"Comparative Constitutional Law and Legal Culture: Asia and the Americas": an overview of the CRN01 under the Law and Society 2016 Meeting

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The Collaborative Research Network is a Law and Society Association´s iniciative that seeks to develop cross-disciplinary and cross-national research projects which intend to overcome the disciplinary barriers enabling the growth and integration of the social study of law. Organizing theme sessions for the LSA annual meetings, the CRNs can be a forum in which scholars, professors, students, as well as practitioners who are interested in interdisciplinary studies can organize discussions, share work, exchange ideas and build networks.

The **CRN 01** - named Comparative Constitutional Law and Legal Culture: Asia and the Americas - was created in 2015, during the LSA Seattle meeting. It examines legal development, constitutional law and legal cultures from the perspectives of both legal sociology and comparative law regarding Asia and the Americas. In this age of globalization, when economic ties between these regions are gaining strength and momentum, it becomes a necessity to study them comparatively. This is especially important when developing economic relationships bring issues such as the rule of law and protection of human rights to the fore.In particular, it seeks to understand how political and historical paths, as well as global influences such as universalization of human rights and democratic constitutional values, have shaped the formation and evolution of constitutional law and legal culture in these regions various countries. It further seeks to examine the manifestations of contemporary legal culture in the political aspects of constitutional law, and in implementing democratic processes and human rights. The CRN brings together scholars engaged in these thematic and regional foci.

In 2016 CRN 01 took part in the New Orleans from June, from June 1st to June 5th. It sponsored its four first paper sessions that have launched our debate as following.

SESSION 01: Constitutional theory development in Asia and in the Americas

Societies in Asia and the Americas may seem to have nothing in common given their particularities; however, many countries in these two regions share similar historical and political experiences (e.g. dictatorships, revolutions, democratic mobilizations, civil rights or human rights problems, corruption etc.) and interact more and more pushed by economic and cultural globalization. Nevertheless these geographically diverse

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societies, although very different in their current legal and political cultures, may also share constitutional and democratic values. This session intends to bring together scholars engaged in studying the evolvement of constitutional features, either regarding constitutional law or constitutional theory, related to these regional foci.

Brazil´s never ending hunger for adments

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After a troublesome period of its twentieth century history, Brazil has just celebrated the twenty-seventh anniversary of its Constitution. A Democratic Constitution enacted in a constituent national assembly. The constituent power rightfully acted. The constituent national assembly developed a Constitution stabling the new government, a separation of powers and a vast list of fundamental rights. The Constitution was called by many the "citizen constitution". It truly was the turning point into a democratic period. The Constitution formally occupies the highest position in Brazil's legal structure, with no doubt. After two decades of dictatorship, a new era emerged with a Constitution. The legal community celebrated this new part of our history and the academic debates have been thriving ever since. It is safe to say Brazil is living a Democracy and finally developing its own constitutionalism. There are several peculiar aspects to Brazil's constitutional reality. One of them, just as an example, is the coexistence between a judicial review system that allows "every judge or Tribunal" to deem a law as unconstitutional on a specific (concrete) case and the "supreme constitutional court" (Supremo Tribunal Federal) which is the only Tribunal with the power to declare laws, in abstract, as unconstitutional hence rendering them ineffective. As mentioned, it is just an example of Brazil's peculiarities. The topic of interest here is Brazil's never ending hunger for amendments. The Constitution of The United States of America has over two hundred years and twenty-seven amendments ratified. By October of 2015, with only twenty-seven years of age, Brazil's Constitution has already ninety amendments! Not counting the six constitutional amendments of revision which happened in 1994. So, in total, ninety-six amendments in twenty-seven years. The number of amendments is astonishing. On average more than three amendments every year. Is it possible to say that Brazilian Constitution is rigid? A simple answer to the question can be given by just saying that as it is, in fact, harder to change Brazil's Constitution than to "create" an ordinary law, the Constitution is rigid. This is the standard and classical difference between a flexible and a rigid constitution. But is it enough? I think not. Joaquim José Gomes Canotilho on his "DireitoConstitucional" has a brilliant lesson on finding the middle ground between flexible and rigid constitution due to both a necessity to adapt the original text to new realities and the necessity of stability. There are several aspects in this matter which can be analyzed. And we'll have to focus in one to limit the extension of this essay. With a comparison between the United States and the Brazilian Constitutions we will demonstrate both their rigidness. In order to achieve that, we will use the work of Donald Lutz published by Princeton University Press, in which through

a systematic and comparative analysis of constitutions, the author empirically revealed a pattern in the relation between the amendment process and the number of amendments. To do so, Lutz began his work by identifying theoretical propositions concerning the amendment process. It is crucial to establish that although the author's empirical revolves around "amendments patterns in American states constitutions" and that it can be extrapolated to other countries. Not only that, but the author also explains the relation between "amendments patterns and the characteristics of the amendment process". With the view to analyze Brazil's situation through Lutz's work we will have to comprehend the legislative process of an amendment in Brazil and compare it with the United States process. By doing so we will be able to use the measurements given by Lutz and establish as accurately as possible the differences between the two realities. We will give special importance to one of Lutz's propositions because of its congruence with Brazil's reality. The proposition is: "the higher the formal amendment rate, a) the less likely the constitution is viewed as a higher law, b) the less likely a distinction is being drawn between constitutional matters and normal legislation, c) the more likely the constitution is being viewed as a code, and d) the more likely the formal amendment process is dominated by the legislature". At this point we'll be able to grasp beyond the formal limits to amendments in Brazil: the time limit; the circumstantial limit; and the substantial limit. The time limit in few words simply means that are specific time periods that the Brazilian Constitution does not allow changes in its content. The circumstantial limit is related to special security circumstances which prevent the change of the Constitution for as long as they prevail. The substantial limit is especially interesting and we will have to tackle it to understand its significance and how the subjects are treated when amendments concerning them are put to Legislative consideration. Without much depth we can say the Constitution is formally rigid, but there are some "special" matters more rigid. In other words, there are some subjects the original constituent power elected as almost immutable. We will even have to consider the possibility of an unconstitutional amendment proposal and the possibility a judicial review of an amendment. These limits will be more thoroughly analyzed. In conclusion, this paper will focus on Brazil's reality, its great number of amendments and a comparison with the United States. The analysis can no longer be limited by the dichotomic vision of a rigid or flexible constitution. There is a consensus on considering Brazil's constitution as rigid. But just how true is that with an average of more than three amendments per year? Is the continuous high use of the formal amendment process problematic? Why? Those are some of the questions that will need to be answered.

Ecuador’s Constitutional Culture through the Discourse of Rights

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Ecuador's Constitutional Culture through the Discourse of Rights Fundamental rights are crucial for the understanding of a country's constitutional culture. These rights have

been interpreted in the literature as constitutional constructs that are so fundamental, so important, to the political system that they require special mechanisms for their protection so that any attempt to limit them must be handled with special care (Grim, 2015). The existence of the category of fundamental rights presupposes that only some members of the realm of rights are `the chosen ones`. However, the Ecuadorian Constitution, written in 2008, explicitly rejected this categorization of rights by stating that all ninety-nine rights recognized in the constitution are of equal importance. The absence of this category, along with the notion, found in the Ecuadorian Constitution, that all rights are equally important, raises several relevant questions: Does the formal declaration of the equal value of rights in Ecuador mean that, in that country`s constitutional law, there is no such thing as a fundamental rights? Does this mean that there is no hierarchy of values? In this essay I suggest that by carefully analyzing local human rights discourse it is possible to "uncover" a country's most important values and beliefs. This is important to the extent that the meaning that rights acquire, in the social and legal context, both follow from and shape a country's constitutional culture. In other words, rights and constitutional culture are mutually constitutive. Thus, the object of this research is to understand and describe the Ecuadorian constitutional culture through the analyses of human rights discourse from and external and internal perspective. In understanding how courts, judges and ordinary citizens parse rights I will use the concept of "constitutional culture", developed by constitutionalist scholars, and the category of "transnational juridical process", advanced by legal anthropologists. The former concept has been understood and used in two different ways. First, constitutional culture has been theorized as a symbolic order that reflects a society's fundamental ideas (Silke, 2012). This concept stresses the importance of a common understanding and acceptance of the Constitution within a community in order to create social integration. Second, the concept refers to "to the understandings of role and practices of argument that guide interactions among citizens and officials in matters concerning the Constitution's meaning" (Siegel, 2006). Here, the concept is employed to explore how the interactions between citizens and public servants guide constitutional change (Haberle, 2000). It is precisely in this second sense that I plan to use the concept of constitutional culture to help explain how, through political struggle, highly contested cases such as abortion and freedom of expression acquire specific meaning. This will shed light on how the Ecuadorian constitutional culture is transforming nowadays. Human rights as a global discourse influence not only constitutional provisions but also the legal consciousness of those who participate in the creation of meaning of such rights. The concept of human rights has been discussed at length in political philosophy and legal theory. Some thinkers such as Kant, Rawls and Habermas have tried to provide a system to explain the universal and rational foundation for categories of justice such as human rights. While others, like Bentham and McIntyre have resisted the notion of rights built upon theories of a rational universal morality. Bentham regarded those rights as 'execrable trash' as rhetorical nonsense whose purpose was mainly anarchical. In anthropology the discussion is frequently framed in the debate between Relativist and Universalist regarding the importance of culture in order to understand and explain those rights. Universalist scholars base their theories in a universal moral system that explains rights as having their foundation in human nature itself and are completely independent of the context where they are to be applied and enforced. By

contrast, for relativists, the fact of cultural diversity undermines the idea of 'universal values'. For them, rights are socially constructed as products of a specific cultural context (Herskovits, 1947). I resist the dichotomy between Universalist and Relativist and focus instead on the idea of 'transnational juridical process' to explore how the universal discourse of human rights is translated and recognized in local contexts. In this prism, culture is conceived as having a porous border that allows for the penetration of various discourses that are then translated and transformed according to culture's values (Wilson, 1997). Sally Engle has framed this relationship between local and global discourses on what she calls 'vernaculization' (Engle, 2006). This concept describes how the global discourse of human rights is vernaculized by each society in a process of translation that hitches these new concepts with those that exist locally. Within this framework I plan to describe how the actors involved in the cases of freedom of expression and abortion adopt global human rights discourse and ideas and then translate them into the local context. I will also describe the way the indigenous constitutional concept of 'living well' or sumakkawsay has acquired meaning by mixing both the indigenous understanding of that category and the idea of socio-economic rights. By analyzing how Americans talk about rights, Mary Ann Glendon explains that the language of rights in the US is a dialect within a universal language of human rights (Glendon, 1998). This dialect is characterized for being highly individualist and absolute. This research aims to take part of this discussion on the influence the way people talk about rights has on the shaping of their meaning (Cover, 1992). In this sense, the research intends to define the characteristics that make the Ecuadorian version of global human rights language a specific dialect.

Decolonial thought and the citizenship model of the new Latin American constitutionalism

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This paper offers a theoretical framework of decolonial thought and identifies what has been recognized as normative provisions in terms of the model of citizenship in the new Latin American Constitutionalism. Its goals are (i) to map the main theoretical references in the fi eld of decolonial thought; (ii) to systematize contributions to the contemporary debate about citizenship; (iii) to analyze the possible connections between these formulations and the model of citizenship (normativity and effectiveness) of the new Latin American Constitutionalism, especially in Bolivia and Ecuador; and (iv) to collect theoretical tools for a future analysis of a real object consisting of the practices of citizen resistance in the urban space of Rio de Janeiro, in the context of big international sports events. The central research issue is expressed in two questions: Is there a direct connection between the theoretical formulations of decolonial thought and the model of citizenship of the new Latin American Constitutionalism? If so, through which elements and to what extent? The methodology adopted is qualitative research, with an exploratory profi le, using the research techniques of bibliographic review and documentary analysis. The research has an interdisciplinary feature that links law,

philosophy and sociology and is guided by inductive-deductive reasoning. In a first step of research, "theory and norm", this paper aims to make a theoretical mapping of the decolonial thought and the identification of what it has been recognized as norms in terms of the citizenship model in the new Latin American Constitutionalism, specially the cases of Bolivia and Ecuador. In a second step, "theory, methodology and praxis", which will be developed in another paper – "Human rights and emancipation/liberation: possible approaches between Marxism and Decolonialism" – it will appear a connection of theoretical-methodological distinct and confluent traditions, in the perspective of a conception of human rights based in the reality and the concrete, complementary to that of citizenship, in an emancipatory/liberative and transformer way, different of the oppressive patterns of the modern-colonial-capitalist paradigm. Nowadays, it's already considered a reality in Brazil the spread of the theoretical contributions and the academic debates involving the postcolonial and decolonial thoughts. Lots of researchers in many areas of knowledge have been mapping and organizing the main theoretical, methodological and conceptual contributions of authors still not so known, especially in the field of Law, because of its marginality in reference to the referential pillars of the modern thought. By the way, it can be already identified a couple of ethnocentric critics to the supposed absence of officiality of the non Eurocentric worldviews and its philosophical, political and social conceptions, obscured by the processes of colonization of power and knowledge. As an example, subjects and objects of Law have been framed by the officiality of the rational knowledge. Until recent times, these elements were conceived only from the European matrix – modern, iluminist, anthropocentric, rationalist, universalist, bougeois, capitalist, individualist – worldwide by the European conqueror expansions ("globalizations") in the ideals supposed to be universal as those of the human rights, citizenship, National State and Constitution. However, from a few decades, Latin American, African and Asiatic thinkers have worked hard to understand these elements from their own theoretical and conceptual lens, based in their ancestries and cultures, to identify if and which measure categories and institutions compelled imposed by the colonizers must persist in the norms and the reality of their countries and communities. This paper has as goals: (i) to map the main theoretical referentials from the Decolonial Thought; (ii) to systematize the contribution from the contemporary debate on citizenship; (iii) to analyze the possible links between the formulations and the model of citizenship (normativity and effectiveness) in the new Latin American Constitutionalism, especially in the cases of Bolivia e Ecuador; and (iv) to collect theoretical tools to a future analysis of the real object involving the practices of citizen resistance in the urban space in Rio de Janeiro, in the context of the international sportive mega events. Its theoretical object involves the conceptions of the decolonial perspective on citizenship, especially in terms of (i) political organization and participation; (ii) recognition and effectiveness of rights, in the last two decades, by thinkers from Philosophy and Sociology in the intercultural view of the Epistemology from the South, distinct from the European and North American universal anthropocentrism. The main problem of research can be systematized in the following questions: Is there a direct connection between the theoretical formulations from the Decolonial Thought and the model of citizenship from the new Latin American Constitutionalism? If positive, from which elements and in which measure? As hypothesis, it is considered that the theoretical formulations from

the Decolonial Thought and the model of citizenship from the new Latin American Constitutionalism converge when preconize political participation (active citizenship) and the recognition of rights in reference to the ancient traditions as constitutive elements of the citizen, going ahead – but not denying its positive features – in reference to the political, social and juridical parameters imposed by the paradigm of universalism. The research proposed is relevant considering the recent theoretical formulations that seek to investigate, from contemporary thinkers, still not so spread in Brazil, and, mainly, in the field of Law. The main theoretical-methodological referential involved the thinkers in the Decolonial Thought, especially AníbalQuijano, Arturo Escobar, Catherine Walsh, Edgardo Lander, Frantz Fanon, Ramón Grosfoguel and Walter Mignolo, and citizenship and constitutionalism in nowadays Latin American context, as Alejandro Médici, Álvaro GarcíaLinera, EvelinaDagnino, Gerardo Pisarello, Manuel Garretón, Maria da GlóriaGohn and Ricardo SanínRestrepo. Considering the features and the goals of the proposed research, in terms of methodology, it is pertinent a qualitative research, with an exploratory profile, through the use of techniques like bibliographical research and documentary analysis. The research assumes an interdisciplinary face, which connects Law, Philosophy and Sociology, to be conducted by the inductive and deductive ratiocination.

SESSION 2 Constitutional law and legal culture in comparative perspectives: Asia and the Americas

In this age of globalization, when economic ties between Asia and the America are gaining strength and momentum, it becomes a necessity to study their legal cultures comparatively. This is especially important when developing economic relationships bring issues such as the rule of law and protection of human rights to the fore. This sessison examines legal development, constitutional law and legal cultures from the perspectives of both legal anthropology/sociology and comparative law. In particular, this session seeks to understand how political and historical paths, as well as global influences such as the universalization of human rights and democratic constitutional values, have shaped the formation and evolution of constitutional law and legal culture in countries in Asia and the Americas.

The Comparative Study of Constitutional Interpretation Theory between U.S.A. Supreme Court and East Asian Constitutional Court (Korea & Japan) : Changing a Constitutional Culture for 19-21C

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Today, in the globalization of constitutionalism and democratization, parliamentary sovereignty is a waning idea, battered by the legacy of its affiliation with illiberalism and neo-nationalism in East Asia region. Although the postwar constitutionalism has frequently been conflict with the idea of parliamentary democracy in Asia and Latin America as well as Africa, judicial review has expanded beyond its homeland in the United States and has made strong inroads systems where it was previously alleged to be anathema. While we are in the midst of a "global expansion of judicial powers," the non-popularly elected judges has a power of constitutional interpretation which will be invalidated the efficacy of the legislative statute. Even though East Asia has deeply rooted indigenous legal culture and monarchical traditions such as Confucianism for a long times, these traditions are often contrasted with the western legal concepts of both constitutionalism and judicial review. In generally, no human power could not check the emperor's power which represented the mandate of heaven under the Confucian political culture, but emperor's power in Ly-dynasty (Korea) was institutionally checked by constraint of scholar-officials to remonstrate his errors. In short, the Confucian legal culture has posed barriers to the westernized institution of both constitutionalism and judicial review in Korea and Japan so far. But legal cultural factors can provide rationales for a wide range of political institutions after World War since 1950s. This article will explain both implementation and institutionalization of judicial review as Constitutional interpretation as a result of legal culture in Japan and Korea, rather than political institution. By focusing on the transfer of the constitutional practice in US Supreme Court, and later by demonstrating all of German, Japanese and Korean judicial review in their constitutional or supreme courts' constitutional adjudications. Moreover, both common and civil law recognize the supremacy of the constitutional law as the supreme law of the land. In actual, the second clause of Article VI of the United States Constitution is acknowledged as the supremacy Clause. Justice Marshall Court established the judicial review in Marbury v. Madison: when a conflict exists between an act of the legislature and the Constitution, judges have the duty to apply the latter, based on the doctrine that "the constitution is superior to any ordinary act of the legislature," Judicial review has been the most widely used constitutionality control mechanism in both common and civil law countries. However, several differences exist between the structure of EU civil law system and U.S. common law system. There are differences concerning the courts in charge of carrying out the judicial review; the procedures aimed at determining the constitutionality of a statute; the types of abstract or concrete control used by judges for that purpose; and the effects of decisions establishing that a statute violates the Constitution. However, other difference between common law and civil law judicial review system is the kind of procedure used to carry out the constitutional review. Under the U.S. common law system, there is no special constitutional litigation procedure, so judges use regular procedures to that effect. My first concerns are reviewing about the debates among the constitutional formalism and functionalism and legal realism in US Supreme Court since 19 – 20 century. There is a distinctive fact that there is no explicit constitutional provision for judicial review of the US Supreme Court. There may be a distinction between judicial review, in which ordinary judges play the role of constitutional check, and constitutional review, in which the function is given to specialized judges or political actors. In nineteenth century, constitutional formalism dominated jurisprudence in the US Supreme Court. The formalism offers the hope that law truly can be separated from politics and that this can be a nation governed by laws, not by people. To the contrary, during the early twentieth century, legal realists demolished formalism as the dominant legal theory. The realists demonstrated that all legal rules are value choices. They taught us that judging is

inherently discretionary. In actual, Peter Strauss has usefully framed key debates in separation of powers jurisprudence around the distinction between formalist and functionalist methodologies for construing the Constitution. The second concerns are the legal cultural evolution and perspective of judicial review of their constitutional adjudications in the civil law system of all Germany, Japan and Korea, even though Japan and Korea have implanted by civil law system from Germany since the 19 century, but Constitution of both Germany and Japan were deeply influenced by U.S. Constitution after World War of 1945, in particular, German Federal Constitutional Court has even come to define the positive counter-model to the US Supreme Court, but Japanese Supreme Court has been stemmed from by U.S.constitution and judicial review since 1947. After 1952 conservatives and nationalists attempted to revise the constitution to make it more "Japanese", but these attempts were frustrated for a number of reasons. One was the extreme difficulty of amending it. Amendments require approval by two-thirds of the members of both houses of the National Diet before they can be presented to the people in a referendum (Article 96). In retrospect of Nazism and Fascism in both countries past, it happen to be turned out obvious, contrasted that the German court's strength is understood as inevitable reaction to the catastrophic violation of human rights by the Nazi regime. What makes German Constitutional jurisprudence special it seems to me its own "value formalism " which was influenced by U.S. Supreme Court's jurisprudence. To the contrast of German Constitution, Japanese Supreme Court's weakness is acknowledged as passive reaction to the horrible abuses of human dignity and rights by the Japanese Fascism. It seems to me that Japanese Supreme Court continued the quest for value-neutral-judging, that called for "neutral principles" of constitutional law. It was an attempt to provide objective principles of constitutional law. In final, Korean constitution as civil law system was in force since 17 July 1948 that there was few public discussion on constitutional reform except for lots debates of legislature. As a consequence of the political democratization and amendment of Constitution in 1987, Constitutional Court implemented both judicial review and special procedure of constitutional complaint by type of German Constitutional Court. Korean Constitutional Court has both strength and weakness which the court has appeared often formalism or legal realism between politics and judiciary. This article is concerned with the comparative analysis and influences of constitutional interpretation of US Supreme Court toward German Federal Constitutional Court, Japanese Supreme Court, and Korean Constitutional Court's constitutional interpretation through the constitution theory and interpretation since 19-21 century.

Economic Constitutionalism in Asia

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The countries of Asia have a comparatively short history of employing constitutions as developed in the West. Most Asian countries only promulgated Western-style constitutions in order to "open up" to the West in the Nineteenth century and early Twentieth century. Originally this opening up involved mainly political commitments common in the West (rule of law, political representation of some sort, procedural safeguards, etc.). With the rise of socialism in Eastern Europe and Asia, however, many

Asian countries abandoned constitutional models that contained these types of provisions. More recently, as globalization has taken hold around the world, constitutionalism in Asia has correspondingly taken on a distinctly and more explicitly economic connotation. Some commentators even discuss the rise of what has been called "economic constitutionalism." These discussions often focus on the countries of Asia and their relationship to the West. This talk will evaluate this new hybrid form of constitutionalism on a variety of levels; economic, moral, and political. Using the constitutions of the People's Republic of China and the Republic of Vietnam as examples that employ this hybrid form of economic constitutionalism, this talk will conclude that while this form of constitutionalism is likely to spread-particularly throughout the developing world-there are ethical costs to any nation that adopts this model. Constitutionalism is, contrary to what many maintain, a continually evolving concept. Nowhere is this more evident than in Asia. While the West continues to tinker with modernist conceptions of constitutionalism that conform to a remarkably consistent paradigm, Asian nations are forging a hybrid model that is both pragmatic and rapidly changing. This hybrid, which is a form of what has been called "economic constitutionalism," could possibly call into question both the dominance of modern constitutionalism and the efficacy of certain aspects of that paradigm. This talk will begin by looking at the history of modern constitutionalism, exploring the various models of modern constitutionalism that have developed during the last 300 years. I will discuss the parameters of modern constitutionalism, and evaluate the efficacy of constitutionalism as a political and legal movement. In particular, I will set out the relationship between the political, civil/human rights, and economic aspects of modern constitutionalism (what I have called elsewhere the "pillars of modern constitutionalism"). I will then explore the relatively new concept of economic constitutionalism, particularly as it applies to the nations of the Asian-Pacific Rim. I will concentrate on how advocates of economic constitutionalism attempt to pry the economic aspects of constitutional arrangements away from the liberal political, and civil/human rights aspects of the modernist model. This talk will then look specifically at the text of the Constitution of the People's Republic of China and the Constitution of the Republic of Vietnam. I compare each of these documents to the basic parameters developed with regard to modern constitutionalism, discussing the similarities and differences. I will also evaluate these documents in the context of the debate about economic constitutionalism, with a special focus on the calls for reform that have come from both inside and outside these nations. Both of these nations have been quite successful in using constitutional mechanisms narrowly focused on economic modernization to jettison themselves to the forefront of the current wave of globalization. China and Vietnam have essentially cherry picked the aspects of constitutionalism that they believed (successfully it seems) would give them a competitive advantage on the world economic stage. The aspects of liberal constitutionalism they have adopted are not the aspects that theorists in the West emphasize-democracy, civil/human rights, popular sovereignty, etc. In fact, these have been explicitly rejected in the Chinese and Vietnamese constitutional arrangements. Instead, they have carved out the explicitly liberal economic aspects of the modernist model-private property (including intellectual property), market reform and management, and wealth maximization-and applied them in a highly selective manner within their cultural contexts. This move mirrors a burgeoning discussion within economics about the efficacy of stripping away the political and rights aspects of constitutional documents and focusing more directly on more decidedly economic issues. For some within this movement, the whole tapestry of liberal political formation

and extensive rights regimes are a hindrance to the efficient operation of the economy. From this perspective, the traditional aspects of modern constitutionalism seem almost like quaint adornments; a legacy of Western values that cut against economic globalization. The obvious response to this position is that liberal economics and this tapestry of political and human rights guarantees are inextricably intertwined. In other words, some would suggest that it is impossible to have a liberalized economic system without the political and civil rights infrastructure to support it. Theorists in the Western legal tradition have historically emphasized this sort of relationship. The question then becomes, what is at the heart of constitutionalism. Can we pick and choose the aspects of a constitutional model at will to jerry-rig a streamlined (or bare) constitutional arrangement, or must we endorse all the aspects of a traditional model lock, stock and barrel? These are vital questions as we move into the twenty-first century. Finally, I will explore the question as to whether the adoption of a particular constitutional model, or cherry picking aspects from one model or another, necessarily carries an ethical component. That is to say, in this talk I will ask whether there is a moral aspect attached to the decision to use one model of constitutionalism instead of another, and further what the normative aspects of this cherry picking might be. I will further ask, if there is such an ethical component what should the proper level of moral evaluation be? Should it be made at a societal level or an international level? More specifically, I will evaluate the issue of whether the form of economic constitutionalism that is being developed and implemented in Asia can be critiqued from an ethical perspective. Can the stripping away of liberal political and rights values open advocates of economic constitutionalism up to criticism? In the end, I believe that it can.

The meanings of the Due Process of Law Clause in Brazil and in the United States of America.

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This paper is a result of our ongoing research project conducted in the research group called "Center for Legal Studies, Citizenship, Procedure and Discourse", located at Estácio de Sá University, Rio de Janeiro, Brazil (NEDCPD/PPGD-UNESA). Applying the Semiolinguistic Methodology of Discourse Analysis and the method of comparison by difference, borrowed from Cultural Antropology, we aim to provide a description for native and/or theoretical categories of the Brazilian Legal Culture in contrast with the American Legal Culture, in order to illuminate the idea that legal systems cannot be translated/verted straightforwardly as a mere lexicon translation challenge. There is much more about it that relates to meaning and understanding contexts that surpass the linguistic problem. That is what we intend to convey with our efforts. Our observations can be taken in two set of ideas. First we will present the theoretical background that

sustains our research. Then we will discuss specifically the meaning of the "due process of law clause" in Brazilian legal culture opposed to the US legal culture. Our theoretical approach has three fundamental propositions: a) the understanding of Law as a set of local discourses and practices; b) the utility of the theoretical category "legal sensibilities" by Clifford GEERTZ (1983); and c) the recognition that culture interferes in socialization and social efficacy of Law when people translate legal categories. In particular, we call attention to a speech by Professor Daniel dos Santos, an Angolan sociologist at the University of Ottawa, when we met him at the "SeminárioBrasil-Angola: Estado, Direito e Sociedade" (Seminar Brazil-Angola: State, Law and Society), back in 2009, in Rio de Janeiro/Brazil. The sociologist said back then, that Law ultimately is a set of discourses and practices - and, of course, we can ask ourselves: which discourses and practices? And here again we refuse to accept the challenge of pointing out what the criteria for granting the status of legality would be, since, somehow, it escapes the topic proposed for reflection. Anyway, the important part of this statement is that it leads us to the place of social relations and its web of meanings, helping us to appreciate the extent of the practices, rituals and representations that directly impact Law. Thus, we allow ourselves to think that law is a cultural product, despite its universalist normative nature. If we assume that part of these failures can be attributed to the inability of the legal concepts of bearing unambiguous meanings for different people (and here we recall records that point to the difficulty/need that international normative instrument need to face to "negotiate" the adherence to moral clauses, such as equality), the idea of "legal sensibility" seems to be quite operative. The category points towards a path of mutual understanding, acknowledging that each of these culture bears its meaning within its own legal culture. Therefore it is a key concept for understanding Law as a manifestation of a culture. And this key concept can prevent possible uncritical transplantations of legal categories that ultimately result in interpretations out of place showing low capacity to interfere with reality and to shape behaviors or that involve the enforcement of that behavior. The American anthropologist Clifford Geertz was the one who proposed the category of "legal sensibility" as a way of explaining the cultural bases of law, making it necessarily a local product. If classifying law as a branch of knowledge that must be interpreted in light of the "local knowledge" is not new among anthropologists, it is still a pretty impressive relativistic dimension for classical jurists in Brazil. The idea that the formulation of general rules is only meaningful when derived from a proper individualized context can be very innovative from the legal point of view but fairly prosaic for anthropology, the branch of knowledge that has always lived with the escape from ethnocentrism and from the dimension of law receiving different senses according to the legal sensibilities of the society in which it applies. This is the theoretical background that we must keep on mind. On the other hand it is broadly said in Brazil that literal translations between legal concepts and categories of different places are possible and feasible. For instance "due process of law" or "judicial review" (devidoprocesso legal and controle de constitucionalidade in Portuguese language) would be the same in English as in Portuguese, as if the words would only need to go under a proper and accurate translation exercise. However to show that this correspondence is tricky, using the comparative approach by contrast, we have selected one category to put into description and analysis in the Brazilian and later on in the American legal cultures which are the categories of due process of law. In our paper we will provide a description of the meaning of due process of law in Brazilian legal culture and we will focus on describing the general meaning of the due process clause in the US's culture as well. Through a comparison by contrast between both legal cultures

it is possible to challenge the notion that legal categories are universal. And we can conclude that the clauses are not entirely equivalent and play different roles in organizing the legal system as well as in the way reasoning is constructed either by judicial decision or jurists. In Brazil due process of law (devidoprocesso legal, in Portuguese language, as mentioned before) relates to the procedures that are designed by legislator as requirements for state action, either exercising its administrative, legislative or judicial powers. Ultimately we argue that the core idea is to provide a way to legitimate state bureaucracy. Whereas in the U.S., due process of law is related to the idea of protection from the government power, that is freedom from the State. The emphasis is in the people´s liberties that are subjected to constraints imposed by the State. Due process in this sense is a guarantee that can be invoked as a limitation to the State discretion.

SESSION 03: Current legal issues in Asia and the Americas I.

This session covers legal and social issues in Asia and the Americas. The focus will be on work related to current trends in these regions. Examples might include discussions of contemporary political or legal challenges faced by governments or social groups, analyses of emerging trends in legal theory as they are related to Asia or the Americas, and/or projects that concentrate on particular legal or social problems endemic to societies in either region. Papers dealing with issues of racial minorities, gender, or indigenious groups are particularly encouraged. Submissions need not be comparative in nature, but comparative work will be favored given the focus of the CRN.

Custody/acess dispute in the Brazilian judicial system: the space of juvenile in the decision making

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This presentation proposes to describe the judicial administration procedure for custody/access dispute through the practices expressed in the city of Rio de Janeiro. Through this description we expect to show the internal and external legal culture around the dispute over the custody of children, as well as the role performed by juvenile in decision-making about exercise of parenting, taking into account the constitutional guarantee of the child's best interest. Because the focus of this presentation is the practical aspect and not the legal discipline on the issue, we will explain the meaning of the child custody law in the Brazilian judicial system. The purpose of this paper is to present how the Brazilian judiciary handles with the dispute for child custody, allowing a reflection about the Brazilian system when compared of solutions organized in other countries for the same dispute. To this end we look back over the judicial practices, with a focus on ensuring of juvenile rights, questioning to what extent the procedure provided by the State for conflict management on parenting promotes the Children's participation in the construction of the decision and assures the prevalence of their interests. We will describe the procedure as provided by law, the strategies developed by the characters involved, the insights into the experience about

being in court and the intersections proposed by the judiciary with alternative mechanisms of conflict resolution. The information was collected at the second half of 2014 and at first half of 2015 through observations at meetings of parenting orientation programs conducted by the State Court of Rio de Janeiro and hearings in dispute processes for custody of children which enabled me to produce several field notes describing the experience and audio recordings. The intention of these observations was to identify the institutional dynamics and behavior of agents. Access to the these practices also occurred through in-depth interviews, semi-structured with judges and unstructured with lawyers and parties aiming to access the discourse of different actors about their experiences, perspectives and interests. Being inevitable the conflict in family relationships, some points of divergence can focus just on the exercise of parenting. Parents may disagree on the minor's activities, place of residence, school will attend, religion, discipline issues, endless dimensions of this relationship. If the conduction of the child's education and raising a child by itself can cause misunderstandings between married parents and living with their children, the potentiality of conflict only increases when dealing with parents who do not share the same home, the same routine and plans of life. By failing to overcome the conflicts pertinent to the issue of parenting, parents or guardians may seek judicial means for the composition of the conflict. It occurs that once judicialized the conflict over custody of a child, the State task, by the judge and the prosecutor, is to reconcile the procedural rules with the principle of the child's best interests to that child no longer appear as a supporting actor and turn out to be protagonist of judicial protection. What we find in judicial practices was far from the legal prediction. We have a judiciary that should ensure the child's best interests and compliance with procedural rules, acting through a procedure that should serve the interest of a subject who is not part of the process, which can not interfere in the process, who in many occasions is invisible in the construction of decision that will directly intervene in your life. The procedure of custody lawsuits brings an obstacle to juvenile participation. The process takes place and may well achieve the trial with facts exclusively brought by parents and processed by the technical language of the jurist, considering only their perspectives on family dynamics. Core issues that should be clarified in the custody lawsuits, such as bonding with each parent, routine and social relationships of the child, can easily be obscured by the dispute between parents over who has the best qualities to be a father or on accusations do not concern the exercise of parenting. There is a mismatch between what the doctrine believed to be a custody action and what the legal practice presents. Now, there is no way to guarantee the best interest of a subject which is alienated from the decision-making process that discusses precisely what your interest. All that speech about best interests of the child and leadership, compared to an analysis of the legal practices, proved to be a rhetorical question. Although the law and the doctrine emphasizes that the best interests of the child is the most important aspect in guard actions, making irrelevant the claims of the parties, the procedural rules retain control of the procedure and the decision-making in the hands of adults. It is then questioning how compatible the child's best interests with procedural mechanisms to also allocate the decision-making process, rebalancing the relationship of power in the procedural sphere and maximizing the benefits that child involved can benefit from this protagonism. So, give it voice in the process, in every dispute processes for custody and not just those in which arbitrarily is deemed difficult to investigation, it means removing the child from the object condition, elevating them to the subject of the law in relation with the parents and the state. Though there are numerous standards guaranteeing the right to participate and information to the child involved in a lawsuit, the judiciary does not implement or

even discuss access to justice for children and spaces for their effective participation in the dispute. This research effort was needed to corroborate the hypothesis that the procedure provided by the state to administer disputes over child custody does not promote the effective participation spaces for these subjects in discovering their interests, revealing itself as a practice of symbolic violence against children and adolescents.

The eurocenric construction of human rights and the crisis of modernity

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The issue focused in this essay concerns a critical reflection about the reasons for the absence of effectiveness of human rights, and it is discussed from the thought Boaventura de Sousa Santos has called counterhegemonic. The interest in such investigation on their ineffectiveness appears in the extent that the matters relating to the inefficiency identified when the legal exertion of human rights is accomplished are going to rouse a deeper study, even though the theoretical foundations of human rights became a broadly inquired theme, but being worth provoking new approaches. It is convenient to note that many papers directed to the analysis of the production of the corpus of human rights, as regards their validity, efficiency and foundations, are grounded on a basic assumption: the genesis of human rights is distinguished by their intense complexity that interrelates a number of dimensions, from individual rights to collective and diffuse one, being linked to a discourse where the Western view is predominant, insofar as they are considered a product of the political and philosophical movements determined by the modern European context. So, when the course of human rights is discussed, it is necessary to take in mind the conjunction of the political and religious fights emerged in England, France and United States during the seventeenth and eighteenth centuries, with the rationalist theoretical tradition of modernity. The present essay aims to convert into problem the historical and jusphilosophical conceptions that ground the prevailing discourse of human rights. Since the category of "making of subjects" proposed by Giacoia, the tridimensional metaphor (saviorvictim-savage) and the ethical theory, developed by Mutua and MacIntyre respectively, the contradictions of the historicalgeographical understanding of human rights are discussed, and, in parallel, it is intended to reveal the reasons for which the discourse that settled down in Western modernity was acknowledged as a hegemonic discourse. On the other hand, with the support of Villey, Sloterdijk and Lipovetsky's contributions, the project of modernity, cradle of human rights, is investigated, revealing its limitations, disparities and ambiguities, and proving that it reached its exhaustion. By converting into problem the concept of rationality coined by the Enlightenment, it is intended to demonstrate that, under the background of a socalled neutrality, one hides a project of exclusion and human oppression, strengthened by the idea of race and by the exertion of an antihumanist power. Human rights were born in modern political discourse as a necessary prerequisite for the autonomy of individuals in relation to the state marked by absolutist governments in Europe into capitalist expansion. The modern liberal ideology embodied in the Declaration takes as its starting point the natural rights of man as established in the theory of social contract, justified by rational nature of man,

the service of a liberal and bourgeois project. This rationality makes you and holds itself (jus in se ipsum), as well as their choices, why would a violence to prevent the free man to use his reason and, to the extent that the natural rights come from hypothesis (real or imagined) of a pre-social state or nature, its founding anthropological conception is the individual who exists and remains alone and where society is not the time to achieving human, making otherness a purely formal sense when no objection. However, if on the one hand the enhancement of the idea of power of the human being as the subject appears as the basis of equal rights among citizens, even outside the nobility or the clergy, on the other, and paradoxically it promotes the annihilation subjectivity, insofar as it was established a so-called universal knowledge legal starting from the design according to which it would be possible to have knowledge of subjects and neutral apart time and space. With regard to the law, this process leads to the annihilation of subjectivity which was reflected in efforts to reduce as much as possible the influence of subjectivism in judicial practices and a desire to Law science of purification, always based on scientific objectivity of perspective and neutrality with an emphasis on observable reality, not in philosophical speculation. Law and Moral and transcendent values start to be located in independent circles, ie, standards were produced without regard to historical values, social, economic and political aspects of society; the idea is that the only valid law is the right place by the state. However, what we see is a limitation of scientific parameters, and even legal that were used to develop the social in modern times. And precisely because of this disbelief in past models opens the possibility to reflect on a new reference model, to state reasons. Given this situation promising anything that will impact the discourse of human rights, it is urgent to seek new forms of translation that can be configured enablers of overcoming the inefficiency and incompleteness. This means, above all, critical reflection on our times, the prospects are revealed and how the law, as a reflection and engine of society, can play a fundamental role in the break with the ways of life dominated by aseptic rationality at selfish individualism. What is aimed with the present essay is the exercise of a critical reflection on the authorized narrative of human rights, whose limits, although they make difficult the scope of other looks, are not able to impede the perspective for other paths that allow the necessary reflection bound for a movement of human rights that may be multicultural, inclusive and profoundly political. To rethink human rights means to consider the idea of human rights as a product of an inclusive and global development, which may take account of the existence and participation of more than one social actor really enabled and a society whose sign in such a process corresponds to solidarity and tolerance. This elaboration necessarily encompasses a multiplicity of actors whose contribution will be, culturally and socially, of a fundamental importance for the change of the conception, the directions and the aims of human rights. Keywords: human rights – modernity – Western point of view – counterhegemonic thought - inefectiveness

The racial relations in the legal order after slavery abolition: a study in comparative perspective between Brazil and the United States

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This paper aims to contribute to the understanding the relation between racial issues and Law in Brazil and in the United States. First, we address the slavery abolition in Brazil and in the United States, in the context of each the social and economic perspective, and the differences between both countries nineteenth century. In the second part of this paper, we present, from a perspective of comparative law, the post-slavery racial issue in the legal system of Brazil and United States, considering how different types of racism and race relations in both countries contributed to the consolidation of different legal cultures concerning racial laws and public policies related to it. In this way, we present a historical overlook of the colonization process in both countries, and how it is related to the slavery issue. In the United States, the colonization enterprise was mostly done by individual and companies, while the Federated States possessed a great autonomy from the central power of England; in the other hand, in Brazil, the occupation was made under strategically control by the Portuguese Crown. In the United States, the different colonization models in North and South are deeply related with the race issue, and those differences contributed to a Civil War. The northern part of that territory was colonized by European Protestants, who had as its main feature, in relation to the racial question, the utilization of a free work labor. On the other hand, the southern states were characterized by the use of slave labor. The federal character of the American State Union allowed that each state decided whether they would practice slavery or not. Nevertheless, many segregationist laws were created after the abolition of slavery, mainly in the southern states, under the period known as Jim Crow laws. These laws were first judged in the Supreme Court in Plessy vs. Ferguson case, where the Court not only judged then as constitutional, but also signed the doctrine of "separate but equal", according to which laws and public policies that segregate black and white people would be constitutional. Segregation, so, would be legal even though black and white were American citizens, with equal rights. The Jim Crow laws remained until 1954, when there was the trial of the case Brown versus Board of Education of Topeka, which declared unconstitutional the racial discrimination in public schools of the United States. After this trial, three legislative actions have been adopted by American Parliament to bury the racial segregation laws: the Civil Rights Acts of 1964; The Voting Rights Act in 1965; and the Civil Rights Law of 1968. In Brazil, the central presence of the Portuguese State served to keep a territorial unit, and because of that the various separatist conflicts or conflicts linked to racial issues were harshly repressed by the Portuguese government, the colonial period, as the Brazilian Empire, after independence. Also, the scenario of a federation where each state could decide whether or not to allow slavery was impossible in Brazil, since slavery was a uniform policy throughout the country, under the Portuguese central government. During our slavery regime, several laws have been passed to gradually abolish slavery. These laws were approved in order to manage a intense pressure coming from England, and those law became really ineffective in suppressing slavery, becoming known in Brazil for this reason as "Laws made only for English people to see (Leis praingêsver, in Portuguese)". After the year of 1831, where first law against slavery was published, several laws have been passed, but none of them could really restrict the practice of slavery. This scenario lasted until the year of 1888, when finally slavery was abolished by the Lei Áurea. After the abolition of slavery, the Brazilian legal system - Brazilian Constitutions and Laws –

has never addressed the race issue and, because of that, we could say that, under the Law, black and white people were equal. The situation, however, was that former slaves had very different social conditions in comparison with free and white people. We can say, so, that black and white people were not "equal under law" but, in a manner, the absent of law in addressing the social conditions of former slaves composed a scenario where black and white, even though not unequal under Law, were deeply unequal I real society, and black people remained marginalized after the abolition of slavery. This legislative silence related to race in Brazil, has lead to a long time believe that Brazil has a racial democracy, where black and white people live in harmony. This believe only started to be questioned as a fact by Brazilian thinkers from the 1950s, as the Sociologist FlorestanFernandes. So, the race issue only reappears in Brazilian legislation with the Constitution of 1988, moment from which the Brazilian State assumes its historical debt to the black population and goes on to create several laws related to the racial theme. At this point, the Brazilian government assumes its historical debt to the black population and creates various laws related to the racial issue. In this comparative analysis, we rely on the reflections made by the Brazilian anthropologist Roberto DaMatta. Although Brazil had possessed a formal equality between black and white people since the abolition of slavery, with a supposed silence in legislation about race issue, our society would be marked by the absence of egalitarian values, having a highly hierarchical society, where racial issue would be hidden by the myth of racial democracy, leading to the belief that in Brazil there would be no racism, and therefore did not exist in this country laws related to racial issue. In United States, the history happened differently. In this country, after abolition, there was a whole legal structure, especially the Jim Crow laws in the South, which resulted in a legal discrimination, which would only be reversed in more recent times, with the Civil Rights Acts. This legal segregation would be formed under the influence of strong egalitarian values in north-american society, values that would not allow a real segregation that was not founded in law, which lead to the doctrine of "separate but equal". Through this analysis, we conclude that Brazil and the United States have generated different legal cultures on the racial issue, related to it different values of equality and their different racial ideologies, which would be reflected in the forms of segregation and legislative production concerning the racial issue.

Brazil, Haiti and the United Nations: the MINUSTAH case

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One of the great challenges of contemporary societies, which unfolds in their legal systems, is the protection of human rights, which gains special importance in the international arena and in the way States operate and position themselves in international issues. In turn this relevance may have its hallmark associated to the Second World War (II WW) that has laid the foundation and the consolidation of a protective discourse of the human beings beyond the geographical borders of the nation state. Moreover, at the present these challenges can be systematized in four types which may be intertwined a) violations issues due to external or even internal military conflicts; b) the low level of institutionality which threatens the very notion of the rule of law; b) problems related to extreme poverty laying under threat the human existence

itself; and also d) the risks to democratic regimes. These challenges require that the states and the international community propose an agenda very oftenly subjected to severe criticism, which demands discursive legitimacy, either in legal or political terms. This scenario draws attention to the way that countries deal with such challenges and how they engage in processes driven by the protection of human rights which translate into foreign policy networks, legal and political commitments regarding the international community and its agencies, such as the United Nation (UN). This paper discusses the position taken by Brazil to meet these challenges and it will offer a case study on the so-called MINUSTAH (the United Nations Stabilization Mission in Haiti). This study will be organized in three stages. The first point will discuss the concerns and the comprehension that Brazil has about its participation in the international arena. Brazil presents itself as a country that runs its foreign policy always towards reconciliation and dialogue. Added to this characteristic there is a non-interventionist conception that has largely dictated the Brazilian foreign policy through out its republican history. However, since the League of Nations and later, with the creation of the UN, Brazil has continuously claimed its presence as one of the permanent members of the UN Security Council targeting the projection and expansion of Brazil's prestige in the Latin American region. Aiming this projection and seeking a permanent seat on the Security Council, Brazil has been available to compose the so-called "peace missions" on several occasions. The Brazilian official headset is that Brazil will engage all its power to defend and promote human rights. So Brazil's participation in peacekeeping missions would have two main purposes: a pragmatic / realistic character which can be linked to the seach for a permanent seat in the UN Security Council following a policy of "good behavior" towards the major nations that occupy a permanent seat in the Council and another eminently humanitarian / idealistic character. The second aspect of the paper will deal with the MINUSTAH and it discusses the concept of "peace operation". The MINUSTAH was established on 1 June 2004 by the Security Council, through Resolution 1542. It has succeeded a Multinational Interim Force (MIF) which was authorized by the UN Security Council, in February 2004, after President Bertrand Aristide departed Haiti for exile in the aftermath of an armed conflict which had spread to several cities across the country. MINUSTAH was conceived originally by the UN to be a temporary "peace operation" focused on the restructuring of Haiti that has being suffering from low standards of living. The despair of the Haitian population was burdened by a shaky economy and ill infrastructure and it has become even more severe after the occurence of natural disasters such as the tropical storms that hit the country especially in 2004 and 2008 and the damage caused by the 2010 earthquake that left a great balance of dead and homeless people. Such devastation was worsened with the cholera epidemy that followed the tremors. In this alarming situation the permanence of MINUSTAH was imposed with the expansion of its responsibilities. On the other hand, the concept of "peace operation", which ultimately brings the aspect of humanitarian intervention, stands as an international intervention action, nonviolent, voluntary, organized and preferably multinational, with the consent of the host State or States and guided by fairness. However, from a legal perspective, there is no general and previous justification for such operations. The construction of the legal basis for such procedures takes place individually in each and every case, producing a fragmentary legal foundation since these operations were not originally envisaged in the UN Charter. They take place with the setting up of military forces assembled for this purpose: the Peacekeeping Military Forces (PMF). In this context the question is whether it is possible for a humanitarian intervention to be be guided by fairness, using international military forces without a previous legal provision and whose existence was shaped

according to a particular state of affairs. Finally, the paper willdealwith the participation of Brazil in MINUSTAH and its consequences. The concept of impartiality, humanitarism and solidarity are set by the Brazilian government as premises to the participation in the MINUSTAH policy which is characterized by a multidimensional aspect involving internal security, support for the reconciliation of the various political forces and the support to economic development and social development of Haiti. The Brazilian perception seems to be that to obtain a regional leadership role one has to guarantee an active participation in the solution of the stalemates affecting the international system. There seems to be a prepoderance of the realistic aspect of the intervention. On the other hand Brazil's participation in MINUSTAH has received much criticism, either because of its economic costs to the Brazilian Government, either by its inability to foster bases for the construction of a local autonomy for the Haitian society in order to manage its institutions and maintain a relatively stable economy . Brazil which so far was not seen by the people of Haiti as a possible destination for a better life, now passes to be another possibility of immigration, along with the United States and the Dominican Republic. Is this the legacy we were aiming for?

SESSION 04: Current legal issues in Asia and the Americas II - Access to Justice

This session covers legal and social issues in Asia and the Americas. The focus will be on work discussing challenges to access to justice, considered broadly as the access that citizens have to dispute resolution tools of justice including but not limited to courts, but also to civil and administrative processes that might impact on protecting rights. Papers might include discussions on access to justice on its two dimensions: procedural access and also substantive justice. Examples dealing with issues of effective access to justice, reductions in costs, access to lawyers and access to courts and the the efficaciousness of a justice system in meeting the dispute resolution needs of its citizens are welcome. Submissions need not be comparative in nature, but comparative work will be favored given the focus of the CRN.

The application of judicial precedents system in the Brazilian legal system against the new Civil Procedure Code

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Brazil recently created instruments in the legal system inspired by the judicial precedent system of North American law especially with the advent of the new Civil Procedure Code . We intend based on notions of the American judicial system and the systems of common law and civil law outline the differences between the North American legal system and the Brazilian system and point out the favorable and unfavorable arguments to the adoption of judicial precedents system before a critical analysis forward the constitutional principles concluding the need for systematic application of the parental order. Our research aims to present the four main instruments. Initially we treat the binding precedents addressing general notions, legal, assumptions , a historical perspective to better understand the institute , while pointing out the role of binding precedent in constitutional control by checking their compliance with the principles

mentioned above. Then take care of repetitive appeals in higher courts and labor courts . Finally specifically discuss the repetitive demands Resolution Incident established in the new Civil Procedure Code. The Brazil, especially from the 60s, is witnessing an exponential increase in the number of demands and thus the procedural experts have pursued mechanism to contain this advance making a judgment given in the first and second levels of jurisdiction did not arrive the High Courts and often failed to arrive, even the Court itself . We note this progress to Constitutional Amendment 45, known as the Judiciary Reform. This amendment created the National Council of Justice and also the binding precedent that was later regulated in 2006 by Law 11,417. No doubt it was a flag in order to establish understanding of the Supreme Court for application in other organs of the judiciary and the direct and indirect administration and thus assist in containing the number of processes. Despite the differences, which become clear through a comparative review, the binding precedents were inspired in the judicial precedent system in the North American right . This is not the only innovation in this tuning fork. These include the impediment summary of resources provided for in the current civil procedural law, which provides that the judge will not admit refuse the appeal if the decision is in accordance with the precedents of the courts Register the device comes to persuasive precedents , closing the door to an analysis of the collective body from the understanding shown by the Court no binding effect on the subject . Recently the 13,015 law that took effect in September 2015 , to take care of the processing of resources in the labor courts , intends to speed up the processing of cases , to enable the Court to choose a representative process of that legal question at issue and that this single thesis applies to all similar cases . Lately we also noticed an increase in the legalization of labor disputes, which some conclude as effects of the increase of social rights from the Constitution , where many even today have not been adequately regulated . We can not forget the mechanisms that will be implemented with the new Civil Procedure Code , still in vacatio period , among them we can highlight the incident resolution repetitive demands , met the equality ensuring safety in legal relations aiming this way meet demands of the mass societies . Then we start from the factual verification that our planning is creating more and more mechanisms to contain the number of court proceedings and in that sense we must try to adjust them . Currently speech recurring among civil procedural experts is that Brazil is adopting the judicial precedents as occurs in the United States . By studying the US system it is possible to see differences in actual construction and interpretation of the mechanism, so you can not say that our land is reproducing in full the American model based on common law . However we can not get away from the concrete the idea that Brazil is from the first reform of the Civil Procedure Code and essentially the new Civil Procedure Code , Law 13 015 of 16 March 2015 , as already highlighted above still vacatio , creating mechanisms inspired by precedents for these extract the favorable points mainly predictability of decisions. It has been enhanced and the binding force to compel the lower court judges meet the guidelines of the Superior Courts decreasing the forced idea of the review of the decision by a joint committee in accordance with the principle of double jurisdiction . Amid a mass society with an ever increasing number of cases , remains to processualist seek alternatives to achieve the best performance of existing institutions and create other mechanisms that assist in reducing and improving the provision of judicial activity . We believe that until there is a cultural change in Brazilian society we can not achieve the reduction of this number. It needs to rethink and better serve the Brazilian collective process , topic not covered in this article, but that deserve special attention and design the civil process based on the composition of disputes through alternative means such as conciliation, mediation and arbitration .

While this reality is still under construction it is imperative to seek these alternatives in an attempt to contain the number of ongoing processes , not only with a purely reductionist view in arithmetical terms, but in order to assign security in legal relations by attributing predictability decisions dealing with situations legal similar , also enabling significant reduction in processing time implying directly or indirectly in reduced costs and effort of the parties in addition to the movement 's own judicial machinery in perfect contribution to what is expected of the principle of procedural economy . In this pitch we consider the binding precedent, as well as other instruments such as precluding summary of resources, impeding resources in the Superior Court and in the labor courts and in the future the incident resolution repetitive demands , under the new Procedure Code civil , as necessary and appropriate to the Brazilian legal system.

Evolution of class actions for a balanced environemt and animal rights – a comparative study

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Animals have rights that should be recognized and respected by human society. Defending the rights of animals is to work in the roots of the human secular behavior, it's to work against the domination, it's to crack and change the paradigms beyond the animals itself. Looking for protect animals, the notion of speciesism calls for a hugde change in all the society's concepts. The speciesism is similar to racism and sexism, in that they all deny moral and legal rights to one group in favor of another. Every human being, individually, have more collective rights to defend in court than their own individual rights. The proof is a quick analysis of the rightholder: A homo medius, man of medium prudence, normal, consumer services and potential products and can belong to several subgroups of consumers. It is also part of a condominium homes, either as tenant or owner, works in particular public or private company and it belongs to a professional category, and also may belong to unions and associations clubs, as well as health plans etc. In this way, the easier it is that has injured one of those rights than a simple individual right. And the protection of these rights deserves treatment itself, specific as well as diffuse rights aimed at preserving the environment, including animal protection. Today has innovative tools in Brazil such as the Public Civil Action, Popular Action, the Collective Writ of Mandamus that provides the defense 'metaindividual' interests. There is no way to talk about access to justice without protective mechanisms of cultural heritage, the historical, artistic and environmental. From the perspective of Civil Law in Brazil (Law 10,046, of January 10, 2002), the animal does not have legal personality which is attributed only to humans, since the moment of his birth with life, with the rights of the unborn safeguarded. (Articles 1 to 78 defines and classifies the status of the natural and legal persons). Next, the Civil's Code articles 79 until 103 establishes what are considered as goods . And article 82, what is considered as movable property , or assets able to move itself, or to be removal by external forces. So the animal as property is considered " ressemovente" . Being seen as thing, possession and ownership of one or more human beings. (Although the Brasilian's Civil Code does

not classify them). Abandoned animals are considered as res nullius, or thing without onwership. The Brasilian's Federal Law 9605/98, article 32 determines cruelty and ill-treatment of animals, as crime, but does not change its legal (civil) nature. The Brasilian Constitution, however, as the most important Law in the country, in its article 225 §1º, VII disciplines and protects the environment, and that's exactly where this abstract search support to classify the animal in Brazil, as part of the environment wich to be ecologically balanced must includes all animals. . With constitutional basis we have the emerging command of the Constitution in putting the State as responsible for the animal's defense , creating methods to protect stray animals wich lives in the streets of every city in the country. The question of attribution of legal personality to animals is still very controversial and complex and alone deserves proper work. The third wave lease renewal is properly the new focus of access to justice, now from the perspective of so-called "justice of consumers." With this leaves aside the concerns starting from the so-called "justice producers" (lawyers, judges, clerks, prosecutors) to get answer to the calls of those who consume: the people. Search up here to deformalization process, abandonment of excessive formalism and the creation of mechanisms to ensure the parties a solution to their conflicts. New Rights call for new mechanisms, instruments. The search for collective security in legal relations now through new systems come to constitute a new and solid socio-cultural value. Today we have the instrumentalist stage of the process, which is itself a very critical stage. Seeks the effectiveness of the process, with new practical solutions always seeking judicial economy. The process is seen as a great tool for adding value justice, not just technical. This phase meets the three renewals waves and implementation of metaindividual rights. We live in the time of need remodeling of all traditional procedures standards to create a Collective Civil Procedure. Shall be examined further on the changes that have already occurred. Meets first locate historically who first admitted a collective demand. It took place in England in the eighteenth century, with the enactment of the Bill of Peace seventeenth century. It was the idea of common interest or commonality as it looked after the interests of all members of a class evenly. It was the ideal mechanism to meet the requests of a large number of holders totaling impossible to form a procedural plaintiff. Over time such stocks lost their usefulness, being supplanted by the current representative actions (themselves for the defense of homogeneous individual rights) and rapporteur actions, used to defend the indivisible rights. The first resemble classs US actions. In 1845, the US Supreme Court issued a variety of procedural specific regulations based on equity, and precisely in the Equity Rule 48, was the first reference to collective actions in US territory. Only in 1912 there was an improvement from the previous standard become the Rule 38. In United States do not exist a Code of Civil Procedure , but the Federal Rules of Civil Procedure that have emerged as the first set of federal rules, before , there was just the rules of each state, designed within an orbit of a federalism more extreme than the Brazilian model. This federal sphere that was discussed concerned the federal issues, laws and treaties, or cases between citizens of different states (diversity of citizenship). And, Rule 23 divided the treatment of class actions in: true, hybrid and spurius, meaning respectively collective actions themselves, hybrid and inappropriate. This classification of the Rule, has been heavily criticized in 1966, when the Supreme Court issued a revaluation. The three modalities were taken and brought up the opt-out system for collective actions for the defense of individual rights and the notification requirement when it came to diffuse right, indivisible, with very many holders, which would cause an exorbitant cost to carry out a communication criteria one by one unworkable in practice, leading to the withdrawal of action by the authors and walking the wrong way access to fair legal system. So, the "key" to the entire understanding of

the Regulation 23 system is the adequate representation (Adequacy of Representation). Taking as example a company that affects the polluting its environmen: it will be demanded by many people represented by only one which in turn will have to meet several conditions contained in the title of Rule 23. The court shall require that the representative is competent, capable at various levels. It might be an expertise in dealing with collective demands, since it is a lot of responsibility to represent the rights of a larger group. The Court can still choose not to certify the class action. Called certification of a rigorous judgment of admissibility. It will not be certified if it is determined that the requirements of Rule 23 are not present. In Brazil, by contrast, the singular individual is prohibited from joining with class action. Only the prosecutor or classes of entities that enjoy legitimacy conferred by law. Conversely, in the US this legitimacy is much wider, so even if there are abuses in relation to the system. In brasilian's law 8078/90 there was a greater spraying this legitimacy of Brazilian classes, but it's still much narrower than its American inspiration. The class actions for damages or damage class actions based on the "b" (Rule 23) equates to the collective actions of the law 8078/90 in defense of homogeneous individual rights, and have indemnitory on the basis of liability. The American jurisprudence won the extension of the competence to also accept the so-called mass tort case, which are claims involving masses or clusters injured. Before only allowed for action on dealing singular event (single-event). The collective class action should be noted for that should have repeat requests. For instance, a large number of people who take the same remedy can provide the basis for a judgment medication efficiency probability. Treaty mathematically, a collective can be understood as an endless succession of events each of which occurs the possibility of a certain attribute is identical. Taking a class of people individually different from taking them collectively. Not knowing what they were intended can be fatal. The need for a collective inhibitory injunction to prevent illicit, its continuation and repetition is affirmed and guaranteed by Law 8078/90 in Brazil. . Therefore the animals must be introduced in the diffusivity of the right to have a balanced environment. If the environmental law is a fundamental right of every human being, listed in art. 225 of the Federal Constitution, as diffuse right deserves the same tools that the law provides to all those rights considered collective. And it is with this perspective that this research intends to affirm that it is possible to apply the inhibitory injuction to defend animals, wildlife and the environment . Remembering always that a class action to protect the animals would avoid a myriad individual demands that would drown the judiciary. On crimes against wild animals (which are all those animals belonging to native species, migratory, aquatic or terrestrial, having their life or part of it occurring naturally within the Brazilian territory and its territorial waters), usually are protected by law 9.605 / 98 and can still be reported to the Forest Police (where available) and IBAMA. Wild animals have their own legislation provided for in the Federal Constitution in the Criminal Code. In addition it is possible that the animals are represented in court by a Protective Association of Animals. So , all animals together being considered public property, part of the environment , can be perfectly hedged . There is no reason to continue ignoring the urgent need to protect the animals that are priced out of their natural habitat, spread through the towns . The North American model is sophisticated and modern, but it can not simply be transplanted to Brazil. It is a hudge mistake to think that is possible to perform legal transplants. It must be considered all models and adjust them, as far as possible.

Procedures in the North American and in the Brazilian systems – a brief comparative analysis

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The aim of this study present topical notions and comparisons of the Brazilian and North American procedural systems, their structure and dynamics, analyzing this dialectic process some relevant points in these systems. The procedures of Brazil and US systems have some similarities, despite the predominance of North American law is the common Law and equity, incorporating the culture of analysis of individual cases judged, and in Brazilian law is the Civil Law of romanistic origin which worships the legislated text, although we are currently living the meridian of jurisprudence. The project of the American Civil Procedure Code was drafted in 1848 by David Dudley Field for the State of New York, who later served for the preparation of most state codes processes. However, only in 1938 and was approved the code of federal civil procedure, federal rules of civil procedure, in which the first article explains that the purpose of the statute is to ensure fairness, speed and low cost in adjudication. Try to substantive justice (decisions based on law), concrete (decisions on the basis of facts) and efficient (in speed control). In Brazil, civil procedure codes date back 1939, 1973 and the new Civil Procedure Code 2015. It is intended to highlight this work the similarities in the Brazilian and American procedures, highlighting in this regard the special features of both systems, verifying preliminarily that both start with the application for adjudication exploited by initial, the defendant quote, contestation, education probative to the sentence. Similarly, the similarities and particularities of the review mechanisms of the decisions will be reviewed in both systems, what kinds of resources, requirements and effects, emphasizing the changes in procedural rules to provide more rapid adjudication, Doing It in this sense an analysis of alternative means of conflict resolution used in both systems and the benefits of these legal instruments. It is intended likewise demonstrate how the court works on both systems, as well as the sources and principles that guide the civil procedural acts in Brazil and the United States, verifying the procedural formalities on both systems to carry out the provision referring to the requirements for the filing of the action conditions and procedural assumptions as well as the appellate assumptions and species resources, the formation of res judicata and sovereignly res judicata, and deconstitution means those decisions. The North American procedural law prescribes a basic form of action, whether by consolidating it into a system of opponents. The parties in dispute, investigate the facts, present evidence, deduct legal arguments. The judge is neutral, passive. The public interest lies in the right of claimants itself, that it can give up. By filing the suit, the party prepares to quote with counter faith, which will be delivered to the clerk, court clerk. The quotation must be signed by the clerk mentioned, which also stamp the document with the court seal, along with the identification of the parties and their addresses. The own part undertakes to mention the rival, it is worth the mail and even electronic forms such as e-mail with acknowledgment of charge, diverging from the formalities for service in the Brazilian procedural law. In American copyright can give up the action (dismissal) before the start of the trial (before trial). Either way there is a conference that precedes the trial (pretrial conference). This is directed by the judge and aims to determine whether the

parties are ready, if there is agreement, waiver or whether there will be opposition. Just as in the Brazilian procedural law, the American right is given joinder (joinder of claims and parties) with parts under the same jurisdiction and similarity of interests in contracts, personal injury, property damage, observing capacity constraints, greatly of minors (minors), mentally disabled (mental incompetents) and entities not domiciled in the United States (non-resident corporations). Disputes between various stakeholders (multi-party actions) are provided and accepted by the federal procedural status with broad permissiveness. Third parties may be called the process at any time and any interested party may request admission to the plaintiff's argument. The class actions are very common in consumer relations discussions, environmental protection, civil rights, disputes between company shareholders (corporate shareholders). It is how to bring about legal provisions against institutional violators against people and companies who may be liable for damage caused to a relatively large group of people. It also intends to make a comparative study between models of production tests on both systems, whereas the North American model is elastic, volatile multiforme, instrumental, enabling the parties to better prepare for the trial, with a minimum of judicial interference in preparatory phases, focusing on oral as opposed to the Brazilian system. In the American procedural law all procedures undergo prior time research and survey evidence, called discovery. Save up evidence in case of alleged age or deponents disease avoiding surprises in the final judgment. The parties clarify difficult points, limited to dispute the specific terms. Agreements are forced to avoid lasting processes for long. Unlike Brazil, in American law are harvested statements that are provided to persons authorized to receive them, and are not necessarily civil servants. Testimonials are produced in private, usually in the boardroom in law firms. They take up testimonials also by telephone and satellite TV. If they investigate materials, documents and paraphernalia related to the dispute. The jurisdiction in North American right would be in power that particular court has to judge a given concrete problem, in which case qualifies competence, taking into account the circumstances specific to the defendant, taken as a basis for first test identifier. This power is exercised in a specific geographic area, called the venue, which determines where the jurisdiction is exercised, there is in this sense a likeness as the Brazilian procedural law. Observe the place of residence or whereabouts of the defendant, and also where a substantial portion of the controversial facts would have occurred. Set these parameters, and cited the defendant may use the means of appropriate defense, mainly offer challenge, which is to play call answer or response, in which the defendant denies (denial) the author of the reasons articulated counter-claim (counter-claim , cross-claim) or postulates initial ineptitude (motion to dismiss). These are the broad outlines of the US civil procedure, where the conclusion will be made with an emphasis on demonstrating the efficiency and deficiency in both systems, especially regarding the speed of the processes for effective adjudication.

The National Council of Justice and its role in the Brazilian Judiciary Branch

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This paper has as the central issue the National Council of Justice (CNJ) and its role in the Brazilian Judiciary Branch. To address the issue, I contextualize the National Council of Justice emergence in the Brazilian scenario, by clarifying its functions and structure. Then, I present a comparison between the Nacional Council of Justice and the similar institutions in some other Countries. At last, I present some reflections on the National Judicial Council, for example, issues related to its constitutionality under Separation of Powers Principle and the federative pact. All the study was made from doctrinal research (to identify opinions about the CNJ) and from statistical data collected from official repositories. So, first, it was observed that, in 1988's constitutional order, several fundamental rights were established, including free access to the courts - art. 5, section XXXV. However, Brazilian courts were understaffed, and their practices were late e slow, without accountability, harmful to ethics, far from morality, efficiency and still inaccessible to many citizens. Until then, for example, the Brazilian Judiciary Branch manifested itself through 95 courts, by various associations of magistrates (national and local), with speeches and often conflicting goals. It was a disastrous situation, called "Brazilian Judiciary Branch crisis". Thus, the Constitution text had to be improved and updated to those new Brazilian facts, besides to turn effective the fundamental rights, that in Brazil it shalls only be through constitutional amendment or same status act. Thereby, on March 26th, 1992, it had arisen an amendment proposal, to reshape the structure of the Brazilian Judiciary Branch. In truth, the American Convention on Human Rights (the Pact of San José, Costa Rica), from November 22nd, 1969, ratified by Brazil on September 25th, 1992, was the first act to treat reasonable process duration. Anyway, only on December 8th, 2004, in that purpose and so nominated "Judicial Reform Amendment", the Constitutional Amendment n. 45 was enacted – publication in the Official Gazette, on December 31st, 2004. Therefore, that rule had added, among others, the following provisions to Brazilian Constitution: item LXXVIII to art. 5 (providing for the reasonable judicial and administrative proceedings duration, as well as their speed processing), and item I-A to art. 92 (creating the National Council of Justice, as another Brazilian Judiciary Branch body). So, the National Council of Justice can be set to an administrative-constitutional Judiciary body, without jurisdictional function, ie, it has no assignment for law enforcement to prevent or compose disputes, nor to implement law in social interests. It was installed on June 14th, 2005, headquartered in the Brazilian capital, with operations throughout the country territory. This public institution is composed by 15 members, two-year term: nine judges from different areas (the Supreme Court President; a Federal Superior Court of Justice Minister; a Superior Labor Court of Appeals Minister; a State Judicial Branch Judge; a State Judge; a Federal Circuit Court Judge; a Federal Judge; a Regional Labor Court of Appeals Judge; a Labor Judge); one Department of Justice member; one State Prosecutor member; two lawyers; and two notable juridical learning and spotless reputation citizens – art. 103-B, Constitution. It is important to note that prosecutor and lawyers presences in the National Council of Justice is fully compatible with Constitution ideology, which puts these activities as essential to justice - art. 127 and art. 133. The National Council of Justice is integrated by: the plenary, the Presidency, the National Magistrate of Justice, the Board Committees, the General Secretariat, the Department of Judicial Research - DPJ, the Department of Monitoring and Supervision of the Prison System and Implementation System of Socio-Educational Measures - DMF and the Ombudsman. The CNJ, ensuring the judiciary autonomy and the Judiciary Statute implementation, aims to coordinate the various Brazilian courts, by controlling and administrative and financial supervision, and magistrates duties compliance, in order to improve the work of the Brazilian judicial system, eliminating

some harmful practices, so that the judicial relief is done with morality, efficiency and effectiveness, for the society benefit accordingly provision in item LXXVIII, art. 5, 1988's Constitution. In this purpose, National Council of Justice Standing Order has defined to its members such attributions, classified into political, administrative, ombudsman, correctional, disciplinary, punitive, informative and purposeful: ensuring the Judiciary independence and Judiciary Members Statute compliance, issuing normative acts and recommendations; defining strategic planning, goal plans and judiciary institutional assessment programs; receiving complaints, electronic petitions and representations against members or judicial CNJs, including against their ancillary services and public servants; judge disciplinary proceedings, ensuring ample defense, may determine the removal, availability or retirement benefits or proportional incomes to service time and apply other administrative sanctions; prepare and publish half-yearly statistical report on procedural movement and other Brazilian judicial activity relevant indicators. National Council of Justice Brazilian Similar institutions and even its precursor are in comparative law, classified into two main models as: the Latin-European (applied in France, Italy, Spain, Portugal, Belgium, Andorra, Turkey, Russia, Egypt, Hungary, Ukraine, among others); and the Nordic-European (applied in Sweden, Ireland, Denmark, and others). All of them originate in France and Italy, in the years 1946 and 1947, intending the Judiciary independence, as it was closely linked to the Executive Branch. In Latin European judicial council model, it dominates ties between Judiciary Branch and Executive Branch, and the judicial council is responsible for handling most of the ways of entering the judiciary and disciplinary matters. The second model is characterized by a Executive Branch relative independence, and assumes self-government assignments in the judiciary in its almost full. In Latin America, this judiciary reform is relatively recent, and has also created judicial councils, as exemplified: Costa Rica (1989), Colombia (1991), Paraguay (1992), Ecuador (1992), Bolivia (1994) and Argentina (1994). In Brazil, the institution that has the most activity equivalent to today that is performed by the National Council of Justice was the National Council of the Magistracy. It was a administrative body, as well non-jurisdictional, with powers to impose disciplinary sanctions, created in 1975 by Constitutional Amendment n. 7, and that was abolished by 1988's Constitution (this one grants courts self-rule, which now have exclusive jurisdiction to adjudicate their magistrates in cases of disciplinary offenses). It was wondered about the constitutionality to the National Council of Justice installation, to the argument that the institution breachs federal agreement or violates the powers separation, but the fact is, throughout this decade, including by commissioned research and access to statistics of its own Ombudsman, the National Council of Justice created a reliable data base, which allowed to make a strategic planning and to monitore actions to improve the judicial relief. In order to do so, the "Justice in Numbers" report was created: an annual publication, in which the CNJ brings the basic facts about litigation (initiated, tried and downloaded case numbers), staff (judges and servers numbers) and budgetary expenditures. All this made it possible to measure the productivity, speed and access to the courts, among other data. Thus, the National Council of Justice also found a number of irregularities, as by judge briberies, by negligent judicial relief, besides other Judicial Code of Ethics violations. Furthermore, that CNJ detected accurately 'incarceration culture' and several practices against to human dignity and speed expected by the citizen. From the annual research about judicial relief, it has been established goals for Justice branch, defined annually in the National Judiciary Meeting, crossing aims to effective quota. Some moralizing measures were also instituted, which had have great impact: a ban on nepotism practice in judiciary branch; the demand for "clean slate" for

candidates to trust or commissioned positions in judiciary branch; forbiddance to judges to function in cases where they have some relationship with the part; encouraging reconciliation.

The Impact of Simplification of Judicial Procedures on Access to Judicial Systems: The Case of Colombian Abstract Judicial Review

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The simplification of judicial procedures, according to the mainstream approach on improving Rule of Law through judicial reform, is one of the most important mechanisms to guarantee access to the judicial system for citizens. This simplification is also commonly justified in terms of prompt decisions and efficient use of resources. Additionally, the simplification of procedures is also considered an "easy way" to improve judicial systems worldwide, particularly in development countries. Notwithstanding this common understanding in some cases the simplification of judicial procedures would actually build new barriers to access to the judicial system. Simpler procedures, especially in so-called civil law systems, become cumbersome because of the action of judges and attorneys. The Court's decisions can impose, and actually do, new requirements to the judicial procedures, mainly regarding the stage of admissibility of lawsuits. These requirements are enacted through a precedent-based ruling and can be explained by the need of (1) reduce high workload and keep an informal way of case selection, (2) avoid or postpone a substantial holding in controversial or difficult cases; (3) concentrate the litigation skills in few attorneys and law firms, who are familiarized with that non-statutory rules. Furthermore, this admissibility burden to the citizens causes more serious consequences to disadvantaged populations, who use legal actions to protect fundamental rights that have a lack of guarantee in order venues, like Congress and the Executive Branch. Besides, this type of barriers affects the purpose of the judicial review a way to social change. Although the simplification of judicial procedures is a common and less expensive instrument to achieve the objectives of the Rule of Law regarding judicial system (fairness and impartiality, soundness of decision, accessibility, efficiency, independence and credibility), this mechanism can be easily distorted through judicial decisions, which interpret these procedures imposing new requirements outside the statutory law. Consequently, an action that was designed to improve the access to the judicial system becomes in a new and unexpected barrier to this access. The paper will intend analyzing the impact of the simplification of procedures in the access to the judicial system, especially regarding disadvantaged groups. The claim that the paper will defend is that even though the simplification of procedures is, in the books, and adequate and efficient mechanism to improve and facilitate the access to the judicial system, in some cases this instrument is not enough to accomplish that objective because a merely normative simplification would ignore the effect of judicial decisions on the "real definition" of procedures. In order to prove this claim, I will refer to the case of Colombian abstract judicial review by the Constitutional Court. In this scenario, although the Constitution and the statutory law enacted simple requirements to the "Action of Unconstitutionality", the Court has levied, through its decisions, a higher standard of admissibility. Accordingly, as a conclusion, the paper will offer some possible solutions about the improvement of the

access to justice in front of these precedent-based requirements. I will explain that although these requirements are necessary in order to protect the separation of powers and the democratic principle, a proper access to justice requires also (1) a statutory enactment of the requirements of admissibility, through a detailed regulation that can be known for all citizens, not only for an elite of lawyers and legal counselors familiarized with the "informal and unwritten procedures" of the Court, (2) actions regarding the promotion of legal literacy of the judicial review proceedings as a part of the political rights of the Colombian citizens, particularly those who belong to disadvantaged populations and (3) adequate mechanisms of measuring and accountability of the Court's decisions regarding admissibility. These mechanisms would prevent that precedent-based requirements can impose a disproportionate burden to access to justice. In the first section of the paper, I will summarize the main aspects of simplification of procedures as a principal objective of judicial reform, particularly with regard to improvement of access to the judicial system. In the second part, I will explain the structure of the abstract judicial review in Colombia and how important legal reforms pointed out the simplification of procedures as an instrument to expand access of the citizens to abstract judicial review. In the third section, I will analyze the link between the judicial review and social change in developing countries, particularly the relation between access to justice, simplification of procedures and public interest litigation. In this stage, the paper will refer to the experience of Colombian Abstract Judicial Review and a brief analysis of access to justice in India and the experience of the "epistolary jurisdiction" as a broad mechanism of access to the judicial system to the poor. In the fourth part, I will explain how the simplification of procedures in the Colombian case was modified by the precedent-based requirements of admissibility, related to the conditions of Clarity, Specificity, Certainty, Pertinence and Sufficiency of the Action of Unconstitutionality. In the same section, the paper will propose an outline on the arguments that support as well as the problems that these requests offer. For this purpose, it will be used the case of the protection of the right to marry for same-sex couples in Colombia. Finally, in the fifth section, the paper will conclude that even though it is true that the reasons that support precedent-based conditions are closely linked to the core of the constitutional principles; however the protection of the Rule of Law requires, in the case of the Colombian Action of Unconstitutionality (1) legal reform, (2) legal literacy, and (3) mechanisms of judicial measuring and accountability.

Access tooJustie in Asia and in Latin America: comparative perspectives on Japanese and Brazilian Legal Aid Services

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1. Introduction: Legal aid is widely recognized as a foundation for the enjoyment of other rights, not only the procedural/instrumental right to a fair trial but also many other "substantive" rights that are established by law and whose exercise is being denied or

contested in given/concrete life situations. The present paper analyzes the differences between the Asian and Latin American legal aid models, focusing on the Japanese and Brazilian systems. The choice of these countries as a matter for this research did not arises by chance. It has elapsed due to the strategic importance of these countries in the respective continents. Beyond being qualified between the most important economic powers of Asia and Latin America, Japan and Brazil possess highly developed legal aid systems, both from a normative/regulatory viewpoint as well as regarding to the institutional structure. Besides, these countries present an extremely interesting legal particularity in the world-wide scene, therefore they belong to a select/small group of States that have expressly guaranteed the right to legal aid in its Constitutions. All these features make the Japanese and Brazilian legal aid models an obligatory subject of research for those who desire to understand adequately the Constitutional Law and the Legal Culture of Asia and Latin America. 2. The past and the future of legal aid in Japan and Brazil: In order to comply with the commitment to deliver free legal assistance (advice and representation) to the poor, different jurisdictions, influenced by their cultural background and local history, had adopted diverse ways and developed varied models. Currently, four basic models of legal aid services can be identified around the world: (a) pro bono systems, pro bono systems, in which the legal assistance to the poor is given by private attorneys, who act under a charitable regimen and motivated for professional ethics reasons, without any kind of financial compensation from the public purse; (b) judicare systems, in which the legal assistance is delivered by private attorneys, who are receive financial compensation from the public purse in a case-by-case basis; (c) salaried staff model, in which the lawyers are employed directly by government agencies (or through private organizations) and they receive monthly fixed compensation, irrespectively to the load of service or of the tasks effectively fulfilled, normally in a full time basis; and finally (d) hybrid or mixing systems, that basically juxtapose the models mentioned above, in diverse possible combinations. In order to adequately understand the legal aid models adopted by Japan and Brazil, the present work intends to carry through a historical trajectory description of the each country, indicating the cultural and sociological aspects that had influenced these national legal systems. Regarding to Japan, the research will demonstrate that the country industrialization and urbanization process have made the traditional social control methods less effective, resulting in a great increase of lawsuits and, consequently, the judicial litigation. In case of Brazil, the redemocratization process and the increasing awareness about the rights especially by the lower social and economic classes have caused huge increase in the demand for access to Justice. In order to adjust the local legal model to the new social reality, Japan and Brazil went through recent legislative reforms that have affected, amongst other areas, the legal aid system. Under the Comprehensive Legal Support Act, approved in 2004, Japan created the government-funded legal aid organization "Japan Legal Support Center" – JLSC (also know as "Houterasu"), established as a "quasi-incorporated administrative agency". Japan adopted a mixed legal aid system, in which the largest part of civil and criminal aid services are provided by judicare attorneys, who enter into a contract with Japan Legal Support Center. In an innovation way, JLSC also introduced staff attorneys system for the first time in Japanese legal aid history that deals with both civil and criminal legal aid. On the other hand, the Brazilian Constitution determined the creation of the "DefensoriaPública", as an independent state agency, not subordinated to any of the three traditional State Powers. Legal aid services to the poor are provided by staff attorneys and covers not only free legal representation (as plaintiff or defendant) in any kind of civil or criminal suitcase, but also legal advice. Different to what have been

observed in the majority of legal aid systems in the world, which are facing a scenary of reflux and of financial/budgetary cuts in the provision of services, the Japanese and Brazilian legal aid systems have experienced recently a continuous process of expansion and consolidation. To explain this increasing process of development and expansion, the present study will carry through not only to the traditional bibliographical and legislative research, but also the numerical data analysis detailing the volume of legal aid services annually carried through by each country and the annual budgets amount directed to the legal aid system. Finally, it will present geographic data, detailing a territorial coverture of the legal aid services provided by the "Legal Japan Support Center" and the "DefensoriaPública". 3. Conclusion: The legal aid system is a vital element in securing access to justice in modern society. After all, without access to justice, the other rights are emptied in their value and effect. Therefore, a proper understanding of Asia and Latin America legal structure and legal culture must mandatorily consider the local legal aid system study. Although situated in opposing sides of the globe and besides possessing completely distinct cultural roots, Japan and Brazil have in common the fact that they adopted legal aid models that converge in diverse points and present a high degree of evolution. Therefore, the comparative study of these systems can be usefull to supply a valuable perspective about how to guarantee for everyone the full and effective access to justice.