractual parties. A more liberal judge (in the economic sense of the term) will rule differently than another with a more protective view of the consumer, and this distinction will become clearer with greater access to the reasons that determined the verdict.

The analysis of decision coherence implies the idea of universality of judgments. One who says something in a given situation must, for coherence's sake, take the same stand, given a similar situation. The notion of universality of judgments is central to the understanding

tions? Do they involve more than expressions of our individual emotions? Metaethical answers to these questions focus on the issues of universal truths, the will of God, the role of reason in ethical judgments, and the meaning of ethical terms themselves. FIESER, James. *Ethics.* The University of Tennessee at Martin, Martin. Available at: <http://www.utm.edu/research/iep/e/ethics.htm>.

55 I make here the distinction between natural language and symbolic language.

56 HARE, Richard Mervyn. *Freedom and reason*. Oxford: Oxford University Press, 1963. p. 5. Here, the influence of the Second Wittgenstein in Hare shows.

57 Evaluative words and expressions are identified by Karl Engish with the name "undetermined normative judicial concepts in the appropriate sense." The expression "normative concept" has two possible meanings: a) an *improper sense*: normative concept in the sense that it refers to an object perceptible by the senses, but that is given a judicial institutional "costume." As examples we would have: "marriage," "public worker," and "minor." Another sense in the use of the concept would be b) a *proper sense*: a normative concept that is always in need of valuation to be applied in the case at hand. The author states: "If someone is married or a minor, this can be 'established' through descriptive criteria. In contrast, if a characterizing predisposition is 'undignified,' if a motive is 'vile,' if a document is 'pornographic,' if a representation is 'blasphemous,' – one must consider for this purpose the famous George Grosz painting, representing Christ on the cross with a gas mask and soldier boots on his feet (about the above, RGerST. 64, P.121 et seq.), this can only be decided based on a valuation. The normative concepts of the like are called concepts 'in lack of valuation substantiality.' With this horrible expression one intends that the normative volume of these concepts must be substantiated case by case, through acts of valuation." ENGISH, Karl. *Introdução ao pensamento jurídico*. Lisboa: Fundação Calouste Gulbenkian, 2001. p. 213. The undetermined normative judicial concepts are the ones that are so in their own sense, according to the author. These are the ones that properly distinguish themselves from the descriptive concepts and that bring specific problems to the act of interpretation/application of normative texts.

of universal prescriptivism. In order to grant the possibility of criticism, the opinions we have of things have to be of a descriptive nature.[58]

While affirming something, the speaker is responsible for the future use of that word.[59] Because evaluative words[60] are those whose meanings depend on the qualification of a certain object and not the description of the object, meaning is granted, therefore, because of the logical-semantic function in the discourse.

The complexity of evaluative words' use is revealed in the understanding that, while qualifying other objects, their sense always refers to a given situation. This characteristic implies that the use of evaluative words is more difficult than the use of descriptive ones, whose sense remains static between the object and what it means; in the latter, the denomination of the object is purely conventional.[61] Given that the application of the concept of universalization of judgments relates to the logical principle of non-contradiction, and because the meaning of evaluative words is situational, the difficulty in appreciating coherence when evaluative words are used is greater than when descriptive words are used. The problem is brought on by the use of formal logical principles applied to language.[62] Evaluative words have the purpose of qualifying an object by positively or negatively appreciating it. They are words like, for example, "good," "excessive," "pretty," "adequate" and expressions such as "good faith," "excessively onerous," "reasonable value," etc.

Prescriptivism is a principle that regulates the subject's actions. In other words, it expresses the individual commitment character of a certain verdict. The logical character of prescriptivism lays in the fact that he who professes a sincere judgment must be committed to the adoption of the action's consequences, being the agent in any position, even in one that may cause negative consequences.[63]

Evaluative words do not distinguish themselves from descriptive words by the fact that they are imprecise. In fact, one similarity between them is that words like, for example, "red" that have a descriptive sense, as well as the evaluative word "good," used to describe a "good car," are equally imprecise in their use.[64] Polyssemy (as vagueness or imprecision) is not a characteristic that differentiates descriptive from evaluative words.[65] The standard to determine what is a red color or what is a good car is normally imprecise. This fact is important because one of the differences pointed out frequently between norms formulated by descriptive words and those formulated by evaluative words[66] is the semantic vagueness or imprecision of the

58 HARE, Richard Mervyn. *Freedom and reason*. Oxford: Oxford University Press, 1963. p. 10.

59 HARE, Richard Mervyn. *Freedom and reason*. Oxford: Oxford University Press, 1963. p. 12.

60 I use the expressions: "evaluative words," "evaluative expressions" and "evaluative terms" interchangeably, indicating the same idea of distinction between "evaluative" and "descriptive."

61 In onomatopoeia cases, an interesting matter arises that may not be mere convention, but instead may hold some relation to a physical characteristic of the described object and, so, may have something to do with the description of an essence. "It is nearly impossible to find another aspect of semantics that has caused such interest as onomatopoeia. The vast literatures about this vary from capricious fantasies about color and sounds of speech to experiences conducted in laboratorial conditions." ULLMANN, Stephen. *Semântica*: uma introdução à ciência do significado. 2. ed. Lisboa: Fundação Calouste Gulbenkian, 1970. p. 178. According to the author, onomatopoeias have the following points of semantic interest: 1) there is an intrinsic similarity between the name and the sense, in such a way that onomatopoeias are alike in different languages; 2) the phonetic motivation exists between name and sense. Sounds adjust to the meaning of the object; 3) even when the sound is adequate to the expression of meaning, onomatopoeia will come into play if the context is favorable; 4) a word is onomatopoeic if *felt* as such. On the search for phonetic motivation between the word and the object's sense the author says: "This motivation search extended itself till the written word. Some authors say they feel an analogy between the meaning of certain words and their visual form. The poet Lecomte de Lisle once said that if the French word for the idea of '*paon*' were to be written without the *o*, one would no longer see the bird opening its tail feathers. Going even further, Paul Claudel envisions on both *tt* in the French word '*toit*' (roof) the gable-ends of a house and the caldron and wheels in the word '*locomotive*.' These extravagances seem to remount to a primitive way of writing in which visual symbols were directly representative of designated things and were still not submitted to speech." p. 190.

62 HARE, Richard Mervyn. *A linguagem da moral*. São Paulo: M. Fontes, 1996.

63 HARE, Richard Mervyn. *A linguagem da moral*. São Paulo: M. Fontes, 1996.

64 ULLMANN, Stephen. *Semântica*: uma introdução à ciência do significado. 2. ed. Lisboa: Fundação Calouste Gulbenkian, 1970.

65 ULLMANN, Stephen. *Semântica:* uma introdução à ciência do significado. 2. ed. Lisboa: Fundação Calouste Gulbenkian, 1970. p. 123.

66 The juridical doctrine mentions the distinction between "principles," "general clauses" and "rules" with basis on this criteria. For example, BARROSO, Luis Roberto. *Interpretação e aplicação da constituição.* 4. ed. São Paulo: Saraiva, 2001. p. 149; BASTOS, Celso Ribeiro. *Hermenêutica e interpretação constitucional*. 3. ed. São Paulo: C. Ribeiro, 2002. p. 108.

normative texts that compose them. To say, therefore, that norms written with evaluative words are more imprecise does not describe accurately the most important aspect for the differentiation of such types of norms because in both, the language is polyssemic, vague and imprecise. What differentiates norms formulated with descriptive words from those formulated with evaluative words is the logical function of the words that compose them.[67]

The complexity in judging while applying norms formulated with evaluative words lies in the fact that, because its meaning does not express something that manifests itself in the world of phenomena, the criteria used to determine its meaning are very variable. Hence, someone who states that a car is a *good car* implies in this affirmation a set of criteria that determine the meaning of the word *good* used along with the object car. The implication of this fact in law consists in judicial decisions having to necessarily be based in a way that the criteria for the use of evaluative words may be publicly explicit in the *ratio decidendi* in a descriptive way. For example, if it is said that a car is "good" because it has a "good" engine, the problem of explanation of what makes a car good has only been transferred to one aspect of the car, a concept that remains impermeable. After all, what is a "good" engine?

The practical result of this distinction and its relevancy to the present discussion lies in the fact that one of the ways to demand transparency in judicial decisions is to ask the judges to be clear in their decisions' reasoning how the descriptive elements set the criteria for the use of evaluative words.

Let us examine an example of applying norms expressed with evaluative words and how it is possible to demand of the judiciary that decisions be professed in observance of internal coherence.

Article 6, V, Second part of the Consumer's Defense Code is formulated by means of an evaluative expression that shows the difficulties and points out the risks.

> Article. 6: The basic rights of consumers are:
>
> V. – the modification of contractual clauses that establish disproportionate installments or their revision due to supervening facts that make them excessively onerous;
>
> Expressed in logical form and completed with terms in accordance with the Brazilian consumer protection law, the imperative sentence would be[68]:

If:

In a contract of suppliance of a product or service there is a contractual clause excessively onerous to the consumer, due to supervening facts

Then:

There will be a judicial revision of its content to restore the previously existing balance.

It is important to recognize that in this imperative there is a problematic expression from the hermeneutic point of view, precisely because it does not possess the nature of a descriptive expression: "excessively onerous contractual clause." The problem lies in the fact that there is no way to proceed to a semantic stabilization prior to the application of such norm in relation to the terms that function as evaluative words, as in the case of "excessive onerousness."

In the process of norm application, the judge will have to demonstrate, in descriptive terms, the criteria used to formulate the judgment that the consumer's situation is considered excessively onerous. He will, then, reveal his personal preferences, his values, his way of seeing the world in a more transparent way when effectively demonstrating such criteria. The more justified the decision, the clearer the judge's political option will be and the more visible the possible incoherencies in a set of different decisions.

The idea of coherence relates to, as seen, the concept of isonomy, the principle of justice according to which agents with similar characteristics and in similar situations deserve the same treatment. This is also a principle of moral language that allows for a logical appreciation of the rulings. Although there is not just one possible and certain content to a moral or judicial judgment, logic does not allow inconsistent patterns to be adopted or that different judgments for similar situations are made.[69]

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67 ULLMANN, Stephen. *Semântica:* uma introdução à ciência do significado. 2. ed. Lisboa: Fundação Calouste Gulbenkian, 1970. p. 124.

68 It is important to note that the conduct determined by the norm to the supplier is not totally revealed. His duty is, having occurred the change of conditions with the consequent excessive onerousness, alter the clause's content so that contractual balance may be restored.

69 The Bush v. Gore case decided by the United States Supreme Court places the question of exceptionality of ap-

The meaning of evaluative words is prescriptive, and in agreement with this meaning, it is not acceptable from an ethical and logical point of view, that the same agent can profess different judgments in identical situations without losing the idea of isonomy and, therefore, moral or judicial coherence. A logical judgment must always be universal; in other words, the same kind of decision must be professed for the same kind of problem if all things remain the same.[70]

What is "excessively onerous" after all? Judges certainly saturate decisions with their political points of view, values, preferences, world visions and consequential considerations. But if these aspects do not clearly appear in the decision, the audience (society) cannot criticize it. If the judges do not make explicit the reasons that lead them to make a decision one way or another, the possibility of decision criticism is seriously undermined.[71]

Taking for granted the idea of indeterminacy of norms, what we can do is to demand from the judiciary that the valuation options present at the moment of deciding be explained in the fullest way possible and that the decision adheres to some kind of linguistic coherence.

8 Conclusions

Evaluative words and expressions are common in judgments that should be made under concrete situations; these expressions do not have *a priori* descriptive meanings. They are words and expressions whose meaning needs to be identified during the decision making process.

The requisite of decision motivation should ideally allow the receiver of a decision to know not only the deductive process made by the judger, but also the value options made, which should appear in the *ratio decidendi*.

If the descriptive elements that identify the reasons why judges rule a certain way are not clear, it will not be possible to properly analyze the merit of the decision. This procedure has, in my opinion, two different but

plication of a certain norm. In this case, exceptionality is transformed into rule, if verified, in posterior cases; in the name of coherence, the Court will have to apply the same solution. A segment of the decision that suggests the exception to the principle of universality is: "The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." http://www.law.cornell.edu/supct/html/00-949.ZPC.html , em 02;11;2006.

70 The use of rhetorical resources that mask the intents and political reasons of a given decision may be present in the judicial sphere and the political one. Political theory draws attention to the matter of accountability of those who retain power but do not act according to the arguments they present. Although politics is different from law in many ways, the concept of coherence can be applied to both fields of social practices, because both deal with matters of public interest and involve delegation of power from society. Discretion in politics is a lot more visible than in law because of the very characteristic of practice of political power. In politics, the struggle for access to power marks the public disputes in which speeches are made without preoccupation with coherence, but with an eye toward what gains more sympathy from those who receive the message. It is a mundane fact that a politician affirms something during his campaign which is then ignored after entering office. In any case, it is possible to verify to some extent the respect that a certain government has toward its electors if the campaign promises become government actions. Since language is a source of imprecision, it is necessary that the arguments in which decisions are based are submitted to exhaustive criticism as a way to reveal the values, preconceptions and intentions of those responsible for such decisions. International treaties, laws, judicial decisions and political discourses are all expressed in natural language, which is a source of potential multiple meanings of messages. For example, in an article about sustainable development and terrorism, Atapattu shows the discursive incoherence of the decision makers in a global setting, illustrating how rhetorical discourse of the "international terrorism risk" serves the purpose of justifying enormous expenses on safety, even while a great portion of the world suffers from malnutrition and lack of basic sanitation, the cause of many deaths, despite the minimal comparative expense of environmental protection. Ironically, many international treaties, including the Geneva Convention, talk of the concern with the environment's integrity. ATAPATTU, Sumudu. Sustainable development and terrorism: international linkages and a case study of Sri Lanka. *Environmental Law and Policy Review*, Missouri, v. 30, n. 2, p. 273-320, Winter, 2006.

71 The duty to show motivations behind decisions is treated by the procedural doctrine as the "principle of motivation of judicial decisions" and aims at granting public control over the exercise of juridical exercise. CINTRA, Antonio Carlos de Araújo; GRINOVER, Ada Pellegrini; DINAMARCO, Candido Rangel. *Teoria geral do processo.* 19. ed. São Paulo: Malheiros, 2003. p. 68. The principle of motivation of judicial decisions performs a political function, as one can evaluate the impartiality of the judge and the legality and justice of the decisions. Article 93, IX of the Brazilian Federal Constitution mentions the principle of publicity that guarantees the possibility of checking the acts of those involved in judicial procedures. It is in the presence of people that the decisions must be made, a principle that is also stated in the Universal Declaration of Human Rights Article 10. Id., 2003, p. 69.

related consequences. (1) Judges remain apparently free to decide similar cases in different ways without having to compromise with the idea of coherence; (2) Judges only expose partially and indirectly their ideological preferences.

The first consequence derives from the fact that if someone does not determine the meaning of a certain evaluative expression, indicating its descriptive sense, the true meaning of the expression will never be known for sure. This way, if someone only says that an individual acts in good faith without stating what that means, then the following moment it could mean the opposite, without it ever being considered contradictory to the criteria previously adopted.

The second consequence is that by not defining a word or evaluative expression adequately, the decider will not express his ideological convictions. The myth of neutrality is reinforced, and so is the possibility that decisions can be produced according to an exclusively formal deductive method.

I find it possible to generalize the affirmation that this model of decision making process is pervasive in Brazilian courts. This brings on a deficit of accountability of the courts from the point of view of demanding internal coherence of decisions and renders more difficult the identification of the judges' political stances, along with their critique.

The important legacy of CLS is the idea of indeterminacy, the fight against formalism and the attempt to demystify legal discourse, revealing its inherently political content.

This legacy, despite being critically powerful, finds its limit in the radical assumption of the indeterminacy of norms and the impossibility of any optimizing theoretical approach. Although the decision making process is uncontrollable empirically, this does not mean that decisions are totally irrational. The idea that laws are expressed in natural language implies its application as a discourse that must have a minimum of rationality.

Recognizing the anguishing insecurity resulting from the idea of indeterminacy may have the perverse effect of encouraging a nihilistic or radically skeptical posture, which seems to me quite contrary to the transformational propositions of CLS. The way out of this logical trap is adopting a skeptical moral posture combined with criticism grounded in formal logic (no "minimum moral" content assumed), along with adopting a theoretical tool that allows for some sort of advancement from the critical potential of CLS. Universal Prescriptivism can be that instrument because it allows the criticism of norm application discourses.

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