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Luka Burazin*

Legal office

This paper has three aims. The first is to explicate what kind of entity legal offices are and what their specific mode of existence amounts to. The second is to explain in virtue of what these offices can be said to be legal. Finally, third, to show the relevance of the actual use of legal offices for their existence. The main argument is that, ontologically, legal offices are best understood as immaterial institutional artifacts. This is because they can be created only if there is collective recognition of the relevant constitutive norms, which confer the status function of legal office, accompanied by the relevant deontic powers, and can continue to exist only for as long as this recognition is maintained. Furthermore, it is argued that so-called derived legal offices (e.g., the legislature and judiciary) are legal in virtue of the legal norms that constitute them, and the so-called original legal office (i.e., the constitution-maker) in virtue of the citizens' norm of recognition (i.e., in virtue of its being collectively regarded as a legal office by the relevant community). Finally, the paper argues that as institutional artifacts, legal offices can be said to exist only on the condition that they are, at least initially, filled with officials actually carrying out the deontic powers accompanying the offices they hold and for as long as the initial citizens' collective recognition of the original officials is not withdrawn.

Keywords: office, officials, status function, artifact theory of law, efficacy

1 INTRODUCTION

This paper aims to explicate what kind of entity legal offices are and what their specific mode of existence amounts to. That is, it aims to explicate in virtue of what legal offices can be said to exist. Also, it aims to explain in virtue of what these offices can be said to be legal. While the basic idea rests on an antirealist ontological position, according to which artifacts, and thus, per hypothesis, legal offices, depend on the human mind (i.e., they are mind-dependent entities) in the sense that the mental states of the authors of artifacts and the concepts on which these states are based are (at least partly) constitutive of their existence, the paper strives to show the relevance of the actual use of legal offices for their existence.

The paper first sets out the initial concept of legal office as found in ordinary legal discourse (Section 2). It then makes a distinction between original and derived legal offices to account for the relevant differences between the offices of the first constitution-maker, legislature, and judiciary, particularly regarding the issue of what makes them legal (Section 3). This is followed by the explica-

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tion of that in virtue of which legal offices can be said to exist and how they should ontologically best be understood (Section 4). Finally, the paper analyzes the way in which legal officials as officeholders, and their carrying out of their deontic powers, can be said to affect the existence of legal offices (Section 5).

2 THE CONCEPT OF LEGAL OFFICE

Let me start by listing some paradigmatic examples of legal offices, such as Presidency, legislature, and judiciary, which are sometimes called "public" offices. Some also extend the notion of legal office to such things as ownership and trusteeship, which might be called "private" offices.[1]

In ordinary legal discourse, legal offices are spoken of as creations of positive law, i.e., law posited by the norm-authorities (agents who issue legal norms) or customs. For example, the offices of legislature and presidency are created by norms issued by the constituent assembly or the so-called founding fathers (i.e., by the constitution); the offices of tax officer and police are usually created by norms issued by the legislative body or legislators (i.e., by statutory norms). Legal offices are thus norm-based entities. The norms in virtue of which legal offices exist are constitutive norms since they constitute legal offices, i.e., they bring them into existence.

Offices are said to characteristically consist in a set of deontic powers, e.g., the powers to make, change, abrogate, identify, apply, or enforce laws.[2] The legislature, for instance, consists in the powers to make, change, and abrogate general and abstract legal norms; the judiciary in the powers to identify and apply laws. In fact, one could claim that office is but an "officified" (in analogy to personified) unity of a set of deontic powers.

Furthermore, legal offices are commonly said to have officeholders, i.e., individuals who bear the deontic powers that accompany the office. Norms that constitute offices designate individuals or groups of individuals as their holders and confer on them certain deontic powers, e.g., powers to issue norms for others or to apply and enforce existing norms.[3] Thus, norms that constitute offices are also power-conferring norms, i.e., norms that confer the powers of the office on the designated officeholders.[4]

Individuals or groups of individuals who are to take a certain office are usually qualified in some way by a legal order. They may be qualified by some natural properties, e.g., sex, age, physical or mental health, descent, or moral

1 See Essert 2013, Katz 2020, and Penner 2020.

2 On the relationship between legal offices and legal powers, see Burazin 2023.

3 von Wright 1963: 76.

4 Shapiro 2011: 75.

qualifications, or certain skills.[5] However, they are also often determined by the prescribed way in which they are to be called to the office.[6] Officeholders can be called to their offices either directly or indirectly.[7] They are called to the office directly where a norm refers to an individually determined individual or group of individuals and confers on him, her, or them the deontic powers attending to the office. For example, "if the historically first constitution prescribes: '*A* shall be the head of state'; or: 'The Constituent National Assembly shall be the assembly of people who actually convened at a certain day at a certain place and actually adopted a definite constitution'".[8] Officeholders are called to the office indirectly where a norm requires a certain act, such as nomination or election, by which an individual or a group of individuals is called to the office.[9]

Thus, legal offices can initially be defined as statuses accompanied by the deontic powers to create, apply, and enforce legal norms, that are attached to certain people (officeholders, legal officials) directly or indirectly by an existing legal norm.

3 ORIGINAL AND DERIVED LEGAL OFFICES

The legal offices discussed in the previous section might be called derived legal offices.[10] A derived legal office is a legal office that is brought into existence by an existing (positive) legal norm, i.e., a norm belonging to a certain legal order. It is derived since its belonging to a legal order depends on preexisting positive legal norms. What makes it legal, at least in one sense,[11] is the *legal* norm that constitutes it. For example, the offices of legislature, presidency, and judiciary are brought into existence by existing legal norms, in principle, norms of the constitution.

However, every legal order seems to have an office, which, while it does not depend on the existence of a pre-existing positive legal norm, is still regarded as a legal office. That office is the office of the constitution-maker. The "constitution-maker" is here understood as the maker of the historically first constitution,[12] and the constitution is understood in the sense of "the positive

5 Kelsen 1967: 154.

6 Kelsen 1967: 154.

7 Kelsen 1967: 154.

8 Kelsen 1967: 154.

9 Kelsen 1967: 154.

10 Here I draw on the distinction between original (or sovereign) and derived norms. See von Wright 1963: 199 and Guastini 2014: 115-116.

11 It might be said to be legal in another sense by reference to the content of its deontic powers, which are the powers to issue, apply, and enforce *legal* norms.

12 "If we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that is the first historically and that was laid down by an

norm or norms which regulate the creation of general legal norms".[13] The constitution-maker, as understood here, is by definition the office that consists in the power to issue the norm on the production of other norms of a legal order and, in this sense, the first positive norm of a legal order. That being so, the constitution-maker cannot, by definition, be a derived legal office since it is not brought into existence by any existing positive legal norm. If it were brought into existence by an existing positive legal norm, the norm it issued would not be the first positive norm of a legal order, i.e., the first constitution. It can thus be said that the constitution-maker, at least from the point of view of a legal order, is an original or sovereign office. That is, an office that is not constituted by any pre-existing legal norm, but that enables its holders to constitute other legal offices by issuing constitutive legal norms (i.e., derived legal offices, such as legislature, judiciary, presidency). Of course, that does not imply that the office of the first constitution-maker is itself not constituted by any norm, as will be seen shortly.

The question that now arises is what then makes the original office *legal*? What makes it possible to identify holders of the original office as legally relevant agents that exercise their deontic powers of law-creation? What makes their deontic powers legally significant? There are several theoretical accounts that presuppose that there must be a certain normative framework on the grounds of which the original office can be interpreted as a legal office, the deontic powers it consists in as legal powers, and the actions of its holders as legal acts.[14]

According to Kelsen's theory of law, the norm providing the normative grounds of the original legal office (i.e., the office of the constitution-maker) is the basic norm (*Grundnorm*). The basic norm is the norm that ascribes the meaning of the legal norm to the act of the (first) constitution-maker (i.e., to the act of issuing the first constitution) by determining the constitution-maker as the organ authorized to issue the first constitution, and thus establishing the office of the constitution-maker. In Kelsen's words:

> If by the constitution of a legal community is understood the norm or norms that determine how (that is, by what organs and by what procedure – through legislation or custom) the general norms of the legal order that constitute the community are to be created, then the basic norm is that norm which is presupposed when […] the constitution-creating act consciously performed by certain human beings, is objectively interpreted as a norm-creating fact; if […] the individual or the assembly of individuals who created the constitution on which the legal order rests, are looked upon as norm-creating authorities.[15]

individual usurper or by some kind of assembly". Kelsen 1945: 115.

13 Kelsen 1967: 222.

14 See Marmor 2011: 47-48.

15 Kelsen 1967: 154. The parts omitted are those where Kelsen states that a constitution can also come into existence through custom, since in that case one would not speak of the *office* of the

The basic norm is, according to Kelsen, a presupposed norm, and it can be presupposed only if a legal order becomes by and large socially efficacious, meaning that laws are issued by empowered law-creating organs and applied by empowered law-applying organs or obeyed by citizens.[16] If "the old constitution loses its effectiveness and the new one has become effective, the acts that appear with the subjective meaning of creating or applying legal norms are no longer interpreted by presupposing the old basic norm, but by presupposing the new one".[17] Although Kelsen was not always clear regarding who presupposes the basic norm, and changed his views over the years, I side with the claim that, according to Kelsen, it is law-applying organs that presuppose the basic norm, in virtue of which the constitution is legally binding and the constitution-creating act is a genuine legal act.[18]

According to Hart's theory of law, the norm that provides the normative grounds of the original legal office, i.e., the office of the (first) constitution-maker, is the rule of recognition. The rule of recognition is the rule that specifies the criteria of validity in a given legal system. It is not an enacted, positive legal rule, but "a form of judicial customary rule existing only if it is accepted and practiced in the law-identifying and law-applying operations of the courts".[19]

Hart criticizes Kelsen's view that one has to presuppose the basic norm that prescribes that the first constitution, or those who laid it down, ought to be obeyed. He argues that if the constitution is "a living reality in the sense that the courts and officials of the system actually identify the law in accordance with the criteria it provides, then the constitution is accepted and actually exists".[20] Therefore, Hart claims, "it seems a needless reduplication to suggest that there is a further rule to the effect that the constitution (or those who 'laid it down') are to be obeyed".[21] Thus, according to Hart, if the first constitution is efficacious, i.e., if those who are empowered to enact general legal norms (legislators) actually enact them, and if those who are empowered to apply them (courts) actually apply them, and to apply them they first identify them as legally valid norms, then one can speak of the practice of officials as constituting a customary rule "that certain criteria of validity (e.g., enactment by the Queen in Parliament)

constitution-maker but of individuals who by their behaviour constitute the constitution-creating custom. There would be no office of the constitution-maker since one does not usually speak of an office if an individual or a group of individuals has not been called to the office. See Kelsen 1967: 155.

16 Kelsen 1967: 210.

17 Kelsen 1967: 210.

18 See Bindreiter 2001: 149-151.

19 Hart 1994: 256.

20 Hart 1994: 293.

21 Hart 1994: 293.

are to be used in identifying the law".[22] By setting out the criteria for identifying the rules of the system as legally valid, the rule of recognition simultaneously makes the acts of certain entities legally significant and empowers these entities to carry out the acts that produce legally valid rules. In that sense it can be said that the rule of recognition establishes legal offices and empowers the holders of these offices (i.e., officials) to carry out certain actions. By referring to acts such as the (first) constitution, the rule of recognition makes the first constitution legally valid and, presumably, those carrying out these acts, i.e., the original or sovereign power, legally empowered to do so.

According to my artifact theory of law (which is expounded elsewhere),[23] the office of the constitution-maker is constituted by the norm of recognition, which itself is constituted by the practice of citizens (in the sense of members of the relevant community) recognizing the office and office holder. Citizens (including legal officials) are those who, by their collective recognition, impose the institutional status of first or original legal office on certain people, and in doing so confer on them the deontic powers to issue the norm or norms that regulate the creation of general legal norms (i.e., norms on legislation). In this sense it can be said that the members of the relevant community are the authors of the office of the first constitution-maker and of legal officials as its holders.

Although certain people can define themselves as "first constitution-makers" by agreeing on some criteria for having this status, they do not have that institutional status unless collectively recognized as such by a relevant community (a community in respect of which they carry out their deontic powers, which follow from their status of the first constitution-makers).[24] Citizens' collective recognition of the original officials represents their social practice of regarding certain people as their officials. As a social practice resting on social reasons for action (recognizing certain people as officials since others recognize them as such and are expected to do so), it constitutes a social norm of recognition.[25] Apart from being a social norm, it is a double constitutive norm in that it constitutes the institutional status of the original legal office and makes the conceptual framework for an instantiation of their legal system, which, on the basis of the division of labour, is carried out by both the original and the derived legal officials setting the criteria of identification of the sources of law in a relevant community.[26] Thus, according to my artifact theory of law, the office of the constitution-maker is a legal office not because it is created by law or

22 Hart 1994: 293.

23 Burazin 2016 and Burazin 2018.

24 Cf. Lagerspetz 1995: 15.

25 I speak of social practice "constituting" a norm in the sense that a customary norm is constituted by a regularity of behaviour accompanied by the relevant normative attitude.

26 On the conceptual framework (which consists in at least an understanding of what makes someone a legal official) that citizens establish through their social norm of recognition and

recognized as such through the practice of only legal officials, but because it is collectively regarded as a legal office by citizens.

To sum up, like Kelsen's basic norm and Hart's rule of recognition, the citizens' norm of recognition is not an enacted, positive legal norm. Unlike Kelsen's basic norm, which is a presupposed norm, but like Hart's rule of recognition, the citizens' norm of recognition is a social norm. Finally, unlike both Kelsen's basic norm, which is presupposed by officials, and Hart's rule of recognition, which is constituted by the practice of officials, the citizens' norm of recognition is constituted by the practice of citizens.

4 ONTOLOGY OF LEGAL OFFICES

Legal offices are not natural entities like water, gold, and tigers. Rather, they are best understood as social constructions. They are social constructions in that they are created by humans, who obviously create them for some purpose. The purpose of legal offices is reflected in the deontic powers they carry, i.e., in the powers to identify, create, and apply law. Generally, one can say that the purpose of legal offices is to enable individuals to identify, create, and apply law, which they could not do only in virtue of their physical structure. The fact that they are created by human authors and are created for some purpose makes them artifacts, according to the classic definition of artifacts.[27]

Drawing on Searle's theory of social construction,[28] one can define a legal office as the status function carrying the relevant deontic powers, which is brought into existence and imposed on an individual or a group of individuals by (either direct or indirect) collective recognition[29] of the relevant constitutive rule. The fact that they are norm-based and require collective intentionality for their existence (meaning that they can be created only if there is collective recognition or acceptance of the relevant constitutive norms that confer the status function of legal office, accompanied by the relevant deontic powers, and can continue to exist only for as long as this recognition is maintained) makes legal offices institutional artifacts.

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its relation to the officials' norm of recognition, and officials as the primary "authors" of a particular instantiation of a legal system, see Burazin 2018: 126-129.

27 See Hilpinen 2011.

28 For summary of Searle's basic conceptual apparatus see, Searle 2010: 6-11.

29 In Section 2, I used the direct/indirect distinction with respect to the ways officeholders can be called to their offices. Here, I use it with respect to the ways collective recognition can refer to its object. Although the two distinctions are used in the paper independently, there might be some connection between the two (e.g., direct calling to the office of the first constitution-makers is done through direct collective recognition of a certain group of people as constitution-makers by the relevant community). I thank one of the reviewers for pointing this out.

It is here useful to introduce a distinction between different types of (constitutive) norms by which people collectively impose the institutional status of legal office. As I argued elsewhere,[30] a distinction can be drawn between codified or explicit and uncodified or implicit norms of recognition, as well as between general and individual norms of recognition. Codified or explicit norms of recognition are norms that are explicitly posited and formulated by some human authority and are, at least indirectly (through the recognition of the original legal officials and of what they create as law), collectively recognized by citizens. Uncodified or implicit norms of recognition are norms that are constituted solely by the social practice of collective recognition. Uncodified or implicit norms of recognition are, in fact, social norms. General norms of recognition are norms that constitute a type-institutional artifact and can be formulated as follows: For any *x*, we collectively recognize that if *x* meets certain conditions C, then *x* counts as *y*. Individual norms of recognition are norms that constitute a token-institutional artifact (or an instantiation of a type-institutional artifact) and can be formulated as follows: Of a particular (pre-existing) entity *e*, we collectively recognize that *e* counts as *y*.

Let us now turn to the application of these norms to the original (or first) and derived legal offices. The historically first legal office, i.e., the office of the first constitution-maker, of a particular legal system is constituted by the collective recognition of an uncodified or implicit individual constitutive norm.[31] A relevant community collectively recognizes a certain group of people as their constitution-makers, thus imposing on them the institutional status of the office of constitution-maker with the corresponding deontic power to issue the norm on the production of other general norms of the relevant legal order. All subsequent legal offices are (in principle) constituted by the codified or explicit general constitutive norm posited either by the holders of the historically first legal office (e.g., through a constitutional norm) or the holders of derived legal offices (e.g., through a statutory norm). However, even in the case of derived legal offices, there must be at least an informal, uncodified, or implicit collective recognition by citizens, which ensues from their initial recognition of the legal office of the first or original officials and their corresponding deontic powers (including the power to codify the norms which constitute derived legal offices and on the basis of which the holders of these offices are elected or appointed). This is because codification cannot be socially efficacious if a legal system as

30 Burazin 2018: 123.

31 According to Searle, this would be the case where no constitutive rule exists and, thus, a pre-institutional example of the same logical structure as constitutive rules. It is merely an *ad hoc* collective recognition that something has a certain status and a step toward codification in the form of rules. See, Searle 2010: 19–21. See also, Thomasson 2009: 548. According to her typology of constitutive rules, in these cases one is dealing with singular constitutive rules, on the basis of which institutional objects are created on a token-by-token basis.

a whole lacks a certain degree of informal collective recognition by a relevant community.[32]

By collectively recognizing certain people as their original legal officials, members of a relevant community ascribe to them a deontic power to create law. However, since citizens have collectively recognized that certain people are their legal officials and have thereby collectively recognized that that what officials create as law is law, they are committed to the fact that certain people are their officials and that what they create as law is the law of their community. In so doing, they are also committed to participating in a legal practice that was conceptually made possible by the practice of officials. That is, once these norms have been identified as legal norms by the officials of a legal system, citizens are committed to complying with them and to using them when regulating their mutual relationships. This shows why a separate direct recognition by citizens of institutional facts or institutions created within an existing institution, such as derived legal offices and their officeholders, is not necessary.[33] By (directly) collectively recognizing the institution of the first constitution-maker and (indirectly) a legal system, one has already committed himself/herself to recognizing particular norms created by the holders of derived legal offices as legally valid norms of his/her legal system.

In the case of both original and derived legal offices, legal offices are created by the collective recognition of the constitutive norms on the basis of which humans impose the status function of legal office on existing persons.[34] In the case of original legal office (i.e., the office of the first constitution-maker), the office is created by a direct collective recognition of the (citizens') social norm of recognition and, in the case of derived legal offices, by an indirect, implicit collective recognition by the citizens of the (officials') constitutive legal norms. Also, in both these cases, legal offices are ontologically immaterial, since they are nothing but a status function, and this status function, as mentioned, consists in a set of deontic powers (i.e., the powers to identify, create, and apply law), which is an abstraction. Thus, one can say that legal offices are abstract or immaterial institutional artifacts.

The difference between original and derived legal offices is such that, in the case of the former, officeholders are called to their offices directly since the citi-

32 Cf. Tuomela 2009: 159.

33 Although a separate direct collective recognition by citizens of derived legal offices is not a necessary existence condition for derived legal offices, it is necessary that citizens (at least implicitly) maintain their initial collective recognition of the first constitution-maker for the legal system as a whole, and thus also derived legal offices, to exist. And the maintenance of the initial collective recognition is manifested in citizens generally complying with the norms created in the exercise of deontic powers by the holders of derived legal offices. On social validation of citizens' collective recognition with respect to the existence of a legal system, see Burazin 2018: 132-134.

34 Cf. Searle 1995: 41–51.

zens' norm of recognition refers to an individually determined individual or group of individuals, whereas in the case of the latter, officeholders are called to their offices either directly or indirectly depending on whether the officials' constitutive legal norms require a certain act, such as nomination or election, by which an individual or a group of individuals is called to the office. Another difference relates to the content of deontic powers accompanying the different offices. While derived legal offices can consist in all sorts of legal powers, like the power to create, apply, or enforce legal norms, the office of the constitution-maker consists, by definition, in only the law-creating power or, more specifically, the power to issue the first constitution. Here again the constitution is understood in Kelsen's sense of a set of norms that regulate the process of legislation in a given legal system, i.e., "the creation of the general legal norms, in particular the creation of statutes" (the constitution in the material sense).[35]

To summarize, the fact that legal offices have human authors (members of a relevant community), who create them for some purpose (to make, identify, and apply law), makes them artifacts. The fact that they are rule-based (constituted by the social norm of recognition or the positive constitutive legal norm) and require collective recognition (by members of a relevant community) for their existence, makes them institutional. The fact that they are a status function consisting in a set of deontic powers makes them immaterial. Thus, we can say that, ontologically, legal offices are immaterial institutional artifacts.

5 OFFICES, OFFICIALS, AND EFFICACY

Although the original legal office is constituted by norms, it cannot exist without its officeholders and their carrying out their deontic powers, and without certain other legal offices and their officeholders carrying out their deontic powers. That is, in order for the original legal office to exist in the relevant sense, it is not sufficient that it be constituted by a norm. The relevant norm can determine only the intended character of the institutional artifact and thus create its concept. The actual existence and the actual character of the institutional artifact depend on whether its deontic powers are actually used. This follows from all of the above discussed explanations of what constitutes the office of the first constitution-maker.

According to Kelsen, the basic norm, which empowers an individual or a group of individuals to create the first constitution and thus constitutes the office of the first constitution-maker, is presupposed only if the first constitution is efficacious. The first constitution is efficacious if an individual or a group of individuals empowered by the constitution actually issued the first constitution,

35 Kelsen 1945: 124.

the legislative authority empowered by the constitution actually issues laws, and these laws in turn are actually applied by law-applying organs, and finally, laws are obeyed by people.[36] Therefore, the office of the constitution-maker exists in the relevant sense, i.e., as a legal office, only if the holders of this office exist, if they carry out their deontic power of issuing the first constitution, if the office of legislature and its holders (legislators) exist, if legislators enact laws, if the office of judiciary and its holders (judges) exist, if judges apply laws, and if people obey laws.

The same conclusion follows from Hart's explanation of what constitutes the office of the first constitution-maker. The rule of recognition, which establishes the office of the first constitution-maker, exists only if there is an existing practice of identifying and applying the first constitution (and other sources of law) by law-applying organs. This, again, presupposes that the holders of the office of the constitution-maker actually enacted the first constitution and thereby established the office of legislature, that legislators are called to their office, and that they carry out their power of issuing general legal norms.

According to my artifact theory of law, the office of the first constitution-maker is constituted by citizens' collective recognition of an uncodified or implicit individual constitutive norm. Since individual constitutive norms constitute the relevant status by ascribing this status to particular pre-existing individuals, the citizens' norm of recognition presupposes the existence of certain individuals who are collectively recognized by citizens as the first constitution-makers and their legal officials. Since for an institutional artifact's actual existence its deontic powers must be carried out, there would be no first constitution-maker if it did not issue the first constitution and thereby did not establish the office of legislature. Also, the function of issuing the first constitution is not merely to establish the office of legislature, but also to fill this office with individuals who will carry out their deontic powers of producing general legal norms. If the office of legislature, established by the first constitution, were never filled and its officeholders never issued any general legal norms, one could at best say that some people, i.e., the purported constitution-makers, put forward a proposal that something be the first constitution. Also, if the purported legislators issued some general norms, and these were never applied by the law-applying organs, one could at best say that some people, i.e., the purported legislators, put forward a proposal that some norms be legal norms of their purported legal order.

This suggests a slight qualification of the claim that "offices are always capable of vacancy because they are impersonal positions of authority separable from the officeholder".[37] This qualification is in order with respect to both original and derived legal offices. The office of the first constitution-maker can never be vacant, or in other words, there can never be an institutional gap with

36 Kelsen 1967: 210.

37 Katz 2020: 269.

regard to the office of the first constitution-maker.[38] For the office of the first constitution-maker to come into existence, there have to be certain people who are recognized as holders of the office. Also, since the deontic power of issuing the first constitution is, by definition, exhausted by the carrying out of the act of issuing the first constitution,[39] the problem of the continued existence of the office of the first constitution-maker and its potential vacancy does not arise. With respect to coming into existence, the same holds for the offices of legislature and judiciary. If the offices of legislature and judiciary are not filled initially, one might claim that, in fact, no legal offices exist since no deontic powers accompanying these offices were carried out. However, the offices of both legislature and judiciary can indeed become vacant without ceasing to exist as long as there exists a norm regulating how the officeholders are to be called to their office. This is because in both cases it is possible (and indeed is often the case) that their officeholders are called to the office indirectly and their deontic powers are not exhausted by being carried out.

Thus, legal offices, as institutional artifacts, can be said to exist in virtue of their constitutive norms, which are collectively recognized by members of a relevant community, on the condition that they are, at least initially, filled with officials actually carrying out the deontic powers accompanying the offices they hold and for as long as the initial citizens' collective recognition of the original officials is not withdrawn.

6 CONCLUSION

This paper aimed to explain the nature of legal offices in terms of the artifact theory of law. According to this theory, legal offices are status functions carrying relevant deontic powers, which are brought into existence and imposed on an individual or group of individuals by (either direct or indirect) collective recognition of the relevant constitutive rules. Since legal offices have human authors (members of a relevant community), who create them for some purpose (to make, identify, and apply law), they are artifacts. Since they are norm-based (constituted by the social norm of recognition or the positive constitutive legal norm) and require collective intentionality for their existence, they are *institutional* artifacts. Since they are status functions, consisting in a set of deontic powers (i.e., the powers to identify, create, and apply law), they are *immaterial* institutional artifacts.

To account for the relevant differences between different types of offices, e.g., the offices of the first constitution-maker, legislature, and judiciary, the paper

38 On institutional gaps see, Romano 1925: 7-10.

39 Guastini 2014: 166.

introduced a distinction between original and derived legal offices. According to this distinction, derived legal offices are legal offices that are brought into existence by existing (positive) legal norms (i.e., norms belonging to a certain legal order), while original legal offices are those that do not depend on the existence of such norms. With regard to what makes an office legal, the paper argued that derived legal offices (such as legislature or judiciary) are legal because they are constituted by a (positive) *legal* norm, while original legal offices (the first constitution-makers) are legal because they are constituted by the social norm of recognition, which itself is constituted by the citizens' collective recognition of certain people as *legal* officials and as having deontic powers to issue the norm on legislation. With regard to the type of constitutive norms that bring offices into existence, the paper argued that original legal offices are constituted by uncodified or implicit individual constitutive norms, while derived legal offices are (in principle) constituted by codified or explicit general constitutive norms posited either by the holders of the historically first legal office (e.g., through a constitutional norm) or the holders of derived legal offices (e.g., through a statutory norm). With regard to the collective recognition of the relevant constitutive norms, the paper argued that original legal offices are created by a direct collective recognition of the (citizens') social norm of recognition, while derived legal offices are created by the citizens' indirect, implicit collective recognition of (the officials') constitutive legal norms. Furthermore, the paper argued that in the case of original legal offices, officeholders are called to their offices directly, since the citizens' norm of recognition refers to an individually determined individual or group of individuals, while in the case of derived legal offices, officeholders are called to their offices directly or indirectly, since in some cases the officials' constitutive legal norms require a certain act, such as nomination or election, by which an individual or group of individuals is called to the office. Finally, the paper argued that while derived legal offices can consist in all sorts of legal powers, like the power to create or apply or enforce legal norms, the office of the constitution-maker consists, by definition, in only the law-creating power or, more specifically, the power to issue the first constitution.

Finally, the paper analyzed the way in which legal officials as officeholders, and their carrying out of deontic powers conferred on them, can be said to affect the existence of legal offices. The paper concluded that legal offices, as institutional artifacts, can be said to exist in virtue of their constitutive norms, which are collectively recognized by members of a relevant community, on the condition that they are, at least initially, filled with officials who actually carry out the deontic powers accompanying the offices they hold and for as long as the initial citizens' collective recognition of the original officials is not withdrawn.

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Alejo Joaquín Giles*

De medios "adecuados" a fines anhelados

Sobre la justificación instrumental en los casos de discriminación

Las normas jurídicas que prohíben discriminar suelen condicionar este mandato a que la diferencia de trato cuestionada no se encuentre justificada. Habrá justificación, entre otros requisitos, cuando la conducta o norma de conducta concernida tenga una finalidad legítima y sea un medio adecuado para lograrla. ¿Qué significa "adecuado" en tal contexto discursivo? En este artículo ofrezco una respuesta que puede resumirse en tres pasos. El primero consiste en elucidar el impreciso vocablo como cierta aportación causal. El segundo consiste en reconstruir el contenido asignado a esta última idea por dos concepciones de la causalidad, la regularista y la probabilística. El tercero consiste en alegar a favor de comprender la exigencia de "adecuación" como una aportación causal probabilística. Luego de avanzar en esos frentes, atenderé a las oportunidades regulativas que se abren con esta última elección respecto de la estrategia, común en el derecho antidiscriminatorio, de requerir una justificación más robusta para determinada clase de casos. Como mostraré, el carácter gradual de la noción de aportación causal probabilística permite formular distintos niveles de "adecuación" que resulten suficientes a los fines justificativos. Respecto de los niveles no básicos se presenta lo que podría resultar un dilema.

Parablas clave: adecuación, discriminación, justificación instrumental, causalidad, suficiencia

1 INTRODUCCIÓN

Las normas jurídicas que prohíben discriminar suelen condicionar este mandato a que la diferencia de trato cuestionada no se encuentre *justificada* en virtud de su proporcionalidad.[1] Normalmente, se establece que habrá justificación cuando la conducta o norma de conducta evaluada tenga una finalidad legítima y sea un medio "adecuado" para lograrla. En ocasiones se incorpora, como requisitos adicionales, que sea también la más eficiente en dicha empresa y que resulte proporcional en sentido estricto. Si cumple con tales pautas,

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1 Por un estudio más detallado de los elementos del concepto genérico de discriminación prohibida, véase Giles 2023.

y aunque perjudique a un grupo protegido, una diferencia de trato resultará permitida.[2]

El derecho antidiscriminatorio supranacional europeo y el interamericano ofrecen ejemplos de lo que acaba de caracterizarse. Empecemos por el antiguo continente, observando la interpretación del artículo 14 ("Prohibición de discriminación") del Convenio Europeo de Derechos Humanos. Al atribuirle sentido a esta disposición, el Tribunal Europeo de Derechos Humanos (TEDH) viene afirmando –de modo reiterado y sostenido en el tiempo– que una diferencia de trato califica como discriminatoria sólo si, entre otros requisitos, "carece de una justificación objetiva y razonable". Y que:

> La existencia de una justificación semejante debe apreciarse en relación con la finalidad y los efectos de la medida examinada […] Una diferencia de trato en el ejercicio de un derecho consagrado por el Convenio no sólo debe perseguir una finalidad legítima: el artículo 14 se ve también violado cuando resulta claramente que no existe una razonable relación de proporcionalidad entre los medios empleados y la finalidad perseguida.[3]

Esa idea está presente en numerosas disposiciones del derecho europeo[4] y en la interpretación sobre ellas del Tribunal de Justicia de la Unión Europea (TJUE).[5] Respecto de ciertos supuestos, sin embargo, algunas fuentes omiten el mencionado requisito, prohibiendo las diferencias de trato perjudiciales basadas en determinados rasgos con independencia de cualquier razón que pudiera alegarse a su favor como justificación.[6]

Adicionalmente, el TEDH ha establecido una especie de agravante, un nivel de exigencia o escrutinio más estricto, aplicable a las diferencias de trato basa-

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2 Se trata de un permiso en sentido *débil*, como no prohibición: si la conducta se tuviera por justificada, no habría norma en el sistema jurídico que ordenase omitirla por discriminatoria. Sobre esta variante de los permisos, véanse Alchourrón & Bulygin 2012: 175-176 y von Wright 1963a: 86.

3 TEDH, "Belgian Linguistic case", 1968, pág. 34, §10. El tribunal ha reiterado tal interpretación en varias oportunidades después de este caso, hasta la actualidad. Véanse, entre muchos otros, "Marckx v. Belgium", 1979, §33; "Rasmussen v. Denmark", 1984, §38; "Abdulaziz, Cabales and Balkandali v. The United Kingdom", 1985, §72; "Karlheinz Schmidt v. Germany", 1994, §24; "Salgueiro da Silva Mouta v. Portugal", 2000, §29; "Vallianatos and Others v. Greece", 2013, §76; "Lupeni Greek Catholic Parish and Others v. Romania", 2016, §164; "Biao v. Denmark", 2016, §90; "Molla Sali v. Greece", 2018, §135; "Jurčić v. Croatia", 2021, §62.

4 Como en las siguientes directivas europeas: 2000/43/EC (2.2.b; 4); 2000/78/EC (2.2.b.i; 4.1); 2004/113/EC (2.b; 3.5); y 2006/54/EC (2.1.b; 14.2).

5 Como en "Bilka-Kaufhaus", 1986, §37; "Johnston v Chief Constable of the Royal Ulster Constabulary", 1986, §38; "Sirdar v. The Army Board y Secretary of State for Defence", 1999, §26; "Kreil v Bundesrepublik Deutschland", 2000, §23; "Kücükdeveci", 2010, §33; "Vital Pérez v. Ayuntamiento de Oviedo", 2014, §60; "CJ v. TGSS", 2022", §48.

6 La *Equality Act* (2010) del Reino Unido es un ejemplo bastante claro. Los únicos casos de discriminación directa que, en su marco, admiten justificación son los basados en la edad y en la discapacidad (secciones 13.2 y 15). Véase Hepple 2010: 15 y Fredman 2011: 198 ss.

das en determinados rasgos o atributos, como el sexo[7] y la orientación sexual:[8] éstas requieren para su justificación razones "de mucho peso". En lo que concierne a la relación medio-fin y respecto de ciertos supuestos, ello significa que los medios empleados han de ser más que meramente "adecuados" para lograr la finalidad con ellos perseguida; deben ser –afirma– "necesarios" a tal efecto.[9] Valga como ilustración el siguiente extracto de una sentencia dictada por la Gran Sala del tribunal:

> En los casos en los que el margen de apreciación concedido a los Estados es estrecho, como ocurre con las diferencias de trato basadas en el sexo o la orientación sexual, el principio de proporcionalidad no exige únicamente que la medida elegida sea, en principio, adecuada para alcanzar el objetivo perseguido. También debe demostrarse que, para alcanzar dicho objetivo, era necesario excluir a determinadas categorías de personas […] del ámbito de aplicación de las disposiciones objeto de estudio.[10]

Esta combinación de "adecuación" y "necesidad" es lo que parecen exigir, para todo supuesto, las directivas antidiscriminatorias europeas[11] y la jurisprudencia de su intérprete privilegiado, el TJUE.[12]

Si cruzáramos el océano, podríamos advertir que la Corte Interamericana de Derechos Humanos (CorteIDH) adopta, en general, una línea jurisprudencial afín con lo relatado.[13] En torno a esta última arista, parece congeniar con el TEDH interpretando que, respecto de las diferencias de trato basadas en los atributos protegidos por el artículo 1.1 de la Convención Americana de Derechos Humanos, la evaluación de su justificación debe regirse por "un escrutinio estricto que incorpora elementos especialmente exigentes en el análisis". Mientras que el objetivo perseguido ha de ser imperioso, el medio escogido

> debe ser no sólo adecuado y efectivamente conducente, sino también necesario, es decir, que no pueda ser reemplazado por un medio alternativo menos lesivo. Adicionalmente, se incluye la aplicación de un juicio de proporcionalidad en sentido estricto, conforme al cual los beneficios de adoptar la medida enjuiciada deben ser claramente superiores a las restricciones que ella impone a los principios convencionales afectados con la misma.[14]

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7 Véase: "Schuler-Zgraggen v. Switzerland", 1993, §67; "Abdulaziz, Cabales and Balkandali v. The United Kingdom", 1985, §78; "Jurčić v. Croatia", 2021, §65.

8 Véase: "Karner v. Austria", 2003, §37; "Vallianatos and Others v. Greece", 2013, §77, y sus citas.

9 Véase: "Karner v. Austria", 2003, §41, "Vallianatos and Others v. Greece", 2013, §85, y sus citas; "Jurčić v. Croatia", 2021, §65.

10 TEDH, "Vallianatos and Others v. Greece", 2013, §85, itálicas y traducción propias.

11 Véanse: 2000/43/EC (2.2.b); 2000/78/EC (2.2.b.i; 6.1); 2004/113/EC (2.b); y 2006/54/EC (2.1.b).

12 Véase: TJUE, "Johnston v Chief Constable of the Royal Ulster Constabulary", 1986, §38.

13 En general, véanse: OC-4/84, §56; OC-17/02, §46-48; "Espinoza Gonzáles vs. Perú", 2014, §219; "Flor Freire Vs. Ecuador", 2016, §125; "Guevara Díaz vs. Costa Rica", 2022, §80.

14 Corte IDH, "Pavez Pavez vs. Chile", 2022, §69. El tribunal ya había esbozado la misma idea antes, en "Gonzales Lluy y otros vs. Ecuador", 2015, §256; y "I.V. vs. Bolivia", 2016, § 241.

En este marco, el exigir que el factor cuestionado sea "necesario" para lograr un objetivo determinado suele entenderse como la exigencia de que resulte el menos lesivo[15] o menos restrictivo[16] de los medios posibles.[17]

De manera algo superficial, podríamos hacer una síntesis y decir que la "adecuación" de un medio alude a su *efectividad*[18] y la "necesidad", a cierta *eficiencia*.[19] Una diferencia de trato podría ser "adecuada" para realizar un fin pero, al hallarse disponibles otros medios menos lesivos al efecto, no resultar "necesaria". Por ejemplo, disponer el retiro de los trabajadores de un rubro desde que cumplan los 60 años de edad podría ser "adecuado" para garantizar la calidad del servicio que tienen a su cargo, si éste dependiera de aptitudes que disminuyen con el paso del tiempo. Sin embargo, si las habilidades relevantes comenzaran a perderse recién desde que las personas cumplen los 65 años, el corte cinco años antes sería "innecesario". Habría un medio menos lesivo para lograr la finalidad de aquella diferencia de trato: disponer el retiro a partir de este último hito.[20]

Pues bien, en lo que sigue me ocuparé de elucidar el requisito (o elemento básico) de la "adecuación" para los casos de discriminación en que se cuestionen normas o prácticas generales, pensando en regulaciones que compartan los rasgos que acaban de señalarse.[21] ¿Qué significa exigir que la relación de un medio con su fin sea "adecuada"?[22] Siguiendo una definición dada por el TJUE, podría acotarse que con ello se requiere que el medio "responda verdaderamen-

15 Como expresa la CorteIDH en el fragmento que acaba de citarse.

16 Conf. TJUE, "'CHEZ Razpredelenie Bulgaria AD' v. Komisia za zashtita ot diskriminatsia", Gran Sala, 2015, §120, §122, §128.

17 Esta parece ser la manera habitual de entender el término en la literatura sobre el juicio de proporcionalidad. Dos ejemplos notables se hallan en Barak 2012: 317 y Bernal Pulido 2014: 933.

18 Sobre el concepto de efectividad, entendido como "conducir a" ciertos resultados, véase Fernández Blanco 2019: 266-269, Fernández Blanco 2021: 14-17.

19 Según Barak (2012: 305, 320), lo que distingue al examen de necesidad del de adecuación en el juicio de proporcionalidad es precisamente ello: que el primero requiere, además de su efectividad, que el medio sea eficiente. La idea de *eficiencia* que adopta el autor –siguiendo a Rivers 2006: 198-200– se inspira en la mirada de W. Pareto, para quien una distribución es eficiente cuando no hay alternativa que pueda mejorar la situación de al menos una persona sin empeorar la situación de otra. Dados los límites de la indagación que emprenderé aquí, no hace falta que me explaye más acerca de dicha noción. Para darle un sentido más preciso, debería recurrirse a la literatura económica o a la que trabaja en la intersección entre la Economía y el Derecho. Véanse, por ejemplo, Margolis 1987, Cooter & Ulen 2012: 12-14, 42-43, Tuzet 2016: §3, Chiassoni 2013: 231-259 y Acciarri 2019: 6-9.

20 En TJUE, "Reinhard Prigge v. Lufthansa", 2011, §64, se encuentran argumentos similares. Esta sentencia tiene su contrapunto en TJUE, "Gennaro Cafaro v. DQ", 2019, §49-55.

21 Lo que diré no aplica a los supuestos de discriminación –señalados en una nota anterior– en los cuales no se admita justificación alguna, como sucede usualmente con la discriminación directa basada en ciertas especies de atributos protegidos.

22 O "idónea", "apta", "apropiada", entre otros términos usados como sinónimos.

te a la inquietud" de lograr su objetivo.[23] Pero, ¿bajo qué condiciones cabría decir que lo hace? Se echan de menos precisiones al respecto.

Mi objetivo principal será elucidar el problemático vocablo recurriendo a algunos aportes de la filosofía de la ciencia. Como punto de partida, propondré entenderlo como cierta aportación causal (§2). Después me dedicaré a reconstruir el contenido asignado a esta última idea por dos concepciones de la causalidad, la regularista (§3) y la probabilística (§5). Ambas ofrecen una base para formular dos modelos distintos de justificación instrumental. Dado que encaja mejor con algunas tesis acerca de lo que debería exigirse para justificar normas o prácticas generales, así como con aquello que se exige a dicho efecto en ciertas ocasiones, la idea de aportación causal probabilística es la más apropiada, alegaré (§4 y §6), para elucidar qué significa la "adecuación" medio-fin requerida a dicho efecto.

Por último, me ocuparé también de algunas oportunidades regulativas que se abren al entender de la manera propuesta la exigencia de "adecuación" (§7). Particularmente, atenderé a las que se presentan respecto de la estrategia, común en el derecho antidiscriminatorio, de requerir una justificación más robusta (razones "de mucho peso") para determinada clase de casos, adoptando niveles de exigencia justificativa diferentes. Como mostraré, el carácter gradual de la noción de aportación causal probabilística permite, entre otras cosas, formular distintos niveles de "adecuación" que resulten suficientes a los fines justificativos. Respecto de los niveles elevados (o no básicos) se presenta –subrayaré– lo que podría resultar un dilema entre la elección de un umbral fijo de suficiencia y la delegación de este último juicio evaluativo en manos de quienes funjan de intérpretes.

En la medida en que se entienda –como es usual– a la justificación en los casos de discriminación como un caso especial del juicio de proporcionalidad, utilizado más ampliamente en la limitación de principios constitucionales, lo que diré sobre el requisito de la "adecuación" para la especie aplica también al elemento respectivo de su género. Lo que sigue, entonces, podría también leerse como un aporte al estudio y la caracterización de la (normalmente rezagada) faceta fáctica de aquel esquema general de razonamiento.[24] En *Proportionality and Facts in Constitutional Adjudication* (2021), A. Carter se ha ocupado recientemente de la cuestión, haciendo un destacable aporte. En relación con esa obra, el argumento que presentaré en este artículo tiene un objeto más acotado, pues se limita al elemento de la "adecuación" y a cierta clase de relaciones.[25] Lo cual, si bien limita su alcance, tiene la ventaja de permitirle una aproximación

23 Véase TJUE, "CJ v. TGSS", 2022, §48, y sus citas.

24 El fenómeno de la relevancia de los enunciados fácticos en la argumentación constitucional, del que participan los supuestos en los cuales se aplica el juicio de proporcionalidad, ha sido destacado en distintas obras, con mayor o menor alcance y con distintos énfasis. En el ámbito anglosajón, véanse, por ejemplo, Rosen 1972, Davis 1973, Acker 1990, Erickson & Simon 1998, Faigman 2008 y Larsen 2012, Larsen 2014.

25 Detallaré estos límites en los últimos párrafos del apartado §2.

más detallada que la ofrecida en la mencionada contribución, donde se definen los elementos de la "adecuación" y "necesidad" recurriendo a la terminología causal (como "llevar a", "contribuir a", "ser capaz de lograr", etcétera) pero no se especifica a qué clase de aportaciones causales se refiere.[26]

Sin más preámbulos, comencemos con el itinerario detallado.

2 "ADECUACIÓN" Y JUSTIFICACIÓN INSTRUMENTAL

Requerir que un medio sea "adecuado" para lograr un objetivo es sinónimo –así lo entenderemos– de exigir que ambos factores resulten instrumentalmente vinculados. La cualidad de *instrumental* suele atribuirse a algo de acuerdo con su aptitud para lograr otra cosa. Con este predicado puede referirse a multitud de entidades, de las cuales nos interesan especialmente tres. Se dice de alguien que es instrumentalmente *racional* cuando adopta los medios que contribuyen a conseguir aquello que se propone. Se caracteriza un *razonamiento* como instrumental cuando su conclusión es una aserción acerca de cómo se tiene que actuar y sus premisas dan cuenta de cierta relación entre dicha conducta y un estado de cosas pretendido. Por último, se afirma que una conducta o norma de conducta está instrumentalmente *justificada* cuando hace una aportación para realizar un objetivo determinado (para cuya realización se tienen razones suficientes).

Genéricamente, se entiende que un razonamiento instrumental está compuesto por enunciados referidos por lo menos a tres elementos: un estado de cosas que se procura realizar, el objetivo o finalidad (F); una conducta dirigida a ello, el medio (M); y cierta relación entre ambos polos, del medio con su fin.[27] Si tomamos el esquema básico de esos razonamientos e introducimos una leve modificación en la conclusión, obtenemos el esquema básico de justificación instrumental sobre el que trabajaremos, a saber:

26 Conf. pp. 3, 23-26, 32-35, 58-60. La clasificación entre los "*adjudicative facts*" y los "*legislative facts*" a la que se recurre en la obra, siguiendo los aportes de K. C. Davis (1942: 402 ss.), permite advertir que la clase de hechos que nos interesan –los segundos– no son aquellos ocurridos en un caso particular. Pero no aporta más que ello a la comprensión del requisito que nos ocupa, al costo de multiplicar las categorías de hechos según el contexto institucional en el que sean relevantes (los proceso individuales, la discusión legislativa, los procesos constitucionales, etcétera) o lo que se decida acerca de cómo justificar en los procesos judiciales las aserciones que los tienen como objeto. En especial, no brinda mayores precisiones acerca de un aspecto clave, el de cómo se relacionan causalmente los fenómenos de interés.

27 Me ocuparé aquí exclusivamente de las relaciones medio-fin de naturaleza *empírica*. Sin embargo, ellas no son las únicas que podrían darse. En algunos supuestos ambos factores podrían unirse mediante un vínculo (no empírico sino) convencional.

(a) Se procura realizar un estado de cosas F.
(b) La conducta M es adecuada para realizar un estado de cosas F.

Entonces:
(c) Debe considerarse i-justificado llevar a cabo la conducta M.

Con la premisa (a) se describe –o adscribe– un objetivo o finalidad, cuyo contenido es la realización de un estado de cosas. Con la premisa (b) se describe la ejecución de una conducta, se trate de una acción o de una omisión, como un medio "adecuado" (el término que elucidaremos) para el logro de aquello que es pretendido. "Llevar a cabo una conducta" se entiende aquí como producir el cambio de un estado de cosas (inicial) a otro (final).[28] Por su parte, el enunciado (c), la conclusión del razonamiento, ha de leerse como una norma particular que deriva de los enunciados (a) y (b), en conjunción con una premisa normativa implícita según la cual debe considerarse como instrumentalmente justificada –o "i-justificada" para abreviar– toda conducta que sea "adecuada" para realizar el contenido de un objetivo legítimo. Como vimos al comienzo, esta premisa suele encontrar apoyo en el discurso jurisprudencial y de las disposiciones jurídicas.

Así como está presentado, el razonamiento resulta entimemático. Le faltan algunas premisas para que su conclusión se siga deductivamente. Las omito por simplicidad, para poner sobre la mesa exclusivamente aquello sobre lo que trabajaremos aquí.[29] La notación utilizada podría ser más detallada pero es suficiente para nuestro objetivo. "F" denota un estado de cosas genérico y "M", una conducta genérica.

Mi intención en esta oportunidad es concentrarme sobre la premisa (b). ¿Qué significa exigir que ocurra una relación de "adecuación" ente dos fenómenos? Responderé al interrogante mediante dos premisas sucesivas. Presentaré la primera de inmediato y esbozaré apenas la segunda, para profundizar en ella en los apartados posteriores.

28 "Realizar un estado de cosas" o "llevar a cabo una conducta" se entienden como producir un "suceso", en el sentido que le da al término von Wright 1963a: 26-28.

29 En su versión completa el esquema se ve así:
(*) Debe considerarse i-justificado llevar a cabo toda conducta que sea adecuada para realizar un estado de cosas que procure realizarse y sea considerado legítimo realizar.
(a) Se procura realizar un estado de cosas F.
(*) Realizar un estado de cosas F es considerado legítimo.
(b) La conducta M es adecuada para realizar un estado de cosas F.
Entonces:
(c) Debe considerarse i-justificado llevar a cabo la conducta M.

Primera premisa: exigir una "adecuación" medio-fin ha de ser entendido, en el contexto discursivo que nos ocupa, como requerir que el medio haga una *aportación causal* (de ciertas características) para realizar el objetivo.

Cuando dos factores se dan juntos, siempre o con alguna frecuencia, se dice que hay una *correlación* o asociación entre ellos. "La mayoría de los futbolistas de élite poseen relojes de lujo" es un claro ejemplo de enunciado que versa sobre correlaciones. Supongamos que es verdad lo que dice y que, aburridos de nuestros trabajos, queremos proyectarnos hacia las más altas ligas del balompié. ¿Sería una *buena estrategia* invertir los ahorros de toda una vida en adquirir uno de esos accesorios? Definitivamente pareciera que no; que ello sólo nos empobrecería y no contribuiría en nada con el objetivo planteado. Si quisiéramos realmente alcanzarlo, deberíamos pensar en las condiciones que, además de estar asociadas con ser futbolista de élite, expliquen por qué las personas llegan a serlo; aquellas condiciones que, de ocurrir, llevarían o contribuirían a lograrlo. Entre tantos otros factores, cabría pensar en el entrenamiento constante e intenso, y en la posesión de cierto talento innato. Entrenar mucho y tener talento, pero no el dispositivo que usemos para leer la hora, son cosas que contribuirían a conseguir nuestro sueño. Son las que se denominarían las *causas*, o algunas de las causas, de una proyección como la anhelada.

Pues bien, cuando se dice que algo es un medio "adecuado" para lograr otra cosa, normalmente se está hablando de factores como el entrenamiento o el talento, pero no de relojes, en relación con ser futbolista de élite. En general se quiere decir que, si se pusiera en práctica el medio, eso llevaría o contribuiría de alguna manera a la concreción del objetivo, y que si aquél se hubiera ejecutado, la aludida contribución se habría verificado. En definitiva, que ambos factores no están meramente correlacionados sino que están causalmente vinculados. Esta clase de relaciones es lo que se capta con el lenguaje causal, a través de términos como "llevar a", "contribuir a", "ayudar a", "ocasionar", "provocar" y especialmente "causar".[30] Y es, al mismo tiempo, lo que parece exigirse como requisito para que una conducta califique como instrumentalmente justificada: no que simplemente coincida con la concreción de un objetivo legítimo, sino que contribuya a producirlo.[31]

Con apoyo en lo dicho, me parece plausible comprender la requerida "adecuación" de un medio respecto de un fin de la siguiente manera: un medio es "adecuado" para un fin cuando hace una *aportación causal* (de ciertas caracte-

30 Sobre el lenguaje de la causalidad, véase Hitchcock 2003: 2-3.

31 En un sentido similar, von Wright (1963b: 160) ha destacado que una de las premisas del argumento que denomina "inferencia práctica", aquella que conecta el medio con su fin, "se apoya en una relación causal". N. Cartwright (1979: 420, 431) ha argumentado algo parecido acerca de la idea de estrategias efectivas (en nuestro términos: "adecuadas") para lograr algo.

rísticas) a su respecto.[32] Así, afirmar que "La conducta M es adecuada para realizar un estado de cosas F", como se hace en nuestro esquema, resulta equivalente a sostener que "La conducta M hace cierta aportación causal para realizar un estado de cosas F".[33]

Como una manera de ordenar las ideas, en adelante entenderé que dos factores están unidos por una relación de causalidad cuando uno de ellos hace una aportación causal para que el otro se produzca. De modo que este último concepto cumplirá –en el discurso que sigue– la función de noción básica o primitive.[34] Como se advierte, la aproximación todavía deja abierta la definición acerca de cómo se caracteriza la aportación aludida: exactamente cómo han de relacionarse dos factores para que se los considere causalmente vinculados. Esto da paso a la premisa número dos.

Segunda premisa: según la concepción de la causalidad subyacente, pueden caracterizarse distintas relaciones de aportación causal de un factor respecto de otro; lo que ofrece una base para formular modelos correlativos de justificación instrumental.

Si se acepta la traducción que acaba de proponerse, puede continuarse el trabajo de esclarecimiento avanzando sobre el territorio de la filosofía de la ciencia y deteniéndose, a su interior, en la parcela de los estudios sobre las relaciones de causalidad. Recuperaré algunos de esos aportes para traerlos a la arena de la justificación instrumental, con el propósito ya explicitado. En particular, presentaré una reconstrucción de dos concepciones de la causalidad que, aplicadas a nuestro centro de interés, le dan contenido a la idea de aportación causal y al mismo tiempo ofrecen una base para formular dos modelos de justificación instrumental, uno regularista (§3) y otro probabilístico (§5), según que la relación medio-fin involucrada sea de naturaleza universal o frecuencial, respectivamente.

Pero antes de continuar es pertinente hacer algunas aclaraciones y poner de manifiesto algunos límites de la anunciada empresa. En primer lugar, hablo de "concepciones" –también de "enfoques" o "puntos de vista"– de la causalidad en un sentido muy amplio, para referirme a los discursos que pretenden dar cuenta de las aportaciones causales entre fenómenos. No distinguiré, entre sus variantes, los que consisten en aproximaciones conceptuales (buscan definir las aportaciones causales) o epistemológicas (estudian lo que podemos conocer

32 Este punto de vista es adoptado respecto del juicio de proporcionalidad, por ejemplo, en Bernal Pulido 2014: 920 y Vázquez 2016: 62.

33 Mediante esta traducción se está dejando de lado, para el ámbito discursivo que nos ocupa, una acepción de "adecuado" que en ocasiones se utiliza en el discurso coloquial, según la cual un medio es adecuado para un fin cuando es el mejor preparado para concretarlo en relación con otros (porque ha sido concebido para ello, porque lo hace mejor que los demás, etcétera). En nuestro ámbito discursivo, esta acepción se capta mayormente mediante el requisito de la "necesidad" mencionado al comienzo (§1).

34 En el sentido usado por Tarski 1994: 110.

acerca de estos vínculos) de los que, más ambiciosamente, tienen pretensiones ontológicas (procuran identificar de qué se trata la causalidad en los objetos). Para los objetivos de este trabajo basta con las primeras aproximaciones. Sus conclusiones son independientes de cómo se resuelva la disputa acerca de la ontología de la causalidad.

En segundo lugar, cabe subrayar que el hecho de que presente sólo dos enfoques sobre la causalidad no significa que sostenga que son los únicos admisibles, ni que uno solo de ellos sea el correcto frente al otro. Los pienso, en cambio, como dos discursos que dan cuenta de sistemas de relaciones causales diferentes, a los cuales ciñen su dominio. Podría decirse, así, que adopto una posición pluralista al respecto.[35] En el contexto de los casos de discriminación, cuál sea el sistema de relaciones causales relevante para evaluar la justificación de una diferencia de trato –información elemental para elegir el modelo más apropiado para dar cuenta de ellas– depende de algo que no puede definirse *a priori*: el tipo de fenómenos que interese vincular. Ello a su vez se subordina, entre otras cosas, a cómo se precisen los fines y en qué consistan los medios elegidos para alcanzarlos. Estos factores pueden referirse a un fenómeno biológico (como la relación entre el aumento de la edad y la pérdida de ciertas habilidades), a un fenómeno social (como la relación entre la tasa de migración y la tasa de desempleo de un determinado lugar), etcétera. Pues bien, aquí atenderé (no a todas sino) a cierta clase de relaciones causales entre fenómenos, las referidas en las tesis y casos que oportunamente mencionaré (§4). Las conclusiones a las que llegaré se limitarán a ellas.

En tercer y último lugar, cabe adelantar que me ocuparé de las relaciones entre fenómenos que son *casos genéricos* o tipos de casos definidos por poseer una serie de propiedades; los vinculados, típicamente, cuando se afirma que "fumar causa cáncer de pulmón". Es importante tenerlo en cuenta porque la cuestión sobre qué enfoques de la causalidad son más apropiados para dar cuenta de cierta clase de relaciones depende, entre otros elementos, del carácter genérico o específico de éstas.[36] La razón para limitarme a casos genéricos es que mi interés principal aquí está puesto en la justificación de normas jurídicas y prácticas generales, cuyo contenido o factor aglomerador, respectivamente, consiste en tales casos. Una de las consecuencias de este recorte es que el discurso que se presenta resultará útil para métodos de decisión generalistas. Es decir, para métodos que, al evaluar la justificación de una conducta, tengan como objeto su justificación en general y no la de su aplicación a un caso concreto, considerando todas las propiedades que concurran en él.[37] Para los sistemas que adopten

35 Como se hace, por ejemplo, en Cartwright 2004: §6 y Hitchcock 2003: 1, 21-22.

36 Destacan esto, entre otros, Cartwright 2004: §6 y Frosini 2006: 313. La elección deja afuera, entre otros, los enfoques contrafácticos de la causalidad.

37 Por la conveniencia de adaptar uno u otro modelo, véase el contrapunto entre la postura presentada en Schauer 2003: 123-125 y la defendida en Arena 2018: 571 ss., Arena 2019: 27 ss.

métodos particularistas será necesario complementar lo que se dirá en las páginas siguientes con reflexiones, entre otros aspectos, acerca del salto entre los planos que se conocen como causalidad general y causalidad específica.[38]

Dicho esto, continuemos con el plan detallado.

3 LA JUSTIFICACIÓN INSTRUMENTAL REGULARISTA

Denominaré *justificación instrumental regularista* a todo razonamiento según el cual está i-justificado llevar a cabo una conducta porque hacerlo es una "condición", universal o regular, para realizar una finalidad legítima. En el marco de este modelo, la premisa (b) del esquema básico se modifica de la siguiente manera: "La conducta M es una condición, universal o regular, para realizar un estado de cosas F".

La esquiva idea de relación de causalidad –o aportación causal– es una fuente aparentemente inagotable de debates en la filosofía de la ciencia. Un asentado enfoque propone entenderla sirviéndose de la noción de *condición*, esto es, como una relación condicional regular entre dos sucesos: la condición (C) y su efecto o consecuencia (E). Como parte del armazón conceptual que sirve a esta aproximación, se ha formulado una tipología de condiciones que es útil recuperar. Lo haré de la mano de G. H. von Wright.

Como rasgo general, las relaciones de las que hablamos son regulares o universales, lo que significa que se dan siempre, de modo invariable y no solamente con alguna frecuencia. Si comer (C) es una condición regular de saciar el hambre (E), siempre que se come, se alcanza este efecto, sin excepción.

Von Wright parte de la conocida distinción entre dos tipos básicos de condiciones, las "necesarias" y las "suficientes";[39] cada una caracterizada por cumplir roles diferentes en la producción de un suceso. Las define de la siguiente manera:[40]

(1) Decir que C es una condición *suficiente* de E significa que siempre que se da C, también se da E. La presencia de C basta para asegurar que ocurra E. (Aunque podría darse E sin que se diera C.) Con este sentido decimos que comer una pizza casera (C) es una condición –suficiente– para saciar el hambre (E), aunque se pueda lograr lo mismo por otros medios (ingiriendo otro alimento, por caso). Su forma lógica puede expresarse así:

38 E. Eells se dedica a estudiar este problema en Eells 1991: 6.

39 En lo sucesivo tendré en cuenta especialmente a von Wright 1971: 38-41, von Wright 2001: 66-77.

40 Conf. von Wright 2001: 66-67. Téngase en cuenta que, a continuación, los símbolos que expresan relaciones condicionales (→) y bicondicionales (↔) se usarán en el sentido tradicional.

$C \rightarrow E$ (condición suficiente)

(2) Por otra parte, decir que C es una condición *necesaria* de E significa que siempre que se da E, también se da C. La presencia de E exige que ocurra C. (Aunque podría darse C sin que se diera E.) Con este sentido decimos que calentar el horno (C) es una condición –necesaria– para cocinar la pizza que hemos preparado en casa (E), sin perjuicio de que para lograr esto último tengan que darse también otras condiciones (como preparar la masa, colocar la pizza en el horno, etcétera). Su forma lógica puede expresarse así:

$E \rightarrow C$ (condición necesaria)[41]

(3) Combinando los conceptos, decir que C es condición *necesaria y suficiente* de E significa que, si se da C, y solo cuando se da C, también se da E. Con este sentido decimos que incorporar agua al cuerpo (C) es una condición –necesaria y suficiente– para hidratarlo (E), dado que es de esa manera, y solo de esa manera, que se logra dicho efecto. Su forma lógica puede expresarse así:

$C \leftrightarrow E$ (condición necesaria y suficiente)

Sobre la base de esta tipología se definen otras relaciones condicionales con las que captar distintos supuestos de *pluralidad* de condiciones, aquellos en que un suceso tiene más de una condición necesaria o suficiente. Veamos algunas:[42]

(4) Consideremos por simplicidad sólo dos condiciones, C_1 y C_2. Se dice que son conjuntamente *suficientes* respecto de E cuando, siempre que ocurren conjuntamente ambas, también se da E. Aunque por separado no aseguran que suceda E, sí lo hacen juntas.[43] En cambio, se dice que son disyuntivamente suficientes respecto de E cuando, siempre que ocurre al menos una de ellas, también se da E. Cada una por sí misma es suficiente para producir E.[44] Por otra parte, se dice que son conjuntamente *necesarias* respecto de E cuando, siempre que se da E, también ocurren conjuntamente ambas. Cada una por sí misma es necesaria para producir E.[45] En cambio, se dice que son disyuntivamente necesarias respecto de E cuando, siempre que se da E, se da al menos una de ellas.

41 Esta relación puede expresarse, de un modo quizás más intuitivo para el estudio de nexos causales, como sigue: $\sim C \rightarrow \sim E$. La inversión es lógicamente correcta de acuerdo con la ley de la contraposición, según la cual se da una equivalencia lógica entre un enunciado condicional (como $E \rightarrow C$) y su contraposición, es decir, la inversión y negación de su antecedente y consecuente ($\sim C \rightarrow \sim E$).

42 Conf. von Wright 1971: 38-39, von Wright 2001: 70-71.

43 Su forma: $(C_1 \cdot C_2) \rightarrow E$.

44 Su forma: $(C_1 \vee C_2) \rightarrow E$.

45 Su forma: $E \rightarrow (C_1 \cdot C_2)$.

La ocurrencia de E no exige incondicionalmente ninguna en especial, sino que se dé al menos una.[46]

A la disyunción de todas las condiciones suficientes para E dentro de un conjunto de propiedades lógicamente independientes nuestro autor la denomina condición suficiente *total*; y a la conjunción de todas las condiciones necesarias al mismo respecto, la denomina condición necesaria total. Desde esa perspectiva (relativa) es que puede advertirse cuántas condiciones suficientes tiene un suceso cualquiera E, cuántas son sus condiciones necesarias, y qué forma guarda cada una. Un conjunto de condiciones dado tendrá un mayor grado de complejidad mientras más condiciones lo conformen.

Retrocediendo eslabones en la cadena de condiciones, tenemos que cada condición C respecto de E puede ser, a su vez, el efecto de otra condición X; la que al mismo tiempo puede ser el efecto de otra condición Y, y así hacia el infinito. En tal supuesto, X se conecta con E de modo mediato, ayudando a producir C que tiene relación inmediata con E. Para dar cuenta de esto von Wright (2001: 73) incorpora cuatro definiciones más:

(5) X es una condición *contribuyente* respecto de E cuando resulta condición necesaria de, por lo menos, una condición suficiente de E. X es una condición *contribuyente indispensable* de E cuando es condición necesaria de todas las condiciones suficientes de E. Por otra parte, X es un *requisito sustituible* respecto de E cuando es condición suficiente de al menos una condición necesaria de E. Por último, X es una condición *contrarrestante* de E cuando su negación es una condición contribuyente de E.

En suma, un modelo de justificación instrumental regularista conecta los medios con sus fines a través de relaciones condicionales regulares o universales como las que se acaba de caracterizar.[47]

4 LÍMITES DEL MODELO REGULARISTA

Ahora bien, el modelo que acaba de caracterizarse tiene un ámbito de aplicación limitado. Dicho a grandes rasgos, expresa la forma de razonar cuando lo requerido para la justificación instrumental de ciertas conductas es que lleven siempre a la concreción de sus objetivos. Sin embargo, en los casos de discriminación (y también más allá de ellos) parece exigirse comúnmente otra cosa, algo de lo que este modelo no da cuenta.

Como mostraré a continuación, importantes tesis en la filosofía del derecho sostienen que lo que debería requerirse al evaluar la justificación de normas generales no es una relación medio-fin regular o universal sino una de carácter

46 Su forma: $E \rightarrow (C_1 \vee C_2)$.

47 En §6 ilustraré mediante un ejemplo la aplicación de este modelo en casos de discriminación.

frecuencial, lo cual se condice con aquello que la jurisprudencia requiere –de hecho– en muchas ocasiones. Aunque no fuera lo que se exija o deba exigirse en todos los casos (conceder este punto no socavaría mi argumento principal), lo señalado nos convoca a pensar en modelos de justificación más apropiados para dar cuenta de tales requerimientos cuando sí se apliquen.

(1) La primera tesis que quisiera destacar tiene por objeto, ampliamente, la toma de decisiones basada en reglas o criterios generales. Su punto de partida es la falibilidad sistemática de esta actividad: el hecho de que, al decidir de tal modo, normalmente se abarcan casos que no deberían abarcarse en virtud de las razones para adoptar las reglas que guían esas decisiones. Se trata de un mecanismo –más o menos– imperfecto.[48]

Dicho rasgo es precisamente lo que ha llevado a F. Schauer a proponer comprender el contenido de las reglas generales como generalizaciones empíricas de carácter probabilístico. Si se elige como antecedente de una regla la posesión de tales o cuales propiedades, afirma, es porque ello resulta causalmente relevante para lograr un objetivo dado;[49] y dicha relación no es regularista sino probabilística: las instancias del contenido de las reglas no llevan a cumplir con su objetivo siempre, sino solo con alguna frecuencia.[50] De modo que, respecto de los casos individuales, tales generalizaciones pueden resultar tanto supraincluyentes como infraincluyentes.[51] Luego, sobre esta base el autor da un segundo paso interpretativo: sostiene que es dicha clase de relaciones entre una regla y sus razones subyacentes la que determina la corrección de la regla.[52] Siguiendo la misma idea, en un trabajo posterior ha propuesto interpretar que, cuando se prohíbe la "discriminación arbitraria", como lo hace en su país la *Age Discrimination in Employment Act*, normalmente no se está vedando toda generalización que no sea universal, sino toda aquella que, siendo frecuencial, carezca de apoyo empírico.[53]

48 Este carácter imperfecto es un tópico entre quienes se ocupan del fenómeno legislativo, algo que Aristóteles ya advertía (Vega López 2017: 28, 31-32).

49 Tras esta afirmación hay una asunción que vale la pena develar, según la cual quienes legislan son agentes instrumentalmente racionales. Podría pensarse a la racionalidad legislativa como una condición de la legitimidad de esta actividad, de modo que nuestras libertades solamente podrían limitarse, legítimamente, teniendo alguna (buena) razón para hacerlo.

50 Conf. Schauer 1991: 25-31.

51 Conf. Schauer 1991: 31-34. Estudiando la justificación en casos de discriminación, Tussman & tenBroek (1948: 347-353) ya habían tenido en cuenta estas alternativas.

52 Conf. Schauer 1991: 27, 29, 31.

53 Conf. Schauer 2003: 117. No obstante lo señalado, téngase en cuenta que, cuando la distinción cuestionada se basa en rasgos como el género o el origen étnico de las personas, suele exigirse una justificación más robusta (razones "de mucho peso"), pudiendo requerirse –entre otras alternativas– una relación instrumental más estrecha con el objetivo que persiguen, una que sea de tipo *universal* o cercana a ello. El mismo Schauer (2003: 128-130, 131-154) ha dado cuenta de esa exigencia reforzada al comentar, entre otros casos, la sentencia de la Corte Suprema de su país dictada en 1996 contra el *Virginia Military Institute*, por discriminación de

(2) La segunda tesis que me interesa señalar versa sobre el juicio de proporcionalidad, aquel esquema de razonamiento utilizado para evaluar la limitación a principios constitucionales. Estudiando sus elementos, A. Barak se refiere al requisito de la "adecuación" como aquel según el cual un medio dado ha de "conducir racionalmente" a la realización de su finalidad. Lo cual significa que debe contribuir a la misma incrementando "la probabilidad de su realización". En efecto, para este autor no debe exigirse "que los medios elegidos cumplan plenamente con su finalidad. Una realización parcial de ésta –siempre que no sea marginal o insignificante– satisface el requisito de la conexión racional" (Barak 2012: 303-305). De modo similar, C. Bernal Pulido entiende el requisito de la "adecuación" como aquel que exige que la medida en cuestión "guarde una relación positiva de cualquier tipo con su fin inmediato, es decir, que facilite su realización de algún modo, con independencia de su grado de eficacia, rapidez, plenitud y seguridad" (Bernal Pulido 2014: 916).

Las posturas mencionadas se condicen con las exigencias justificativas aplicadas por la jurisprudencia en ciertos casos, como se advierte en los ejemplos que siguen.

(3) Empecemos con un caso del TJUE donde se cuestionaba una diferencia de trato basada en la edad.[54] En él se demandaba a una ciudad porque establecía un límite etario de 30 años a la incorporación de personal en el "servicio técnico medio de bomberos", un cuerpo dedicado a la extinción de incendios y al salvamento de personas, entre otras actividades. El objetivo de colocar aquel límite –admitido como legítimo por el tribunal– era "garantizar el carácter operativo y el buen funcionamiento del servicio de bomberos profesionales".[55] El TJUE declaró que la diferencia de trato cuestionada era "adecuada" y "necesaria" para lograrlo,[56] en virtud de las siguientes razones coligadas. Por un lado, porque, dadas las características de las actividades a realizar por aquellos trabajadores, "el hecho de disponer de una capacidad física particularmente importante puede considerarse una exigencia profesional esencial y determinante".[57] Por otro lado, porque, según los "datos científicos resultantes de estudios realizados en

género ("United States v. Virginia", 518 U.S. 515). Por una lectura detallada de esta decisión y una propuesta de interpretación en línea con los precedentes previos del máximo tribunal estadounidense, véase Case 2000. Entre Schauer y Case parece haber un contrapunto en la lectura del contenido de la sentencia. Mientras que Case interpreta que lo exigido por la Corte es una generalización de tipo universal y no meramente frecuencial (un "*perfect proxy*"), Schauer parece entender que –según la Corte– las generalizaciones basadas en el género resultan incorrectas con independencia de cuál sea su alcance, frecuencial o universal.

54 Hablo de TJUE, "Wolf v. Stadt Frankfurt am Main", 2010, resuelto por la Gran Sala del tribunal. Por un estudio detallado de la jurisprudencia del TJUE acerca de la materia, véase Horton 2018.

55 TJUE, "Wolf v. Stadt Frankfurt am Main", §37-39.

56 TJUE, "Wolf v. Stadt Frankfurt am Main", §44.

57 TJUE, "Wolf v. Stadt Frankfurt am Main", §40.

el marco de la medicina del trabajo y deportiva" ofrecidos por el Gobierno alemán,

> […] la capacidad respiratoria, la musculatura y la resistencia disminuyen con la edad. De este modo, *muy pocos* funcionarios de más de 45 años tienen la capacidad física suficiente para ejercer su actividad en el ámbito de la extinción de incendios. En el ámbito del salvamento de personas, los funcionarios de que se trata dejan de disponer de la referida capacidad a la edad de 50 años. Los funcionarios que superan dichas edades trabajan en los demás sectores de actividad antes mencionados.[58]

Por último, porque, "a fin de garantizar el funcionamiento eficaz del servicio técnico medio de bomberos", es preciso que quienes ingresen en él estén en condiciones de llevar a cabo las actividades correspondientes "durante un período mínimo de entre 15 y 20 años".[59] Según la información disponible, sólo podrían hacerlo quienes fueran contratados antes de superar los 30 años; ingresando a esta edad, podrían extinguir incendios durante no más de 15 años.

Como puede advertirse con la lectura del fragmento largo que acabo de citar, el TJUE consideró que el límite etario es "adecuado" porque (tuvo por probado que) existe una relación condicional –en sentido *lato*– entre la edad de las personas y ciertas aptitudes físicas, aquellas requeridas para cumplir con las actividades propias del servicio técnico medio de bomberos. Lo interesante para nosotros es que –según lo que se indica– esa relación no es regular o universal. Es decir, no es el caso de que todos los funcionarios que superan los 45 años (C) pierden dichas habilidades (E), de modo que lo primero sea "condición suficiente" de lo segundo (C → E). Lo que ocurre, en cambio, es que "*muy pocos* funcionarios de más de 45 años" continúan poseyendo tales aptitudes. Con ello basta, según el TJUE, para calificar como "adecuado" al límite etario cuestionado.[60]

(4) Ahora pasemos a considerar un caso del TEDH sobre discriminación de género. A principios de los 80 se dispusieron en el Reino Unido ciertas reglas migratorias en relación con los pedidos de reunificación familiar entre personas casadas. Reglas que eran más restrictivas para el supuesto en que se requiriera el ingreso de hombres invocando como causal el estar casados con residentes, que cuando se requiriera el ingreso de mujeres bajo el mismo argumento. Contra esta diferencia de trato se planteó un caso de discriminación que llegó hasta el TEDH.[61] En su defensa, el estado británico alegó que una finalidad de la legislación cuestionada era "proteger el mercado laboral en un momento de alto desempleo", algo que el tribunal consideró legítimo. Y que como "los hombres son más propensos que las mujeres a buscar empleo", "los hombres inmigrantes

58 TJUE, "Wolf v. Stadt Frankfurt am Main", §41, itálicas añadidas.

59 TJUE, "Wolf v. Stadt Frankfurt am Main", §43. Las razones a favor de esta premisa pueden leerse en el mismo párrafo.

60 En §6 me detendré sobre esto.

61 Se trata de TEDH, "Abdulaziz, Cabales and Balkandali v. The United Kingdom", 1985, resuelto por el Pleno del tribunal.

tendrían un mayor impacto que las mujeres inmigrantes en dicho mercado". La discusión giró en torno a si, sobre esa base, la diferencia de trato tenía "una justificación objetiva y razonable".[62] El TEDH resolvió que no la tenía, alegando como uno de sus argumentos principales que la información disponible sobre la diferencia entre hombres y mujeres "económicamente activos"[63] no mostraba que existieran –o hubieran existido, de no ser por la aplicación de las reglas cuestionadas– disparidades semejantes en el impacto respectivo sobre el mercado laboral de la inmigración de esposos hombres o de esposas mujeres.[64]

Lo destacable del caso, para nuestros objetivos, radica en la naturaleza de las aserciones instrumentales que fueron discutidas, las cuales versaban sobre relaciones que –cabe suponer– el tribunal hubiera considerado "adecuadas" de haberlas tenido por probadas. Las hipótesis que presentó el gobierno son reconstruibles con una forma netamente frecuencial. Una de las principales puede formularse así: "un aumento en la tasa de ingresos por reunificación familiar de migrantes hombres contribuye a aumentar (o no disminuir) la tasa de desempleo".[65] Con ello se afirma que hay una relación condicional –en sentido *lato*– entre una y otra tasa. Pero no supone que todo aumento en la primera produzca siempre un aumento correlativo en la segunda. Tampoco que todo cambio en la tasa de desempleo se explique por un cambio en la tasa de ingresos aludida. Significa que la última tasa es un factor que aporta parcialmente, en mayor o menor medida y junto con otras variables, a explicar los cambios en la tasa de desempleo. La medida parcial en que los explica es lo que determina su aportación causal relativa. Exactamente sobre esto último versa el otro argumento principal del TEDH en contra de la defensa del gobierno: sin perjuicio de lo anterior, tampoco estaba convencido de que la diferencia que "pueda existir entre el impacto respectivo de hombres y mujeres en el mercado de trabajo doméstico sea *suficientemente importante* para justificar la diferencia de trato".[66]

(5) Por último, consideremos lo resuelto en un conocido caso del Tribunal Constitucional federal alemán, referido a la limitación de otros derechos fundamentales.[67] Se cuestionaba una norma que ordenaba etiquetar los paquetes

62 Los entrecomillados son traducciones propias de extractos de los apartados §74-75 de la sentencia.

63 Según algunos datos, el 90% de los hombres y (sólo) el 63% de las mujeres calificaban como tales.

64 Véase el apartado §79 de la sentencia. Estar "económicamente activo", señaló, no significa (solamente) estar buscando ser empleado por alguien más.

65 Esto es parte de lo que el TEDH le cuestiona al gobierno no haber demostrado, lo que sugiere que, si lo hubiera hecho, lo habría considerado relevante para el juicio de adecuación.

66 Conf. apartado §79 de la sentencia (traducción e itálicas propias). Recuperaré este argumento en §7.

67 Me refiero al caso del etiquetado de tabaco, 95 BVerfGE 173, de 1997, citado por autores como Alexy (Alexy 2003a: 136, Alexy 2003b: 437) para ilustrar parte de la estructura del juicio de proporcionalidad.

de productos de tabaco con advertencias sobre los peligros para la salud de su consumo. La libertad de empresa de las productoras de tabaco resultaba limitada en aras de proteger la salud de las personas. La "adecuación" de una medida como esta dependía (entre otras cosas) de la existencia de cierta relación entre fumar tabaco y adquirir problemas de salud, como el cáncer de pulmón. Si una cosa no llevara a la otra, no habría nada que advertir ni beneficio alguno a favor de la salud en convencer de no fumar.

¿Qué clase de relación se exigiría para sostener, en el marco de un caso como ese, que "fumar causa cáncer de pulmón" (o cualquier otra enfermedad)? Es plausible pensar que no se requeriría que ambos factores estén asociados invariablemente, de modo que siempre que alguien fume (C), contraiga cáncer (E). Es decir, una relación del tipo C → E. En cambio, pareciera aceptable un vínculo menos estrecho, según el cual fumar haga cierto aporte a la enfermedad, aumentando la probabilidad de adquirirla. Precisamente esta ha sido la clase de vínculo que –de hecho– el Tribunal Constitucional federal alemán consideró "adecuada" para justificar la obligación de etiquetado. En el caso de 1997 tuvo por probado que existe una relación de causalidad entre fumar y contraer cáncer y otras enfermedades, citando como apoyo tres investigaciones publicadas en prestigiosas revistas científicas.[68] Lo particular de estas fuentes, en lo que nos interesa, es que no demostraban –ni pretendían hacerlo– que fumar llevase invariablemente a contraer cáncer. Lo que hacían, sirviéndose de métodos estadísticos, es poner en evidencia asociaciones generales de carácter frecuencial, como aquella según la cual "aproximadamente la mitad de los fumadores habituales de cigarrillos morirán eventualmente *debido a* ese hábito".[69]

En resumen, los ejemplos ilustran que hay casos en los cuales se aceptaría como instrumentalmente justificado –y de hecho se lo hace– llevar adelante un medio para lograr un fin aun cuando no haya una relación regular entre las instancias de ambos. Esto es, incluso cuando no se dé que todo funcionario que supere los 45 años pierda las habilidades requeridas en el cuerpo de bomberos, o que cada nuevo migrante hombre que ingresa al país sea una persona más que busca trabajo y no lo consigue, o que cada persona que es convencida de no fumar sea una persona que se salvará de contraer enfermedades que, de seguir con ese hábito, hubiera seguramente adquirido.

En supuestos como esos, en cambio, se consideraría suficiente que la relación bajo estudio resulte *frecuencial* o probabilística. Sea porque se asuma que el vínculo entre los factores relevantes no consiste, en sí mismo, en otra cosa; o porque, asumiendo que se vinculan de modo regular o universal, no se conozcan más que leyes causales incompletas, desprovistas de todas las condiciones que –dadas en conjunto– asegurarían que ocurra siempre determinado efecto.

68 Véase el §55 de la sentencia.

69 Conf. Doll et al. 1994: 901, traducción e itálicas propias.

Así las cosas, para dar cuenta de requerimientos como los que contienen las tesis y las sentencias mencionadas, es preciso pensar en modelos de justificación distintos, más apropiados que el regularista. Con este objetivo exploraré una concepción de la causalidad que, como lo sugiere su etiqueta, tiene la ventaja de gravitar sobre relaciones de la misma clase que las exigidas para justificar diferencias de trato en los ejemplos que llamaron nuestra atención. Avancemos, pues, con ello.

5 LA JUSTIFICACIÓN INSTRUMENTAL PROBABILÍSTICA

Denominaré *justificación instrumental probabilística* a todo razonamiento según el cual está i-justificado llevar a cabo una conducta porque hacerlo produce cierta diferencia en la probabilidad de que se den instancias del contenido de una finalidad legítima. En el marco de este modelo, la premisa (b) del esquema básico se modifica de la siguiente manera: "Las instancias de la conducta M producen cierta diferencia en la probabilidad de que se den instancias del estado de cosas F".

Una reconstrucción de algunos rasgos de los enfoques probabilísticos de la causalidad permitirá comprender qué significan los términos clave del párrafo anterior. Estas concepciones entienden las relaciones causales como frecuencias relativas entre tipos de hechos y las representan mediante una función de probabilidad.[70] Su idea básica es que las "causas" hacen una *diferencia en la probabilidad* de sus efectos, aunque no conduzcan invariablemente a ellos.[71] Lo cual puede expresarse, en un principio, como $Pr(E|C) \neq Pr(E)$, que se lee así: la probabilidad frecuencial de E (el efecto) dado C (la causa) es diferente a la probabilidad frecuencial de E. En virtud de dicha estipulación, y habiendo advertido en los hechos que fumar hace una diferencia en la probabilidad de contraer cáncer de pulmón, es correcto aseverar que "fumar *causa* cáncer de pulmón".

Frente a las regularistas, las concepciones probabilísticas admiten calificar como causales a relaciones en las cuales los factores involucrados (sus instancias) no se vinculan de modo invariable o regular. Permiten aseverar que "fumar causa cáncer de pulmón" aunque esta enfermedad también se manifieste entre quienes nunca han fumado (la condición no es necesaria para el efecto)

70 Una función de probabilidad asigna a un evento un número real que representa la probabilidad de su ocurrencia y tiene un rango de valores posibles que va entre 0 y 1.

71 Aquí daré cuenta, fundamentalmente, de los aportes de Suppes 1970, Cartwright 1979 y Eells 1991. En opinión de Cartwright (2004: §6), allí está la base de las aproximaciones, más sofisticadas, que actualmente se destacan entre las concepciones probabilísticas de la causalidad. En Frosini 2006 puede hallarse una perspectiva más general de la historia y evolución de las concepciones sobre la causalidad, incluyendo y poniendo en contexto la que nos ocupa.

y aunque haya asiduos fumadores que no la contraigan nunca (la condición tampoco es suficiente para el efecto). Sus partidarios consideran esto como una ventaja comparativa, por razones epistemológicas (normalmente sólo seríamos capaces de conocer regularidades imperfectas) y ontológicas (no existirían en la realidad relaciones deterministas entre los fenómenos que podamos aspirar a conocer).[72]

Así como la he presentado, la idea básica de la diferencia-en-la-probabilidad es apenas una aproximación al modo en que los probabilistas entienden lo que vengo llamando la "aportación causal"[73] de un factor sobre otro. La utilidad de tal enfoque para nuestros objetivos se manifestará sólo si nos detenemos en algunas precisiones ulteriores. Por simplicidad me referiré en adelante a la aportación causal *positiva*, el aumento en la probabilidad del efecto mediante la causa: $Pr(E|C) > Pr(E)$.

El aumento-en-la-probabilidad que atenderemos es lo que se conoce como una *correlación* positiva. Si C y E están positivamente correlacionados y se suceden con ese orden en el tiempo, usando los términos de P. Suppes (1970: 12) podría decirse que C es una "causa *prima facie*" de E. La etiqueta es un buen un modo de destacar que algo falta, que no toda correlación se traduce linealmente como una aportación causal. Quedan todavía una serie de precisiones. Entre ellas, las que interesan ahora son las vinculadas con la necesidad de descartar las llamadas "correlaciones espurias".

Un factor puede estar correlacionado con otro porque lo produce o porque ambos son producidos por un tercer factor en común. En el segundo supuesto, y para los fines de la atribución causal, se dice que el vínculo es *espurio*.[74] En términos probabilísticos, una correlación entre dos factores (C y E) califica como "espuria" cuando un tercer factor (T) –su causa común– produce, una vez considerado e incorporado a la ecuación, un "apantallamiento" (*screening off*) en la relación entre éstos.[75] Lo cual significa que la probabilidad de E dado C y T es igual a la probabilidad de E dado T.[76] Habiendo ocurrido T, la ocurrencia de C no hace aportación causal alguna para la probabilidad de E.

72 El problema de los regularistas para dar cuenta de regularidades imperfectas (como la del ejemplo) es una de las razones que suelen invocarse a favor del desarrollo de enfoques probabilísticos. Es ilustrativa a este respecto la introducción de *A Probabilistic Theory of Causality* de Suppes (1970: 5-10).

73 Una aclaración terminológica. Las obras en las que me apoyo suelen hablar aquí de "relevancia" o "significancia" causal. Para nuestros fines, he decidido denominar esta diferencia-en-la-probabilidad como "aportación causal", para no confundirla con el juicio acerca de su suficiencia para tomar determinada decisión (esto será importante en §7).

74 Véanse Eells 1991: 59, 62 y Suppes 1970: 21.

75 El término "*screening off*", de uso corriente en la literatura estadística para referir a las relaciones mencionadas, es tomado de H. Reichenbach [1956] 1971: 189-190.

76 Es decir: $Pr(E|C{\cdot}T) = Pr(E|T)$.

Recostada en esos conceptos, la primera gran precisión a la idea de aportación causal probabilística indica que, si un factor C es apantallado por otro en su correlación con un factor E, entonces C no puede ser calificado como la causa de E. Así, un factor es definido como una causa de otro cuando hace una diferencia en su probabilidad *y* no resulta apantallado por un tercer factor.[77] Es lo que Suppes (1970: 10, 21-25) denomina una "causa genuina" (no ya *prima facie*).

De acuerdo con lo dicho, la aportación causal probabilística, entendida como una correlación positiva no apantallada, es la contribución exclusiva que hace un factor al aumento en la probabilidad del otro. Esta idea, más completa que la primera aproximación, todavía ha sido objeto de algunas precisiones adicionales. Mencionaré dos.

Por un lado, se ha llamado la atención acerca de que el valor de verdad de toda aserción causal depende, entre otras cosas, de la población sobre la que se predica, o como también se le llama, de su clase de referencia.[78] Un cambio en ésta puede conllevar una alteración en la probabilidad condicional entre los factores vinculados. Por ejemplo, la probabilidad de tener un ataque al corazón siendo fumador difiere normalmente según la edad de los sujetos: no es la misma entre quienes tienen treinta que entre quienes tienen sesenta años. De acuerdo con ello, se sugiere que toda aserción causal debe entenderse como relativa a una población determinada, aunque sea implícitamente.

Por otro lado, se ha destacado que no toda población –o clase de referencia– es apropiada para establecer la aportación causal de un factor respecto de otro.[79] Sucede que cualquier asociación entre dos factores que se observe en una población o conjunto, puede revertirse en sus subconjuntos por efecto de un tercer factor que esté correlacionado con ambos. Este fenómeno se denomina la Paradoja de Simpson o de la reversión y da lugar a la pregunta acerca de qué correlaciones corresponde invocar en las aserciones causales.

Un conocido caso ayudará a comprender el problema. Proviene de un estudio sobre la tasa de admisiones en la Universidad de Berkeley en 1973, que se interesó por esclarecer la influencia sobre tales decisiones, si alguna, del género de quienes postularon.[80] Atendiendo al total de las postulaciones, se encontró que las mujeres eran admitidas en menor proporción que los hombres. Sin embargo, observando la misma información al nivel de los departamentos de la

77 Esto tiene una excepción, señalada por autores como Eells 1991: 59, 167 ss. Si se da un supuesto de *intermediación* causal, es decir, cuando E produce C mediante la producción de T, se permite calificar a C como causa de E, pese a que T lo apantalle.

78 Véase Eells 1991: 1.1.

79 Véanse Cartwright 1979: 422, así como Eells 1991: 72. Según Eells, "es dentro de las subpoblaciones apropiadas que las correlaciones coinciden con la causalidad" (Eells 1991: 3, traducción propia).

80 Véase Bickel et al. 1975. El estudio ha sido citado por Cartwright en la obra citada para ilustrar el problema que nos ocupa.

universidad, se halló –simplificando un poco– que en cada uno de ellos la proporción en que eran admitidos hombres y mujeres resultaba idéntica. Aunque no parezca, las dos observaciones, al nivel de la universidad y al nivel de sus departamentos, son compatibles entre sí; pueden ser verdaderas al mismo tiempo, sin contradicción alguna. En el caso, el resultado fue explicado por el efecto de un tercer factor: las mujeres tendían a postular a los departamentos que tenían una tasa de rechazo más alta.

La pregunta, entonces, es qué correlación –la propia de qué clase de referencia– utilizar al establecer vínculos causales. La respuesta que se ha dado, dicha en pocas palabras, consiste que ha de recurrirse a la correlación que se predique sobre una clase (o población, o conjunto) de referencia causalmente *homogénea*. De modo que "C causa E si, y sólo si, C incrementa la probabilidad de E en toda situación que por lo demás es causalmente homogénea con respecto a E".[81] Lo que puede expresarse así:

$$Pr(E|C\cdot K_j) > Pr(E|K_j)$$

Una población o clase de referencia es causalmente homogénea cuando está conformada por, y solamente por, la afirmación o negación de cada una de las propiedades que hacen algún aporte causal a la producción del factor E, excepto por el factor C cuya relevancia se quiere establecer. Esta descripción es denotada como K_j.[82] Entonces, cuando una clase es homogénea no hay ninguna propiedad adicional que pueda incorporarse a dicha descripción y que divida la clase en dos subclases donde la probabilidad de E sea distinta (lo que la haría *no*-homogénea). En una clase así, toda propiedad adicional resulta siempre apantallada por las propiedades que la hacen homogénea.[83] De modo que el único factor que podría introducir un cambio en la probabilidad de E, si es que contribuye causalmente (y esto es justamente lo que se quiere determinar), es C.

La clase de referencia apropiada para establecer aportaciones causales, aquella causalmente homogénea, es denominada el "contexto causal de fondo" (*background causal context*) de la aserción causal correspondiente.[84] En tal ope-

81 Conf. Cartwright 1979: 423, traducción propia. W. Salmon (Salmon 1971: 42-43, Salmon 2006: 63) ha recurrido a la idea de homogeneidad con propósitos asimilables (desarrollar un modelo de explicación estadística).

82 Cartwright (1979: 423) distingue claramente entre el conjunto de propiedades que hacen una aportación causal a E, que puede denotarse como $\{C_i\}$, y la descripción de estado (en términos carnapianos) que establece, para cada una de ellas, si está presente o no en una clase dada, denotada como K_j.

83 Lo que puede expresarse así: $Pr(E|T\cdot K_j) = Pr(E|K_j)$, donde "T" denota cualquier otra propiedad no incluida en K_j.

84 En este sentido: Eells 1991: 85-86. Se ha discutido si C tiene que aumentar la probabilidad de E en todo contexto de fondo o al menos en uno, sin disminuirla en los demás. Véanse al respecto Eells 1991: 94 ss. y Hitchcock 2021: §2.6.

ración, se dice que las propiedades que conforman la clase de referencia apropiada, K_j, son mantenidas fijas (*held fixed*) o constantes, lo cual significa que el aporte de C a la probabilidad de E se mide en un contexto donde ellas (su afirmación o su negación) se dan. Así, toda aserción causal probabilística lleva siempre implícita una cláusula *ceteris paribus*.

En resumen, si se observa que C incrementa la probabilidad de E sin importar qué otros factores del contexto causal de fondo (que sean independientes y hagan aportaciones causales) estén presentes, entonces se dice que C realiza una aportación causal a E. Hay aportación causal probabilística si, y sólo si, tenemos que $Pr(E|C{\cdot}K_j) > Pr(E|K_j)$.

El método comentado permite, superando los problemas antes introducidos, distinguir entre el grado de correlación de C y E, y lo que puede denominarse el *grado de aportación causal* de C respecto de E. La magnitud de la aportación causal de C respecto de E es equivalente a la correlación entre C y E que no resulta apantallada por K_j. Es decir, al resultado de la siguiente operación: $Pr(E|C{\cdot}K_j) - Pr(E|K_j)$.[85]

Volviendo al ejemplo del ingreso a la universidad, vemos que el factor "aplicar a los departamentos más exigentes" hace una aportación causal al factor-efecto "rechazo de la postulación" y corresponde, por lo que vimos, mantenerlo constante como parte del contexto de fondo. Hecho eso, se obtiene que la correlación entre el factor "género del postulante" y el efecto queda apantallada: ambos resultan estadísticamente independientes dado el primer factor mencionado.

Antes de concluir, y cambiando del plano conceptual al de la *investigación* causal, conviene reparar en la distinción entre el conjunto de propiedades cuya posesión hace, de hecho, alguna aportación causal respecto de un factor E y las propiedades cuya posesión *creemos que* hace alguna aportación causal a E, dado el acervo de información que dispongamos en un momento dado. A lo primero podríamos denominarlo homogeneidad "objetiva" de una clase de referencia, aquella que se da en el mundo, y a lo segundo homogeneidad "epistémica" de una clase de referencia, aquella que nos consideramos justificados a creer.[86] Las investigaciones causales se nutren de clases de referencia epistémicamente homogéneas, seleccionadas de acuerdo a la información de fondo que se disponga en un momento y contexto dados. Esto da la pauta de que siempre puede ser el caso de que una aserción causal resulte falsa por haberse formulado sin contar con la información suficiente, es decir, cuando creemos conocer todas las propiedades cuya posesión hace alguna aportación causal al fenómeno de interés pero se nos escapa alguna.

85 Simplifico aquí la notación utilizada por Eells 1991: 88.

86 En un sentido similar, pero no idéntico, véase Salmon 1971: 44, Salmon 2006: 63. También se halla una sugerencia en este sentido en Cartwright 1979: 433.

En suma, un modelo de justificación instrumental probabilística conecta los medios con sus fines a través de dependencias probabilísticas como las caracterizadas aquí.

6 VENTAJAS DEL MODELO PROBABILÍSTICO

Habiendo formulado un modelo de justificación sobre la base de la idea de aportación causal probabilística, parece una buena idea recuperar algunos ejemplos con el propósito de ilustrar mejor las ventajas que presenta, en comparación con el modelo regularista, cuando se lo utiliza para dar cuenta de lo que comúnmente se exige en los casos de discriminación (y más allá de ellos) al evaluar la justificación de normas o prácticas generales. Retomaremos, así, lo sugerido en §4.

Tomaré como ejemplo principal el caso del TJUE en el que se cuestionaba un límite de 30 años de edad a la incorporación de personal en el servicio técnico medio de bomberos de una ciudad. Hablo de "Wolf v. Stadt Frankfurt am Main" (2010). Recordemos brevemente que, según la Gran Sala del tribunal, la restricción se trataba de una diferencia de trato "adecuada" y "necesaria" para lograr que quienes ingresaran en dicho cuerpo pudieran cumplir con las actividades correspondientes "durante un período mínimo de entre 15 y 20 años", como una manera de garantizar su buen funcionamiento.

Pues bien, el punto que he intentado destacar podría reconducirse, en lo central, como una cuestión relativa a la forma en que se precisa –o cabe reconstruir– la contribución que debe hacer una diferencia de trato a su objetivo para que se la considere justificada (por simplicidad, hablaré en adelante de "la contribución requerida"). Si se especifica este aporte de forma irrestricta o categórica, sin aceptar concreciones parciales, el modelo de justificación regularista parece ser apropiado para evaluar los medios con que se pretende alcanzarlo. En cambio, cuando se lo precisa de forma frecuencial, este modelo se vuelve demasiado exigente.

Pensando en el caso "Wolf", se especificaría de modo *irrestricto* la contribución requerida para el límite etario si ella consistiera en "*hacer que* todas las personas que ingresen al servicio técnico medio de bomberos mantengan el estado físico indispensable al menos durante 15 años". Lo cual se concretaría de manera exitosa, únicamente, en un estado de cosas donde, un quindenio después de su contratación, *ninguno* de los ingresantes hubiera perdido las aptitudes físicas que se precisan para realizar sus tareas.

Para que la norma que establece el límite produzca, por sí misma, una contribución como la que acaba de especificarse, el hecho de que una persona contratada no supere los 30 años de edad (C) debería ser, cuanto menos, una "con-

dición necesaria" (en el sentido analizado en §3) de que mantenga el estado físico una vez transcurridos 15 años de su incorporación (E).[87] De modo que, si se incorporara alguien que superara esa edad (~C), incumpliendo con el límite, esta persona no mantendría el estado físico indispensable pasado el lapso mencionado (~E). Se asume, entonces, una relación regular o universal entre ambos factores, la edad y el mantenimiento del estado, del tipo ~C→~E[88].

Haciendo las adaptaciones pertinentes, estamos en condiciones de volcar lo dicho en nuestro esquema básico de justificación instrumental (presentado en §2). A tal efecto, acordemos en denotar como "LE" al estado de cosas en el cual todas las personas ingresantes hubieran sido contratadas con 30 años o menos, y en llamar "conducta M" al paso del estado de cosas "~LE", en el cual no se cumpliera con dicho criterio, al estado de cosas LE. Además, representemos como "F" al estado de cosas en el cual, 15 años después de incorporados, todos los ingresantes mantuvieran las aptitudes físicas que se precisan para realizar sus tareas. El esquema quedaría así:

(a) Se procura realizar un estado de cosas F.
(b) ~LE → ~F.[89]
Entonces:
(c) Debe considerarse i-justificado llevar a cabo la conducta M.

Este esquema de justificación, que descansa en aportaciones causales universales o regularistas como ~LE → ~F, es el modelo apropiado para dar cuenta de la forma de razonar cuando la contribución requerida se especifica como lo hicimos recién, de manera irrestricta ("*hacer que* todas las personas que ingresen…").

Consideremos ahora la alternativa *frecuencial* para precisar la contribución requerida. Ella podría formularse como "*aumentar la probabilidad de que* todas las personas que ingresen al servicio técnico medio de bomberos mantengan el estado físico indispensable al menos durante 15 años". El aporte exigido, así, se presentaría como algo gradual cuya unidad de medida es la frecuencia en que se dan ciertas clases de hechos.

Precisada de tal manera la contribución, la norma podría concretarla –y justificarse por ello– incluso cuando no todas las personas mayores de 30 años fueran a perder el estado físico indispensable antes de los 15 años de haber sido contratadas (la condición no es suficiente), o cuando no todas las personas que

87 Asumiendo, claro está, que dicho medio es el único empleado para cumplir con la finalidad, es decir, que se pretende lograrla únicamente a través de ese medio.

88 Lo que también puede expresarse (según vimos en §3) como E → C.

89 Lo que puede leerse así: Si se contratan personas mayores de 30 años (~LE), entonces no todos los ingresantes mantendrán las aptitudes físicas que se precisan para realizar sus tareas 15 años después de incorporados (~F).

pierdan el estado físico indispensable antes de los 15 años de haber sido contratadas hubieran ingresado al servicio con más de 30 años (la condición no es necesaria). Bastaría, simplemente, con que superar los 45 años aumente la probabilidad de perder tales aptitudes. O, con otras palabras, con que "muy pocos funcionarios de más de 45 años" continúen poseyéndolas, tal como tuvo por probado el TJUE en la decisión que estudiamos.[90]

Denotando como "LE" al estado de cosas en el cual todas las personas ingresantes al servicio sean contratadas con 30 años o menos, y como "F" al estado de cosas en el cual, 15 años después de incorporados, todos los ingresantes mantuvieran las aptitudes físicas que se precisan para realizar sus tareas, la contribución requerida, expresada frecuencialmente, podría formalizarse como sigue:

$$Pr(F \mid LE \cdot K_j) > Pr(F \mid {\sim}LE \cdot K_j)$$

Se lee: manteniendo fijo el contexto causal de fondo (K_j), la probabilidad frecuencial de F dado que ocurre LE es mayor a la probabilidad de F si no ocurre LE.

Si acordamos nuevamente en llamar "conducta M" al paso del estado de cosas ~LE al estado de cosas LE, podemos colocar esas expresiones en nuestro esquema básico de justificación instrumental, con el siguiente resultado:

(a) Se procura realizar un estado de cosas F.
(b) $Pr(F \mid LE \cdot K_j) > Pr(F \mid {\sim}LE \cdot K_j)$.
Entonces:
(c) Debe considerarse i-justificado llevar a cabo la conducta M.

Este esquema de justificación, que descansa en aportaciones causales probabilísticas del tipo $Pr(E|C{\cdot}K_j) > Pr(E|K_j)$, es el modelo apropiado para dar cuenta de la forma de razonar cuando la contribución requerida se especifica de manera frecuencial ("*aumentar la probabilidad de que* todas las personas que ingresen…").

Como vimos, cada alternativa para especificar la contribución requerida tiene como correlato su propio modelo de justificación. ¿Cuál de las dos alternativas y su modelo respectivo es preferible?

En la sentencia que recuperamos, el TJUE se ha inclinado claramente por la segunda alternativa, la versión frecuentista. Si bien no ha invocado razones a favor de adoptar un enfoque tal, yo creo que sí las hay: se trata de una excelente manera de enfrentar las derivaciones del siguiente problema epistemológico. Al menos en el plano de los casos genéricos, resulta muy difícil conocer cuáles

90 TJUE, "Wolf v. Stadt Frankfurt am Main", §41.

son las condiciones que –en soledad o en conjunto con otras– resultan suficientes y necesarias para producir de manera regular tal o cual efecto. Es decir, adquirir creencias justificadas y verdaderas sobre leyes causales completas. De modo que, si se exigiera como requisito de justificación para toda diferencia de trato que se demuestre que ésta hace un aporte causal regularista respecto de su objetivo, ello sería demasiado pedir, al punto que obturaría por completo el mecanismo –sistemáticamente falible– de toma de decisiones basadas en reglas o criterios generales.[91]

El problema mencionado se manifiesta respecto del tipo de relación causal que era relevante para resolver el conflicto judicial que he tomando como ejemplo principal. Es muy difícil, cuando no imposible, conocer la combinación de circunstancias que han de darse para que, indefectiblemente, alguien pierda el estado físico indispensable para ser bombero pasados 15 años. El haber sido contratado con más de 30 años, y superar los 45 transcurrido un quindenio, es un factor que no basta por sí solo para asegurar aquel resultado, según la información científica con la que contaba el TJUE. Pareciera que no es una "condición necesaria" (en el sentido analizado en §3) de que alguien pierda las aptitudes indispensables. No es disparatado pensar en que algunas personas podrían sufrir graves lesiones mucho antes de sus 45 años. Además, pareciera que el factor aludido tampoco es una "condición suficiente" (de nuevo, en el sentido analizado en §3). No es absurdo imaginarnos casos –aunque resulten excepcionales– de funcionarios que tengan un organismo privilegiado y se entrenen a tal punto de superar los 45 años con un estado que les siga permitiendo dedicarse, entre otras actividades, a la extinción de incendios.

Por lo señalado, si el TJUE hubiera aplicado un modelo de justificación instrumental regularista, debería haber declarado discriminatoria, por carecer de "adecuación", la imposición del límite etario que se cuestionaba en el caso. Y podría decirse que también, más ampliamente, la mayoría de las diferencias de trato establecidas mediante normas generales. Pero, como sabemos, no es eso lo que decidió. En vez de ello, aplicó un modelo de justificación instrumental probabilístico (de un modo reconstruible como acabo de hacerlo unos párrafos atrás). Le bastó con que el medio cuestionado hiciera una aportación causal probabilística al logro de su fin.

Las ventajas del modelo probabilístico para dar cuenta de lo exigido en los casos de discriminación al evaluar la justificación de normas o prácticas generales, ilustradas mediante el caso al que venimos refiriendo, también se advierten en otros ejemplos relevantes, como el caso del Tribunal Constitucional federal alemán sobre el etiquetado de cigarrillos[92] o el caso del TEDH sobre

91 En esta premisa, acerca del mecanismo de toma de decisiones basadas en reglas o criterios generales como algo sistemáticamente falible, se apoya la tesis de Schauer resumida en §4(1).

92 Véase §4(5).

discriminación de género a migrantes.[93] A su respecto, aquel modelo expresa mejor que el regularista el razonamiento que los tribunales intervinientes realmente desplegaron o hubieran desplegado de contar con las pruebas suficientes. En el primer caso, no se requirió una aportación regularista entre fumar (C) y contraer cáncer (E), del tipo C→E, sino una contribución probabilística, del tipo $Pr(E|C{\cdot}K_j) > Pr(E|K_j)$. En el segundo caso, no se hubiera requerido una aportación regularista entre ser un migrante hombre (C) y buscar trabajo pero no conseguirlo, del tipo C→E, sino una contribución probabilística, del tipo $Pr(E|C{\cdot}K_j) > Pr(E|K_j)$. Una contribución, dijo el Pleno del TEDH, que hubiera debido ser lo "suficientemente importante". Lo cual nos lleva al tema que abordaremos a continuación.

7 FORMULANDO NIVELES DE EXIGENCIA JUSTIFICATIVA PROBABILÍSTICA

En apartados anteriores (§3 y 5) caractericé dos versiones diferentes de la idea de *aportación causal*. Me detuve especialmente en la versión probabilística, por las razones oportunamente explicitadas (§4 y 6). Ahora quisiera ocuparme de algunas oportunidades regulativas que se abren al entender como una aportación causal probabilística la "adecuación" requerida para justificar diferencias de trato. Particularmente, de las oportunidades que se presentan respecto de la estrategia, común en el derecho antidiscriminatorio, de requerir una justificación más robusta –razones "de mucho peso"– para determinada clase de casos, adoptando niveles de exigencia justificativa diferentes.

Haciendo un resumen de lo visto en §5, tenemos que la *aportación causal probabilística* (AC-P) consiste en una dependencia probabilística. Un suceso C hace una AC-P a otro E cuando produce una diferencia en la probabilidad frecuencial de que se den instancias de E, sin que sea del todo apantallada por las aportaciones causales de los sucesos que forman parte del contexto causal. Como noción, la AC-P tiene un carácter cuantitativo y gradual. Se expresa mediante funciones de probabilidad que, siendo ésta positiva, pueden adoptar cualquier valor numérico en un rango que va entre más de 0 y menos de 1. Sus instancias se gradúan en virtud de este guarismo: a mayor valor, mayor grado de aportación.[94]

A partir de ello, si lo conectamos con las demás piezas en las que hemos trabajado, surge una cuestión digna de atención. La justificación instrumental en los casos de discriminación –mencioné al comienzo– se apoya en una pre-

93 Véase §4(4).

94 Si $Pr(E|C{\cdot}K_j) - Pr(E|K_j)$ fuera igual a 0, diríamos que C no hace aportación causal alguna a favor de E. En el otro extremo, si fuera igual a 1 podría decirse que C es la causa suficiente y necesaria de E.

misa según la cual debe considerarse como i-justificada toda conducta que sea "adecuada" para realizar el contenido de una finalidad legítima. Pues bien, nos encontramos con que, de traducirse tal vocablo como aportación causal a secas, y dado el carácter gradual de esta última noción, siempre podría preguntarse *cuánta* aportación debería exigirse; cuánta es suficiente. De modo que quien tenga que decidir si una relación medio-fin califica como "adecuada", inevitablemente tendrá que asumir –aunque sea implícitamente– alguna respuesta a este interrogante: aceptar que cualquier contribución satisfaga la exigencia o que solamente lo haga una superior a cierto (¿cuál?) grado. En esta decisión intervendrían, entonces, dos clases de juicios: uno empírico sobre cuál es el grado de AC-P de un medio respecto de un fin y otro evaluativo sobre cuánta AC-P es suficiente a los efectos justificativos.

Si se quisiera evitar que el juicio evaluativo se haga caso-a-caso, eludiendo la impredecibilidad que ello conlleva,[95] podría intentarse –aunque con una efectividad limitada, según veremos– definir la AC-P requerida a los efectos justificativos como una noción categórica en vez de gradual. Se trata de establecer, en el plano regulativo general, cuál es el nivel de exigencia justificativa aplicable según el supuesto, es decir, cuál es el grado de AC-P que debe considerarse *suficiente* y, por ende, calificar como "adecuado" en tales o cuales clases de casos.

La solución puede montarse sobre una estrategia bien conocida en el derecho antidiscriminatorio y contribuir, asimismo, a perfeccionarla. Como reseñé en el apartado inicial (§1), es común que, respecto de ciertas clases de diferencias de trato –las consideradas especialmente nocivas para el principio de igualdad– se requiera una justificación más robusta que para otras: razones "de mucho peso". La jurisprudencia y las disposiciones que he mencionado parecen concretar esta exigencia superior requiriendo que la relación medio-fin sea, además de "adecuada", también "necesaria".

Sin embargo, con esa forma de incrementar la exigencia justificativa –incorporando directamente el requisito de la "necesidad"– se omite sacarle provecho a una oportunidad regulativa que surge del carácter gradual de la AC-P, un rasgo que habilitaría a requerir –además de cierta eficiencia– una mayor aportación causal medio-fin cuando se lo considere pertinente.[96] Cuanto mayor sea el sacrificio que conlleve la implementación de una diferencia de trato, sobre valo-

95 Sobre la predecibilidad de las decisiones de los órganos aplicadores del derecho y su valor en términos de autonomía y distribución del poder, véase Laporta 2007: 127-149.

96 El panorama difiere, aunque sólo parcialmente, en la jurisprudencia estadounidense. La Corte Suprema de los Estados Unidos trabaja –en efecto– con distintos niveles de escrutinio según cuál sea la clase de diferencia de trato cuestionada. Respecto de la relación medio-fin, a veces le basta una mera "conexión racional", otras requiere una conexión "sustancial", mientras que en otras ocasiones solamente acepta una conexión "estrecha". Véanse, entre otras obras, Tussman & tenBroek 1948, Tribe 1988: 1436-1454, Galloway 1989, Chemerinsky 2006: 677-709, Mathews & Sweet 2010 y Congressional Research Service 2012: 2048-2059. De todos modos, subsiste el problema de esclarecer a qué grado de aportación causal se hace referencia

res distintos al logro de su objetivo, podría aplicarse un escrutinio más estricto y exigirse una aportación medio-fin superior a la básica, como condición para que califique como "adecuada" a los efectos justificativos.

A continuación presentaré y analizaré dos formas de definir, categóricamente, cuándo hay una *aportación causal suficiente* entre un medio y un fin, lo que denotaré como ACSuf. Una de ellas representará una exigencia básica y la otra, una elevada. Veremos que, en ambos casos, la estrategia de exigir distintos niveles de exigencia justificativa se perfecciona en lo que respecta al requisito de la "adecuación", esto es, adquiere un sentido más preciso la idea de que algunas diferencias de trato deberían hacer mayores aportes al logro de su objetivo para considerarse justificadas. Sin embargo, también emergen otras cuestiones no menores, que haré notar oportunamente.

Pasemos a las definiciones, comenzando por la exigencia básica:

D1 (nivel básico). Hay una ACSuf entre un medio (M) y un fin (F) cuando el primero realiza cualquier aportación causal positiva a favor del segundo.

Esto podría formalizarse como $\text{ACSuf}(M, F) \equiv [\Pr(F|M{\cdot}K_j) - \Pr(F|K_j)] > 0$.

Bajo el dominio de la D1, afirmar que "la conducta M es ACSuf para realizar un estado de cosas F" consiste exclusivamente en hacer una descripción de la realidad, es decir, en proferir un enunciado con función descriptiva.

Considerando que "cualquier AC-P positiva" significa producir cualquier aumento-en-la-probabilidad no apantallado, podemos advertir que la definición expresa un nivel *básico* de exigencia, dado que es compatible con que la contribución sea de un grado mínimo, incluso levemente superior a 0. Para D1, cualquiera debe considerarse suficiente.

Si bien la definición sirve como criterio por defecto, ya hemos visto que para algunas diferencias de trato no se considera aceptable requerir una justificación tan laxa; se espera, en cambio, una más robusta: razones "de mucho peso". Esto es lo que han expresado el TEDH y otros tribunales en algunos pronunciamientos citados en el apartado inicial. También es lo que ha sugerido el Pleno del TEDH en el ejemplo estudiado antes (§4) sobre el ingreso de migrantes hombres: incluso si se hubiera comprobado que tenían un impacto negativo sobre el mercado de trabajo, superior al producido por el ingreso de migrantes mujeres, el tribunal manifestó que no estaba convencido de que éste fuera "*suficientemente importante* para justificar la diferencia de trato" en aras de proteger el empleo.[97]

con cada término ("racional", "sustancial", "estrecha"), el cual podría afrontarse con las herramientas conceptuales ofrecidas aquí.

97 Conf. "Abdulaziz, Cabales and Balkandali v. The United Kingdom", 1985, §79.

Pues bien, respecto de tales supuestos –y con independencia de requerir además que el medio sea "necesario"– podrían formularse niveles más exigentes de ACSuf. Supongamos una diferencia de trato que requiera para su justificación razones de "mucho peso"[98] y que haga una aportación causal positiva a su objetivo, pero que esta relación no sea (considerada como) lo suficientemente estrecha.[99] En tal caso, podría decirse que la distinción contribuye de alguna manera a lograr su fin, pero *no lo suficiente* para superar el juicio de proporcionalidad correspondiente a la clase de rasgos en que se basa. Dado ello, no está justificada y resulta, por ende, discriminatoria. Esta es una manera de dar cuenta de aquellos casos en los cuales una diferencia de trato hace una contribución a su objetivo pero es considerada injustificada, de todos modos, por razones normativas: porque el sacrificio que se hace al implementarla solamente se justificaría si su aporte fuera mayor (o porque no hubiera aporte, por más alto que sea, que compensara ese sacrificio). El razonamiento respectivo involucra un balance entre, por un lado, el valor de la contribución que hace la medida sobre su objetivo (admitiendo que el aporte puede ser gradual) y, por el otro, los demás disvalores que conlleva su concreción.[100]

Hasta donde puedo ver, hay por lo menos dos maneras de exorbitar el nivel básico de exigencia justificativa, que mostraré enseguida como $D2_a$ y $D2_b$. Por simplicidad formularé la definición de un solo nivel adicional, el *elevado*.

$D2_a$ (nivel elevado). Hay una ACSuf entre un medio (M) y un fin (F) cuando el primero realiza una aportación causal a favor del segundo que supera un umbral previamente establecido.

Esto podría formalizarse como $ACSuf(M, F) \equiv [Pr(F|M{\cdot}K_j) - Pr(F|K_j)] > u$, donde "$u$" denota cierto valor dentro del rango entre más de 0 y menos de 1.

Igual que con la anterior, sostener bajo $D2_a$ que "la conducta M es ACSuf para realizar un estado de cosas F" consiste exclusivamente en hacer una descripción de la realidad, en describir que M hace una aportación tal que supera el umbral aplicable.

Si bien parece una alternativa satisfactoria, la fijación *a priori* del umbral de aportación suficiente conlleva un inconveniente. Hace a la estrategia insensible

98 Una diferencia en virtud del género, del origen racial, etcétera.

99 Al no detentar, por ejemplo, un alcance universal o cercano a ello ("*perfect proxy*"), como se requeriría en la jurisprudencia estadounidense para las distinciones basadas en el género, según la lectura de Case 2000 mencionada varias notas atrás, en §4(1).

100 Esta evaluación está ligada conceptualmente con lo que se conoce como juicio de "proporcionalidad en sentido estricto". Según el entendimiento corriente, para que haya proporcionalidad en sentido estricto "los beneficios de adoptar la medida enjuiciada deben ser claramente superiores a las restricciones que ella impone a los principios convencionales afectados con la misma" (Corte IDH, "Pavez Pavez vs. Chile", 2022, §69).

a las características particulares de los fenómenos concernidos en cada caso y a lo que se conozca acerca de los factores que conforman su contexto causal de fondo. Ello es problemático porque una AC-P podría ser relativamente baja y, sin embargo, constituir la alternativa conocida que más contribuya a producir un estado de cosas pretendido, de modo que descartarla llevaría a desechar todo esfuerzo por alcanzar el objetivo. En otros supuestos, también podría darse que, dada la importancia relativa de cierto objetivo en un ámbito dado, los aportes pequeños también sean, de todos modos, considerados proporcionales en relación con sus "costos" sobre el principio de igualdad.

La siguiente definición evita dicho incordio, al tiempo que recupera otro:

> $D2_b$ (nivel elevado). Hay una ACSuf entre un medio (M) y un fin (F) cuando el primero realiza una aportación causal a favor del segundo que sea evaluada como suficiente por el intérprete.

Esto podría formalizarse como $ACSuf(M, F) \equiv ES[Pr(F|M{\cdot}K_j) - Pr(F|K_j)]$, donde "ES[…]" denota la evaluación positiva, como suficiente, del intérprete.

Bajo el dominio de $D2_b$, y a diferencia de lo que sucede con las dos definiciones anteriores, sostener que "la conducta M es ACSuf para realizar un estado de cosas F" tiene una función mixta, descriptiva y evaluativa. Involucra tanto una descripción según la cual M hace una aportación causal a F, como la emisión de un juicio de valor sobre su suficiencia. En virtud de la $D2_b$, la idea de ACSuf consiste en lo que se denomina un *concepto evaluativo denso*.[101]

Lo que hace esta alternativa es delegar en el intérprete el juicio sobre el carácter suficiente del aporte causal de un medio para un fin. Esto le da la flexibilidad de la que carece $D2_a$, pero al costo de aceptar que dicho juicio evaluativo se haga caso-a-caso y no a nivel regulativo general. La decisión involucra un balance de razones que, para la clase de casos aquí atendidos, típicamente se dará entre el perjuicio o disvalor que conlleva la diferencia de trato cuestionada (la exclusión de cierto grupo del acceso a determinados bienes) y el beneficio que conlleva contribuir como lo hace al logro de su objetivo.[102]

Haciendo un inventario, con las propuestas de definición categórica aquí volcadas (D1, $D2_a$ y $D2_b$) se supera la indeterminación que se presenta de traducir la "adecuación" medio-fin requerida como una AC-P a secas. Sin embargo, en las definiciones que expresan niveles de exigencia justificativa más elevados (no básicos) se genera un dilema: hay que elegir entre prefijar un umbral de suficiencia ($D2_a$) o delegarlo en el intérprete ($D2_b$), con las consecuencias que cada decisión regulativa conlleva: la insensibilidad al contexto y la incorporación en la idea de ACSuf de elementos evaluativos, respectivamente.

101 Sobre esta clase de conceptos, véase el panorama delineado en Väyrynen 2021.

102 Es decir, se trata de una evaluación conceptualmente ligada al juicio de proporcionalidad en sentido estricto.

8 CONCLUSIONES

En este trabajo me detuve en algunas aristas del razonamiento con el que se evalúa si una diferencia de trato se encuentra justificada y, por ende, exenta de la prohibición de discriminación. Permítanme hacer un balance de los resultados obtenidos.

Partamos de una mirada global. Como se ha sugerido,[103] decir que una diferencia de trato califica como "discriminatoria" implica, conceptualmente, afirmar que:

> Es comparativamente perjudicial para una o más personas,
> está basada en la posesión por parte de esas personas de atributos protegidos por el derecho y
> carece de una *justificación* suficiente.

Además, afirmar –en ese contexto discursivo– que una diferencia de trato detenta una "justificación suficiente" implica, conceptualmente, aseverar que:

> (a) Tiene una "finalidad legítima",
> (b) es "*adecuada*" para lograrla,
> (c) es "necesaria" para lograrla y
> (d) es "proporcional en sentido estricto".[104]

¿Qué significa –en ese contexto discursivo– aseverar que la diferencia de trato es "adecuada" para lograr su objetivo? Esta es la pregunta que intenté responder, principalmente, a lo largo del artículo.

El primer paso hacia aquel propósito fue presentar el siguiente esquema básico de justificación instrumental, un razonamiento con el que se evalúa si una diferencia de trato se encuentra justificada y, por ende, no resulta prohibida por discriminatoria:

> (a) Se procura realizar un estado de cosas F.
> (b) La conducta M es adecuada para realizar un estado de cosas F.
>
> Entonces:
> (c) Debe considerarse i-justificado llevar a cabo la conducta M.

103 Aquí remito a lo tratado en Giles 2023.

104 Este no es más que un resumen de la reconstrucción realizada en §1. Quedan por fuera muchos matices, como el hecho de que la jurisprudencia no suele requerir para todas las diferencias de trato, como condición de justificación, que se presenten todos estos elementos.

Nuestra atención se posó sobre la segunda premisa del razonamiento. ¿Qué significa exigir, como condición de justificación, que un medio sea "adecuado" para un fin?

Para responder la cuestión desplegué una estrategia argumentativa que puede resumirse en tres pasos. El primero fue comprender el impreciso vocablo "adecuado" como cierta *aportación causal*. El segundo fue reconstruir el contenido asignado a esta última idea por dos concepciones de la causalidad. Ambas fueron presentadas como la base de dos modelos de justificación instrumental, uno regularista (JI-R) y otro probabilístico (JI-P).

El tercero paso del argumento principal de este artículo fue alegar en favor de comprender la exigencia de "adecuación" como una *aportación causal probabilística* y, por consiguiente, de la adopción del modelo probabilístico de justificación instrumental para los casos de discriminación en que se cuestionen normas o prácticas generales. ¿Por qué razones? Porque ello encaja mejor con algunas tesis acerca de lo que debería requerirse para justificar estos factores, así como con aquello que se exige a dicho efecto, de hecho, en ciertas ocasiones.

Dicha traducción conlleva algunas oportunidades regulativas.

Como vimos, un suceso C hace una aportación causal probabilística (AC-P) a otro E cuando produce una diferencia en la probabilidad frecuencial de que se den instancias de E, sin que sea del todo apantallada por las aportaciones causales de los sucesos que forman parte del contexto causal. Como noción, la AC-P tiene un carácter cuantitativo y *gradual*. De traducirse la "adecuación" medio-fin exigida para justificar una conducta como una AC-P a secas, siempre podría preguntarse cuánta aportación causal debería exigirse. De modo que quien tenga que calificar una relación como "adecuada", inevitablemente habrá de asumir alguna respuesta a este interrogante. En esta decisión intervendrían dos clases de juicios: uno empírico sobre cuál es el grado de AC-P de un medio respecto de un fin y otro evaluativo sobre cuánta AC-P es suficiente a los efectos justificativos.

Como un modo de evitar que el juicio evaluativo se haga caso-a-caso, exploré distintas definiciones categóricas de la adecuación suficiente (ACSuf) a los fines justificativos. Son opciones alternativas que podrían adoptarse a nivel jurídico-regulativo y contribuir a perfeccionar la estrategia, común en el derecho antidiscriminatorio, de requerir una justificación más robusta –razones "de mucho peso"– para determinada clase de casos.

En las definiciones que expresan niveles de exigencia justificativa más elevados (no básicos) se genera un dilema. Hay que elegir entre prefijar un umbral de suficiencia o delegar la decisión sobre cuándo hay ACSuf en el intérprete, con las consecuencias que cada decisión regulativa conlleva: la insensibilidad al contexto y la incorporación en la idea de ACSuf de elementos evaluativos, respectivamente.

De acuerdo con el abanico de alternativas desplegado, aseverar que una diferencia de trato es "adecuada" para lograr su finalidad podría querer decir, según el nivel de exigencia justificativa que se adopte para cada clase de supuesto, alguna de estas tres cosas:

D1 (nivel básico). La diferencia de trato realiza cualquier aportación causal positiva a favor del logro de su finalidad.

$D2_a$ (nivel elevado). La diferencia de trato realiza una aportación causal a favor del logro de su finalidad que supera un umbral previamente establecido.

$D2_b$ (nivel elevado). La diferencia de trato primero realiza una aportación causal a favor del logro de su finalidad que es evaluada como suficiente por el intérprete.

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Alejo Joaquín Giles*

From "appropriate" means to desired aims

On instrumental justification in discrimination cases

Legal rules prohibiting discrimination often make this mandate subject to the condition that the difference of treatment in question is not considered justified. Typically, a difference of treatment must be considered justified if, among other factors, it pursues a legitimate aim and is an "appropriate" means to achieve it. But what does "appropriate" mean in such a context? My answer in this article develops over three steps. The first step is to elucidate the vague requirement of "appropriateness" as a given causal contribution. The second step is to reconstruct the content assigned to the notion of causal contribution by two conceptions of causality: the regularistic and the probabilistic. The third step is to argue for an understanding of the requirement of "appropriateness" as a probabilistic causal contribution. After establishing these grounds, I turn to the regulatory opportunities that the choice in the third step opens regarding the strategy, common in anti-discrimination law, of requiring a more robust justification for certain kinds of cases. As I will show, the gradual character of the notion of probabilistic causal contribution allows for the formulation of different levels of "appropriateness" that are sufficient for justificatory purposes. In relation to the non-basic levels, a dilemma may arise.

Keywords: appropriateness; proportionality; discrimination; instrumental justification; causality; probability; sufficiency.

1 INTRODUCTION

Legal rules prohibiting discrimination often make this mandate subject to the condition that the difference of treatment in question is not considered *justified* according to its proportionality.[1] Typically, a difference of treatment must be considered justified if, among other factors, it pursues a legitimate aim and is an "appropriate" means to achieve it. In addition, some provisions state that to be considered justified, the inequality must also be the most efficient means of achieving its aim and must be proportionate (*stricto sensu*) to it. If a difference

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1 See Giles 2023 for a more detailed analysis of the elements of the generic concept of discrimination.

of treatment satisfies these conditions, and even if it harms a protected group, it is legally permitted.[2]

European and Inter-American supranational anti-discrimination law provide remarkable examples of what has just been characterised. Starting in Europe, let us consider the interpretation of Article 14 ("Prohibition of discrimination") of the European Convention on Human Rights. In interpreting this provision, the European Court of Human Rights (ECtHR) has repeatedly held that a distinction qualifies as discriminatory if, among other conditions, it "has no objective and reasonable justification". The Court has also made it clear that:

> The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration […]. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[3]

The same idea is found in many provisions of European law[4] and interpretations of the Court of Justice of the European Union (CJEU).[5] However, for some types of cases, some sources omit this requirement and prohibit unfavourable differences of treatment based on certain grounds, regardless the reason(s) that could be invoked to justify them.[6]

Furthermore, the ECtHR has established a stricter level of scrutiny for differences of treatment based on certain grounds, such as sex[7] and sexual orientation:[8] they require "very weighty" reasons to justify them. With regard to

2 This is a *weak* permission (a non-prohibition): if the conduct were considered justified, there would be no rule in the legal system requiring its omission on grounds of discrimination. On permissions in a weak sense, see Alchourrón & Bulygin 2012: 175-176 and von Wright 1963a: 86.

3 ECtHR, "Belgian Linguistic case", 1968, p. 34, §10. The ECtHR has reiterated this interpretation on several occasions since this case. See, among many others, "Marckx v. Belgium", 1979, §33; "Rasmussen v. Denmark", 1984, §38; "Abdulaziz, Cabales and Balkandali v. The United Kingdom", 1985, §72; "Karlheinz Schmidt v. Germany", 1994, §24; "Salgueiro da Silva Mouta v. Portugal", 2000, §29; "Vallianatos and Others v. Greece", 2013, §76; "Lupeni Greek Catholic Parish and Others v. Romania", 2016, §164; "Biao v. Denmark", 2016, §90; "Molla Sali v. Greece", 2018, §135; "Jurčić v. Croatia", 2021, §62.

4 As in the following European Directives: 2000/43/EC (2.2.b; 4); 2000/78/EC (2.2.b.i; 4.1); 2004/113/EC (2.b; 3.5); y 2006/54/EC (2.1.b; 14.2).

5 As in "Bilka-Kaufhaus", 1986, §37; "Johnston v Chief Constable of the Royal Ulster Constabulary", 1986, §38; "Sirdar v. The Army Board y Secretary of State for Defence", 1999, §26; "Kreil v Bundesrepublik Deutschland", 2000, §23; "Kücükdeveci", 2010, §33; "Vital Pérez v. Ayuntamiento de Oviedo", 2014, §60; "CJ v. TGSS", 2022", §48.

6 The UK's Equality Act (2010) is a clear example. The only cases of direct discrimination that allow for justification within its framework are those based on age and disability (Sections 13.2 y 15). See Hepple 2010: 15 and Fredman 2011: 198 y ss.

7 See "Schuler-Zgraggen v. Switzerland", 1993, §67; "Abdulaziz, Cabales and Balkandali v. The United Kingdom", 1985, §78; "Jurčić v. Croatia", 2021, §65.

8 See "Karner v. Austria", 2003, §37; "Vallianatos and Others v. Greece", 2013, §77, and citations.

the relationship between means and ends, the measure adopted must be more than merely "appropriate" to achieve the aim pursued; it must be "necessary" to that goal.[9] The following extract from a decision of the Grand Chamber of the ECtHR illustrates this point:

> In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people […] from the scope of application of the provisions in issue.[10]

The European anti-discrimination directives[11] and the case law of their main interpreter, the CJEU,[12] seem to require this combination of "appropriateness" and "necessity" in all cases.

On the other side of the Atlantic ocean, the Inter-American Court of Human Rights (CorteIDH) has generally adopted a similar approach.[13] The Court seems to agree with the ECtHR in interpreting that, with regard to differences of treatment based on the grounds protected by Article 1(1) of the American Convention on Human Rights, the evaluation of their justification must be guided by "a strict scrutiny that incorporates particularly demanding elements into the analysis". While the aim pursued must be imperative, the means chosen

> must not only be appropriate and effective, but also necessary, that is, it must not be substitutable by a less harmful alternative. In addition, it involves the application of a strict proportionality test, according to which the benefits of adopting the measure in question must clearly outweigh the restrictions it imposes on the conventional principles it affects.[14]

In this framework, the requirement that the contested factor be "necessary" to achieve a particular goal is often understood to mean that it must be the least harmful[15] or least restrictive[16] of the possible means.[17]

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9 See "Karner v. Austria", 2003, §41, "Vallianatos and Others v. Greece", 2013, §85, and citations; "Jurčić v. Croatia", 2021, §65.

10 ECtHR, "Vallianatos and Others v. Greece", 2013, §85.

11 See 2000/43/EC (2.2.b); 2000/78/EC (2.2.b.i; 6.1); 2004/113/EC (2.b); 2006/54/EC (2.1.b).

12 See CJEU, "Johnston v Chief Constable of the Royal Ulster Constabulary", 1986, §38.

13 Generally, see OC-4/84, §56; OC-17/02, §46-48; "Espinoza Gonzáles vs. Perú", 2014, §219; "Flor Freire Vs. Ecuador", 2016, §125; "Guevara Díaz vs. Costa Rica", 2022, §80.

14 CorteIDH, "Pavez Pavez vs. Chile", 2022, §69. The Court had already expressed the same idea in "Gonzales Lluy y otros vs. Ecuador", 2015, §256; and "I.V. vs. Bolivia", 2016, § 241.

15 As the CorteIDH states in the extract just quoted.

16 See CJEU, "'CHEZ Razpredelenie Bulgaria AD' v. Komisia za zashtita ot diskriminatsia", Grand Chamber, 2015, §120, §122, §128.

17 This seems to be the common understanding of the term in the literature on proportionality. Two notable examples can be found in Barak 2012: 317 and Bernal Pulido 2014: 933.

Summarising somewhat superficially, we could say that the "appropriateness" of a means refers to its *effectiveness*[18] and the "necessity" to a certain *efficiency.*[19] A difference of treatment may be "appropriate" to achieve an aim but not "necessary" because there are other, less harmful means. For example, it may be "appropriate" to require workers in an organisation to retire at 60 to guarantee the quality of the service for which they are responsible, if this depends on skills that decline over time. However, if the relevant skills are not lost until the age of 65, the retirement five years earlier would be "unnecessary". There would be a less harmful means of achieving the purpose of this unequal treatment: to provide for retirement at age 65 rather than earlier.[20]

In what follows, I will elucidate the requirement (or basic element) of "appropriateness" for discrimination cases involving general rules or practices, focusing on legal provisions with the characteristics just described.[21] What does the requirement that the relationship between a means and its end must be "appropriate"[22] mean? Following a CJEU definition, it could be that the means in question must "genuinely reflect a concern to attain" the objective pursued.[23] But under what conditions can we say that this is the case?

My main objective will be to elucidate the problematic "appropriateness" requirement with the help of contributions from the philosophy of science. As a starting point, I will understand the requirement of "appropriateness" as a certain causal contribution (§2). I will then reconstruct the content that two conceptions of causality – the regularistic (§3) and the probabilistic (§5) – assign to that idea. Both provide a basis for formulating two different models of instrumental justification. Because it fits better with some theses about what should be required to justify general rules or practices, as well as what is actually required by courts for this effect, I will argue (§4 and §6) that the idea of

18 On the concept of effectiveness, understood as "to lead to" given results, see Fernández Blanco 2019: 266-269, 2021: 14-17.

19 According to Barak (2012: 305, 320), what distinguishes the necessity and appropriateness criteria in the proportionality test is precisely this: the former requires, in addition to effectiveness, that the means be efficient. The idea of efficiency adopted by the author – following Rivers 2006 – is inspired by the view of W. Pareto, for whom a distribution is efficient if "no other distribution could make at least one person better off without making any one else worse off" (Rivers 2006: 198). Given the limitations of the research I am undertaking here, it is not worth elaborating on this notion. For a more precise understanding, one might turn to the Economic or Law & Economics literature. See, for example, Margolis 1987, Cooter & Ulen 2012: 12-14, 42-43, Tuzet 2016: §3, Chiassoni 2013: 231-259 and Acciarri 2019: 6-9.

20 Similar arguments can be found in CJEU, "Reinhard Prigge v. Lufthansa", 2011, §64. This judgment has its counterpart in CJEU, "Gennaro Cafaro v. DQ", 2019, §49-55.

21 What I will say does not apply to discrimination cases – mentioned in a previous footnote – where no justification is accepted, as is usually the case for direct discrimination based on certain protected grounds.

22 Or "suitable", "proper", "adequate", and other terms used as synonyms.

23 See CJEU, "CJ v. TGSS", 2022, §48, and citations.

probabilistic causal contribution is best suited to elucidating what the "appropriateness" required for justificatory purposes means.

Finally, I will also explore some of the regulatory opportunities that arise from my proposed understanding of the "appropriateness" requirement (§7). In particular, I will consider the opportunities that arise for the strategy, common in anti-discrimination law, of requiring more robust justification ("very weighty" reasons) for certain kinds of cases by introducing different levels of the justification requirement. As I will show, the gradual character of the notion of probabilistic causal contribution allows for, among other uses, the formulation of different levels of "appropriateness" that are sufficient for justification purposes. At the high (or non-basic) levels, as I will emphasise, there is a potential dilemma between choosing a fixed threshold of sufficiency and delegating this assessment to interpreters.

Insofar as justification in cases of discrimination is understood – as it usually is – as a special case of the proportionality test, which is applied in assessing the limitations of fundamental rights, what I will say about the requirement of "appropriateness" for the species also applies to the respective element of its genus. What follows could therefore also be read as a contribution to the study and characterisation of the (mostly neglected) factual side of the proportionality test.[24] In *Proportionality and Facts in Constitutional Adjudication* (2021), A. Carter has recently addressed this issue and made a remarkable contribution. The argument I will present in this article is narrower, limited to the element of "appropriateness" and to a particular class of instrumental relations.[25] However, this limitation has the advantage of allowing for a more detailed approach than in the above-mentioned work, where the elements of "appropriateness" and "necessity" are defined in causal terms (such as "lead to", "contribute to", "be able to achieve", etc.), but without specifying what kind of causal contributions they refer to.[26]

Let's start with the detailed itinerary.

24 The relevance of factual statements in constitutional argumentation, a phenomenon that emerges in the framework of the proportionality test, has been highlighted in several works. In the Anglo-Saxon field, see for example Rosen 1972, Davis 1973, Acker 1990, Erickson & Simon 1998, Faigman 2008 and Larsen 2012, 2014.

25 I will explain these limits in the final paragraphs of §2.

26 See pp. 3, 23-26, 32-35, 58-60. Carter's distinction between "judicial facts" and "legislative facts", which follows K. C. Davis (1942: 402 ff.), illustrates that the kind of facts we are interested in – the latter – are not those that have occurred in a particular case. However, it does not contribute to the understanding of the requirement that concerns us, at the cost of multiplying the categories of facts according to the institutional context in which they are relevant (individual trials, legislative debates, constitutional trials, etc.). Specifically, the work does not further clarify a key aspect: how the phenomena of interest are causally related.

2 "APPROPRIATENESS" AND INSTRUMENTAL JUSTIFICATION

The requirement that a means be "appropriate" to an end is – as we shall understand it – synonymous with the requirement that the two factors be instrumentally related. The property of instrumentality is usually ascribed to a thing according to its aptitude for achieving something else. This predicate can refer to a variety of entities, three of which are of particular interest to us. Someone is said to be instrumentally rational if he or she uses means that contribute to achieving what he or she wants to achieve. An argument is said to be instrumentally rational if its conclusion is an assertion about how to act and its premises establish a certain relationship between that action and an intended state of affairs. Finally, an action or a rule of conduct is said to be instrumentally justified if it contributes to the achievement of a certain goal (for the achievement of which there are sufficient reasons).

In general, instrumental reasoning is understood to be composed of statements that refer to at least three elements: a state of affairs to be achieved, the end (or aim or goal) (E); an action directed towards it, the means (M); and a relationship between the means and its end.[27] If we take the basic schema of such an argument and slightly modify the conclusion, we get the *basic schema of instrumental justification* with which we shall work. It is as follows:

(a) It is intended to bring about a state of affairs, E.
(b) Action M is appropriate to bring about E.
Therefore:
(c) Performing action M is instrumentally justified.

"E" denotes a generic state of affairs and "M" a generic action. Premise (a) describes – or ascribes – an end (or aim or goal), whose content is the realisation of a state of affairs. Premise (b) describes the performance of an action as an "appropriate" means to achieve what is intended. "To act" is understood here as producing a change from one (initial) state of affairs to another (final) state of affairs.[28] Statement (c), the conclusion of the argument, is to be read as a particular rule derived from statements (a) and (b) in conjunction with an implicit normative premise, according to which any action that is "appropriate" to bring about the content of a legitimate aim must be considered instrumentally justi-

27 I will deal here exclusively with means-ends relationships of an empirical nature. But these are not the only possible relationships. There are also cases, for example, where a means is connected to its end by a (non-empirical but) conventional relationship.

28 "To bring about a state of affairs" or "to perform an act" is understood here as producing an "event" in the sense given to the term by von Wright 1963a: 26-28.

fied. As we saw at the beginning, this premise often finds support in jurisprudential discourse and in legal provisions.

As presented, the argument is enthymematic. It lacks some premises from which the conclusion would follow deductively. I omit them for simplicity and to highlight only what we will deal with here.[29] The notation used could be more detailed, but it is sufficient for our objective.

I will focus here on premise (b). What does it mean to require a relation of "appropriateness" between a means and its end? I will answer this question with two successive premises. I will state the first immediately and then only sketch the second, which will be elaborated in the following sections.

First premise: in the present discursive context, to require a relation of "appropriateness" between a means and its end is to require that the means makes a causal contribution to bringing about the end.

When two events always occur together, or occur together with some frequency, they are said to be *correlated* or associated. For example, "Most top footballers own luxury watches" is a clear example of a statement involving correlations. If this were true, and we were bored with our jobs and wanted to move up to the top leagues of football, would it be a *good strategy* to invest our life savings into the purchase of one of these accessories? Definitely not. If we really wanted to be a top footballer, we should think about the conditions that, in addition to those merely associated with being an elite footballer, explain why people become elite footballers; the conditions that, if present, would lead or contribute to achieving that goal. Amongst so many other factors, one could think of constant and intense training and the possession of some innate talent. A lot of training and talent, but not a luxury watch, would contribute to the realisation of our dream. These are what we would call the causes, or some of the causes, of such a projection.

Well, when we talk about the "appropriate" means to achieve something, we are generally talking about factors such as training or talent, not watches, in relation to being an elite footballer. In general, we mean that the means, if used, would in some way lead to (or contribute to) the end, and that if the means had been used, the contribution would have been made. In short, we are saying that the two factors are not just correlated, but causally related. This is the kind of

29 In its full version, the schema looks like this:
(*) It is instrumentally justified to perform any action which is appropriate to bringing about a state of affairs which is intended to be brought about and which is deemed to be legitimate to bring about.
(a) It is intended to bring about a state of affairs, E.
(*) To bring about E is deemed to be legitimate.
(b) Action M is appropriate to bring about E.
Therefore:
(c) Performing action M is instrumentally justified.

relationship that is expressed in the language of causality by terms such as "lead to", "contribute to", "help to", "bring about", "produce" and, above all, "cause".[30] It is also what seems to be required for an action to be considered instrumentally justified: not only that it merely coincides with the achievement of a legitimate end, but that it contributes to it.[31]

On this basis, it seems plausible to understand the required "appropriateness" of a means to an end as follows: a means is "appropriate" to an end if it makes a *causal contribution* to the end.[32] Thus, to say that "Action M is appropriate to bring about E" is equivalent to saying that "Action M makes certain causal contribution to bring about E".[33]

To organise ideas, I will hereafter speak of two events as being linked by a causal relationship when one of them makes a causal contribution to the occurrence of the other. Thus, in the following discourse, this last concept will fulfil the function of a basic or primitive concept.[34] As can be seen, the approach still leaves open the definition of how the aforementioned contribution is to be characterised: exactly how two factors must be related in order to be considered causally related. This leads to premise number two.

Second premise: depending on the underlying conception of causality, different relations of causal contribution of one event to another can be characterised; this provides a basis for formulating correlative models of instrumental justification.

If the translation just suggested is accepted, the task of clarification can be continued by moving into the realm of philosophy of science and stopping at studies of causal relations. I will now take up some of these contributions to place them in the arena of instrumental justification for the purpose already explained. In particular, I will present a reconstruction of two conceptions of causality, which applied to our focus of interest, give content to the idea of causal contribution and at the same time provide a basis for the formulation of two models of instrumental justification, a regularistic one (§3) and a probabilistic

30 For the causal language, see Hitchcock 2003: 2-3.

31 Similarly, von Wright (1963b) has pointed out that one of the premises of the argument he calls "practical inference", linking a means to its end, "rests upon a causal relationship" (p. 160). N. Cartwright (1979: 420, 431) has argued something similar about the idea of effective (in our terms: "appropriate") strategies for achieving something.

32 With regard to the proportionality test, this view is expressed, for example, in Bernal Pulido 2014: 920 and Vázquez 2016: 62.

33 For present purposes, we are leaving aside the meaning of "appropriate" that is sometimes used in colloquial language, according to which a means is appropriate to an end if it is best suited to achieve it in comparison with others (because it was designed for it, because it fulfils it better than others, etc.). In our discursive space, this meaning is usually captured by the requirement of "necessity" mentioned at the beginning (§1).

34 In the sense of Tarski 1994: 110.

one (§5), depending on whether we are dealing with a universal or a frequentist means-ends relationship, respectively.

Before proceeding, it is worth making some clarifications and pointing out some limitations of the proposed project. First, I will speak of "conceptions" – also "approaches" or "standpoints" – of causality in a very broad sense, to refer to discourses that attempt to explain causal contributions between events. Among their variants, I will not distinguish between conceptual (which try to define causal contributions) or epistemological (which investigate what we can know about these relations) approaches and those that make more ambitious ontological claims (which try to figure out what causality means in objects). For the purposes of this paper, conceptual approximations will suffice. Their conclusions are independent of how the dispute about the ontology of causality is resolved.

Second, I want to emphasise that the fact that I present only two approaches to causality does not mean I claim they are the only admissible approaches, or that only one of them is correct in relation to the others. Rather, I see them as two discourses explaining different systems of causal relations to which they are bound in their domain. One might say, then, that I take a pluralist view of the issue.[35] In the context of discrimination cases, the system of causal relations relevant for assessing the justification of a difference of treatment – an elementary piece of information for choosing the most appropriate model to explain it – depends on something that cannot be defined *a priori*: the nature of the events to be linked. This in turn depends on how the goals are specified and the means chosen to achieve them. These factors may relate to a biological phenomenon (e.g., the relationship between increasing age and the loss of certain abilities), to a social phenomenon (e.g., the relationship between the rate of migration and the rate of unemployment in a particular place), and so on. Here, I will deal with a certain class of causal relations between events, those that are dealt with by the theses and cases I will mention in time (§4). My conclusions will be limited to these theses and cases.

Third, and finally, I will consider relations between events that are generic cases or types of cases, such as those associated with the claim "smoking causes lung cancer". This is important because the question of which causal approaches are more suitable for explaining particular relationships depends, among other things, on the generic or specific character of those relationships.[36] The reason for the restriction to generic cases is that my main interest here is the justification of legal rules and general practices. One of the consequences of this limitation is that the discourse presented here will be useful for generalist decision-making methods. That is, for methods that, in assessing the justifica-

35 As, for example, in Cartwright 2004: §6 and Hitchcock 2003: 1, 21-22.

36 This is emphasised, for example, by Cartwright 2004: §6 and Frosini 2006: 313. This choice leaves out, among others, counterfactual approaches to causality.

tion of a behaviour, seek its justification in general, and not for its application to a particular case taking into account all the properties present in that case.[37] Particularistic decision-making methods would need to be complemented by reflections on the gap between the levels of general causality and specific causality.[38] With that, let us now move on to the detailed plan.

3 REGULARISTIC INSTRUMENTAL JUSTIFICATION

I will call *regularistic instrumental justification* any argument according to which performing an action is instrumentally justified because it is a universal or regular "condition" for achieving a legitimate end. In this model, premise (b) of the basic schema is modified as follows: "Action M is a universal or regular condition for bringing about E".

The elusive idea of causal relation – or causal contribution – is a source of seemingly never-ending debate in the philosophy of science. One influential approach proposes understanding it through the notion of *condition*, that is, as a regular conditional relationship between two events: the condition (C) and its effect or consequence (E). This approach is based on a solid conceptual framework that includes a typology of conditions. I will take part of this typology here from the work of G. H. von Wright.

As a general feature, the relations we are talking about are regular or universal, which means that they occur always, invariably, and not only with some frequency. If eating (C) is a regular condition for appetite satisfaction (E), then this effect always occurs when you eat.

Von Wright begins with the well-known distinction between two basic types of conditions, "necessary" and "sufficient";[39] each characterised by a different role in producing an event. He defines them as follows:[40]

(1) To say that C is a *sufficient* condition for E is to say that if C occurs, E will also occur. The presence of C is sufficient to ensure that E occurs. (Although E could occur even without C.) In this sense, we say that eating a home-made pizza (C) is a (sufficient) condition for appetite satisfaction (E), even if the same thing can be achieved in another way (e.g., by eating another food). The logical form of this kind of condition can be expressed as follows:

37 For the merits of adapting one model or the other, see the counterpoint between the position presented in Schauer 2003: 123-125 and that defended in Arena 2018: 571 ff, Arena 2019: 27 ff.

38 E. Eells addresses this problem in Eells 1991: 6.

39 Below, I follow von Wright 1971: 38-41, 2001: 66-77.

40 Cf. von Wright 2001: 66-67. In the following, symbols expressing conditional (→) and biconditional (↔) relations will be used in the traditional sense.

$C \rightarrow E$ (sufficient condition)

(2) On the other hand, to say that C is a *necessary* condition for E is to say that if E occurs, C will also occur. The occurrence of E requires the occurrence of C. (Although C could occur without E.) In this sense we say that heating the oven (C) is a (necessary) condition for cooking the home-made pizza (E), regardless of the fact that other conditions (such as preparing the dough, putting the pizza in the oven, etc.) must also occur for the latter to occur. The logical form of this kind of condition can be expressed as follows:

$E \rightarrow C$ (necessary condition)[41]

(3) Combining the concepts, to say that C is a *necessary and sufficient* condition for E, means that if and only if C is given, then E is also given. In this sense we say that the absorption of water into the body (C) is a (necessary and sufficient) condition for hydration (E), because only in this way is this effect achieved. The logical form of this kind of condition can be expressed as follows:

$C \leftrightarrow E$ (necessary and sufficient condition)

Based on this typology, further conditional relations are defined to cover various cases of *plurality* of conditions where an event has more than one necessary or sufficient condition. Let us consider some of them:[42]

(4) For simplicity, let us take only two conditions, C1 and C2. They are said to be jointly *sufficient* for E if E occurs whenever they occur together. Individually, they do not guarantee the occurrence of E, but together they do.[43] They are said to be disjunctively sufficient with respect to E if whenever at least one of them occurs, E also occurs. Each by itself is sufficient to produce E.[44] On the other hand, they are said to be jointly *necessary* together for E if, whenever E occurs, both also occur together. Each by itself is necessary to produce E.[45] They are said to be disjunctively necessary with respect to E if, whenever E occurs, at

41 This relationship can be expressed, perhaps more intuitively for the study of causal relationships, as follows: $\sim C \rightarrow \sim E$. The inversion is logically correct following the law of contraposition, according to which there is a logical equivalence between a conditional statement (such as $E \rightarrow C$) and its contraposition, that is, the inversion and negation of its antecedent and consequent ($\sim C \rightarrow \sim E$).

42 Cf. von Wright 1971: 38-39, von Wright 2001: 70-71.

43 Its logical form is as follows: $(C_1 \cdot C_2) \rightarrow E$.

44 Its logical form is as follows: $(C_1 \vee C_2) \rightarrow E$.

45 Its logical form is as follows: $E \rightarrow (C_1 \cdot C_2)$.

least one of them occurs. The occurrence of E does not require that one of them in particular occurs, but that at least one of them occurs.[46]

Von Wright calls the disjunction of all sufficient conditions for E within a set of logically independent properties a "total sufficient condition"; and the conjunction of all necessary conditions for E within a set of logically independent properties is called a "total necessary condition". From this (relative) perspective, one can see how many sufficient conditions a given event E has, how many its necessary conditions there are, and what form each of them takes.

In short, a regularistic model of instrumental justification links means and ends through regular or universal conditional relations, such as those just characterised.[47]

4 LIMITS OF THE REGULARISTIC MODEL

The scope of the regularistic model of justification is, nevertheless, limited. Broadly speaking, it expresses the pattern of reasoning when it is required for the justification of certain actions that always lead to the realisation of their aims. However, in discrimination cases (and beyond) something else seems to be generally required, which this model does not capture.

As I will show below, there are important theses that hold that what matters in assessing the justification of general rules is not a regular or universal instrumental relation, but one of a frequentist character. These theses are in line with what courts actually require in many cases. Even if this is not or should not be required in all cases (admitting this would not undermine my main argument), it invites us to think about more suitable models of justification to account for such requirements when they apply.

(1) The first thesis I would like to emphasise deals, in a broad sense, with decision-making based on rules or general criteria. Its starting point is the systematic fallibility of this activity: the fact that such a process usually covers cases that should not be covered according to the reasons for adopting the rules that guide the decisions. It is a more or less imperfect mechanism.[48]

It is precisely this feature that led Schauer to propose that the content of general rules be understood as empirical generalisations of a probabilistic nature. If the possession of such-and-such properties is chosen as the antecedent of a rule, he claims, it is because it is causally relevant to the achievement

46 Its logical form is as follows: $E \rightarrow (C_1 \vee C_2)$.

47 The application of this model in discrimination cases will be illustrated by an example in section §6.

48 This imperfect character is commonplace among those who study the phenomenon of legislation, something already pointed out by Aristotle (Vega López 2017: 28, 31-32).

of a particular goal.[49] And, such a relation is not regularistic but probabilistic: the instances of the rule's content do not always lead to the achievement of its goal, but only with a certain frequency.[50] Hence, such generalisations can be both over- and under-inclusive with respect to individual cases.[51] On this basis, Schauer takes a second interpretive step: he argues that it is precisely this kind of relationship between a rule and its underlying reasons that determines the correctness of the rule.[52] Following the same idea, he has suggested that the prohibition of "arbitrary discrimination", found in the US Age Discrimination in Employment Act, should not be interpreted as prohibiting any generalisation that is not universal, but rather as prohibiting any generalisation that, being frequentist, has no empirical support.[53]

(2) The second thesis I would like to highlight concerns the proportionality test. In examining its elements, Barak refers to the requirement of "appropriateness" as the one according to which the use of a means would "rationally lead" to the realization of the purpose of the means, in the sense that the means "increases the likelihood of realizing its purpose". Indeed, according to the author, it should not be required "that the means chosen fully realize the purpose. A partial realization of the purpose – provided that this realization is not marginal or negligible – satisfies the rational connection requirement" (2012: 303-305). Similarly, Bernal Pulido understands the requirement of "appropriateness" as requiring that the measure in question "has some positive relationship with its immediate objective, that is, that it facilitates its realisation in some way, regardless of its degree of effectiveness, rapidity, completeness and security" (2014: 916).

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49 Behind this assertion lies an assumption that is worth revealing, according to which legislators are instrumentally rational agents. Legislative rationality could be thought of as a condition for the legitimacy of legislative activity, in the sense that our freedoms can only be legitimately restricted if there is a (good) reason for doing so.

50 Cf. Schauer 1991: 25-31.

51 Cf. Schauer 1991: 31-34. Tussman and tenBroek (1948: 347-353) already considered these alternatives in their study of justification in discrimination cases.

52 Cf. Schauer 1991: 27, 29, 31.

53 Cf. Schauer 2003: 117. Notwithstanding this point, it is important to note that when the challenged distinction is based on characteristics such as the sex or ethnic origin of persons, a more robust justification ("very weighty" reasons) is usually required, which may require – among other alternatives – a closer instrumental relationship to the pursued aim, which is *universal* or close to it. Schauer (2003: 128-130, 131-154) himself has illustrated this higher standard by referring, inter alia, to the Supreme Court's 1996 decision against the Virginia Military Institute for sex discrimination ("United States v. Virginia", 518 U.S. 515). For a detailed reading of this decision and a suggested interpretation in line with previous US Supreme Court precedents, see Case 2000. There appears to be a counterpoint between Schauer and Case in their interpretation of the reasoning of the decision. While Case interprets the Court as requiring a generalisation of a universal rather than merely frequentist nature (a "perfect proxy"), Schauer seems to understand that – according to the Court – generalisations based on sex are wrong, regardless of their scope, whether frequentist or universal.

The above theses are in line with the justification requirement actually applied by the courts in certain cases, as the following examples show.

(3) Let us start with a CJEU case in which a difference of treatment based on age was challenged.[54] A city was sued for setting an age limit of 30 years for the recruitment of staff for the "intermediate career in the fire service", a force responsible, *inter alia*, for firefighting and rescue services. The purpose of this age limit, which the Court recognised as legitimate, was "to guarantee the operational capacity and proper functioning of the professional fire service".[55] The CJEU stated that the difference of treatment at issue was "appropriate" and "necessary" to achieve its objective[56] on the basis of the following interrelated reasons. First, because, given the characteristics of the activities to be performed by those workers, "the possession of especially high physical capacities may be regarded as a genuine and determining occupational requirement."[57]

Second, because, according to "data deriving from studies in the field of industrial and sports medicine" provided by the German Government,

> respiratory capacity, musculature and endurance diminish with age. Thus very few officials over 45 years of age have sufficient physical capacity to perform the fire-fighting part of their activities. As for rescuing persons, at the age of 50 the officials concerned no longer have that capacity. Officials who have passed those ages work in the other branches of activities mentioned above.[58]

Third, and finally, because, in order to "ensure the efficient functioning of the intermediate career in the fire service", it is necessary that those who enter this career are able to perform the corresponding duties "for a minimum of 15 to 20 years."[59] According to the information available, only those recruited before the age of 30 could do so; if they entered at that age, they could fight fires for a maximum of 15 years.

As can be seen from the long passage I have quoted, the CJEU held that the age limit was "appropriate" because (it held that it proved that) there is a conditional relationship – in a broad sense – between the age of persons and certain physical abilities required for the performance of fire service activities. What is interesting for us is that, according to the information provided, this relationship is not regular or universal. That is, it is not the case that all officers over 45 years of age (C) lose these abilities (E), so that the former is a "sufficient condi-

54 I am referring to CJEU, "Wolf v. Stadt Frankfurt am Main", 2010, decided by the Grand Chamber of the Court. For a detailed overview of the case law of the CJEU on this issue, see Horton 2018.

55 CJEU, "Wolf v. Stadt Frankfurt am Main", §37-39.

56 CJEU, "Wolf v. Stadt Frankfurt am Main", §44.

57 CJEU, "Wolf v. Stadt Frankfurt am Main", §40.

58 CJEU, "Wolf v. Stadt Frankfurt am Main", §41, emphasis mine.

59 CJEU, "Wolf v. Stadt Frankfurt am Main", §43. The reasons for this can be read in the same paragraph.

tion" for the latter (C → E). What happens, however, is that "*very few* officials over 45 years" continue to have these skills. This is sufficient, according to the CJEU, to qualify the age limit in question as "appropriate".[60]

(4) Let us now examine an ECtHR case on sex discrimination. In the early 1980s, the UK introduced certain immigration rules for family reunification between married persons. These rules were more restrictive for men who applied for entry because they were married to a resident, than for women who applied for the same reasons. A discrimination case was brought against this unequal treatment, which reached the ECtHR.[61] In its defence, the UK Government argued that one purpose of the impugned legislation was "to protect the domestic labour market at a time of high unemployment", which the Court found legitimate. And that since "men were more likely to seek work than women", "male immigrants would have a greater impact than female immigrants on the said market". The debate focused on whether the difference of treatment on this basis "had an objective and reasonable justification".[62] The ECtHR ruled that it did not, employing as one of its main arguments that available information on the difference between "economically active"[63] men and women did not show that similar differences existed – or would have existed – in the respective impact of a husband's or wife's immigration on the labour market had the contested provisions not been applied.[64]

What is remarkable about the case, for our purposes, is the nature of the instrumental assertions that were discussed, which dealt with relationships which, it can be assumed, the Court would have regarded as "appropriate" if it had considered them proved. The hypotheses put forward by the UK Government can be reconstructed purely in frequency terms. One of the most important reconstructions can be formulated as follows: "An increase in the family reunification income rate of male migrants contributes to an increase (or no decrease) in the unemployment rate".[65] This claims that there is a conditional relationship – in a broad sense – between one rate and the other. However, this does not mean that any increase in the former always leads to a corresponding increase in the other. Nor does it mean that every change in the unemployment rate can be explained by a change in the family income rate. It does mean, however, that the family

60 I will return to this in section §6.

61 The case is ECtHR, "Abdulaziz, Cabales and Balkandali v. The United Kingdom", 1985.

62 Quotations are from §74-75 of the judgment.

63 According to some information, 90 percent of the men and (only) 63 percent of the women qualify as such.

64 See §79 of the judgment. Being "economically active", the Court emphasised, does not mean (only) seeking employment with someone else.

65 The ECtHR questioned the government's failure to demonstrate that. This suggests that if the government had done so, the Court would have considered it relevant to the appropriateness test.

income rate is a factor that contributes to a greater or lesser extent, and together with other variables, to explaining changes in the unemployment rate. It is the partial extent to which it explains it that determines its relative causal contribution. This is precisely the point of the ECtHR's other main argument against the UK government's defence: Notwithstanding, the Court was also not convinced "that the difference that may nevertheless exist between the respective impact of men and of women on the domestic labour market is *sufficiently important* to justify the difference of treatment."[66]

(5) Finally, consider the decision of the German Federal Constitutional Court in a well-known case on the restriction of other fundamental rights.[67] The case dealt with a regulation requiring the labelling of tobacco product packaging with warnings about the health risks of tobacco consumption. The commercial freedom of tobacco manufacturers was restricted in the interest of protecting human health. The "appropriateness" of such a measure depended (among other things) on the existence of a certain relationship between smoking tobacco and acquiring health problems such as lung cancer. If one did not lead to the other, there would be nothing to warn about and no health benefit from not smoking.

What kind of relationship would be required to argue, in the context of such a case, that "smoking causes lung cancer" (or any other disease)? It is plausible to think that the two factors would not have to be invariably related, so that someone who smokes (C) will also get cancer (E). That is, a relationship of the type $C \rightarrow E$. Instead, a less close relationship seems acceptable, in which smoking makes some contribution to the disease and increases the probability of getting it. Indeed, it was precisely this type of relationship that the German Federal Constitutional Court considered "appropriate" to justify the labelling requirement. In the 1997 case, it found that a causal relationship had been established between smoking and cancer and other diseases and cited as evidence three research studies published in reputable scientific journals.[68] The distinctive feature of these sources for us is that they did not prove – nor did they claim to prove – that smoking inevitably leads to cancer. Rather, they have used statistical methods to show general associations of a frequentist nature, such as that "about half of all regular cigarette smokers will eventually be killed *by* their habit."[69]

In short, the examples show that there are cases where adopting a means to an end is accepted as instrumentally justified, even if there is no regular relationship between the instances of the two. That is, even if it is not the case that every worker over the age of 45 loses the skills needed by the fire service, or that

66 Cf. §79 of the judgment. I will return to this argument in section §7.

67 I am referring to the tobacco labelling case, 95 BVerfGE 173, 1997, cited by authors such as Alexy (2003a: 136; 2003b: 437) to illustrate part of the structure of the proportionality test.

68 See §55 of the judgment.

69 Cf. Doll et al. 1994: 901.

every new male migrant who enters the country is another person looking for work and not getting it, or that every person who is persuaded not to smoke is a person who is saved from contracting diseases that he would certainly have contracted if he had continued the habit.

In such cases it is sufficient that the means-end relationship is *frequentist* or probabilistic, either because it is assumed that the connection between the relevant factors consists in itself of nothing else, or because, assuming that they are connected in a regular or universal way, only incomplete causal laws are known, without all the conditions which, given together, would ensure that a certain effect always occurs. Therefore to account for requirements such as those contained in the above theses and judgments, it is necessary to consider other models of justification more suitable than the regularistic one. To this end, I will examine a conception of causality, which as its name suggests, has the advantage of being based on relations of the same kind as those required to justify the differences of treatment in the examples that have attracted our attention.

5 PROBABILISTIC INSTRUMENTAL JUSTIFICATION

I will call *probabilistic instrumental justification* any argument according to which performing an action is instrumentally justified because it produces a difference in the probability that the instances of the content of a legitimate end will occur. In this model, premise (b) of the basic schema is modified as follows: "The instances of action M produce a difference in the probability that the instances of E will bring about".

Reconstructing some features of probabilistic approaches to causality will provide some insight into the meaning of the key terms in the previous paragraph. These conceptions understand causal relationships as relative frequencies between types of events and represent them through a probability function.[70] Their basic idea is that "causes" make *a difference in the probability* of their effects, even if they do not always lead to them.[71] It can be expressed, in principle, as $Pr(E|C) \neq Pr(E)$ and reads as follows: The probability of the occurrence of E (the effect) given C (the cause) is different from the probability of the occurrence of E. Based on this conceptual stipulation, and having observed that smoking does makes a difference to the probability of getting lung cancer, it is correct to say that "smoking *causes* lung cancer".

70 A probability function assigns a real number to an event that represents the probability of its occurrence. It has a range of possible values from 0 to 1.

71 I will deal mainly with the contributions of Suppes 1970, Cartwright 1979, and Eells 1991. According to Cartwright (2004: §6), these are the foundations of the more sophisticated approaches that currently characterise probabilistic conceptions of causality. For a more general overview of the history and development of conceptions of causality, see Frosini 2006.

In contrast to regularistic conceptions, probabilistic conceptions allow relationships in which the factors involved (their instances) that are not connected in an invariant or regular way to be qualified as causal. They allow the claim "smoking causes lung cancer" even if the disease also occurs in people who have never smoked (the condition is not necessary for the effect) and even if there are regular smokers who never get it (the condition is not sufficient for the effect). Proponents of probabilistic conceptions see this as a comparative advantage for both epistemological reasons (we would normally only be able to know imperfect regularities) and ontological reasons (in reality, there would be no deterministic relationships between the phenomena we can try to know).[72]

As I have introduced it, the basic idea of difference-in-probability is only an approximation to the way probabilistic approaches understand what I have called the "causal contribution" of one factor to another. How useful such an approach is for our purposes becomes clear when we consider some further details. For simplicity, I will refer to the *positive* causal contribution, i.e., the raise in the probability of the effect due to the cause: $Pr(E|C) > Pr(E)$.

The rise-in-probability we are concerned with is, basically, what is known as a positive correlation. If C and E are positively correlated and follow each other in time in that order, we could say, in the words of Suppes (1970: 12), that C is a "prima facie cause" of E. The expression is a good way of highlighting that something else is missing, that not every correlation translates linearly as a causal contribution. There are still several clarifications that need to be made. Of interest now are those that refer to the need to exclude so-called "spurious correlations".

One factor may be correlated with another because it causes it, or because both are caused by a common third factor. In the second hypothesis, and for the purposes of causal attribution, the association is called "spurious".[73] In probabilistic terms, a correlation between two factors (C and E) is called "spurious" if a third factor (T), when considered and included in the equation, screens off the apparent causal contribution of one to the other.[74] This means that the probability of E given C and T is equal to the probability of E given T.[75] Given T, the occurrence of C makes no difference to the probability of E.

Based on these concepts, the first important refinement of the idea of probabilistic causal contribution is that if a factor C is screened off in its correlation

72 The problem regularistic approaches have in explaining imperfect regularities (as in the example) is one of the reasons often given for probabilistic approaches. The introduction to *A Probabilistic Theory of Causality* by Suppes 1970: 5-10 is illustrative on this point.

73 See Eells 1991: 59, 62 and Suppes 1970: 21.

74 The use of the expression "screening off" in the statistical literature to refer to the mentioned relationships goes back to Reichenbach [1956] 1971: 189-190.

75 That is: $Pr(E|C{\cdot}T) = Pr(E|T)$.

with a factor E by another factor, then C cannot be qualified as the cause of E.[76] If not, C is what Suppes (1970: 10, 21-25) calls a "genuine cause" of E. According to this approach, the probabilistic causal contribution, understood as an unscreened-off positive correlation, is the exclusive contribution of one factor to the rise in the probability of the other. This idea, which is more complete than the first approach, has been further refined. Let us look at two lines of refinement.

On the one hand, attention has been drawn to the fact that the truth value of any causal assertion depends, among other things, on the population to which it refers, or as it is also called, its *reference class*.[77] A change in the reference class may lead to a change in the conditional probability of the associated factors. For example, the probability of suffering a heart attack as a smoker tends to vary with age: it is not the same for someone in their thirties as it is for someone in their sixties. It is therefore suggested that any causal claim, even if implicit, should be understood as referring to a specific population group.

On the other hand, it has been pointed out that not every population – or reference class – is suitable for establishing the causal contribution of one factor to another.[78] Any association between two factors observed in a population or set may be reversed in its subgroups by the effect of a third factor correlated with both. This phenomenon is called Simpson's paradox (or reversal paradox) and raises the question of which correlations are appropriate for causal statements.

A well-known case is helpful in understanding the problem. It comes from a 1973 study of admission at UC Berkeley, which attempted to clarify the influence of the sex of applicants on admissions.[79] Looking at the total number of applications, it was found that women were admitted at a lower rate than men. However, looking at the same data at the level of individual departments, it was found – somewhat simplified – that in each department the proportion of men and women admitted was the same. Although it may not seem so, the two observations at the university and departmental levels are compatible; they can be true at the same time without contradicting each other. In this case, the result was explained by the effect of a third factor: women tended to apply to departments with a higher rejection rate.

The question, then, is which correlation – the one that belongs to which reference class – should be used to establish causal relationships. The answer that has been given is, in simple terms, that one must rely on the correlation that is

76 There is an exception to this, pointed out by authors such as Eells 1991: 59, 167 ff. If there is a case of *causal intermediation*, that is, if E produces C through the production of T, it is permissible to qualify C as the cause of E, despite the fact that T screens it off.

77 See Eells 1991: 1.1.

78 See Cartwright 1979: 422 and Eells 1991: 72. According to Eells, "it is within the appropriate subpopulations that correlations coincide with causation" (1991, p. 3).

79 See Bickel et al. 1975. This study has been cited by Cartwright to illustrate the problem we are dealing with.

predicted on a *causally homogeneous* reference class (or population, or set). So, "C causes E if and only if C increases the probability of E in every situation that is otherwise causally homogeneous with respect to E".[80] This can be expressed as follows:

$$Pr(E|C{\cdot}K_j) > Pr(E|K_j)$$

A population or reference class is causally homogeneous if and only if it is composed of the affirmation or negation of each of the properties that make a causal contribution to the production of factor E, with the exception of factor C, whose relevance is to be established. This description is denoted K_j.[81] If a reference class is homogeneous, there is no additional property that can be introduced into the description that would divide it into two subclasses in which the probability of E is different (which would make it *in*homogeneous). In such a class, any additional property is always screened off by the properties that make it homogeneous.[82] So the only factor that could introduce a change in the probability of E, if it contributes causally to E (and that is what we want to determine), is C.

The suitable reference class for determining causal contributions, the causally homogeneous one, is called the *background causal context* of the corresponding causal assertion.[83] In such an operation, the properties constituting the suitable reference class are said to be held fixed or constant, which means that the contribution of C to the probability of E is measured in a context in which they (its affirmation or negation) occur. Thus, every probabilistic causal statement always includes an implicit *ceteris paribus* clause.

In short, if it is observed that C increases the probability of E, regardless of what other factors are present in the background causal context (which are independent and make a causal contribution), then C is said to make a causal contribution to E. There is a probabilistic causal contribution if, and only if, we have $Pr(E|C{\cdot}K_j) > Pr(E|K_j)$.

The method we are discussing here, by overcoming the problems introduced above, enables us to distinguish between the degree of correlation of C and E and what may be called the *degree of causal contribution* of C to E. The magni-

80 Cf. Cartwright 1979: 423. Salmon (1971: 42-43, 2006: 63) has employed the idea of homogeneity for similar purposes (to develop a model of statistical explanation).

81 Cartwright (1979: 423) makes a clear distinction between the set of properties that make a causal contribution to E, which can be denoted $\{C_i\}$, and the state description (in Carnapian terms) that determines for each of these properties whether it is present in a given reference class or not, denoted K_j.

82 This can be expressed as follows: $Pr(E|T{\cdot}K_j) = Pr(E|K_j)$, where "T" denotes any other property not included in K_j.

83 In this sense, see Eells 1991: 85-86. There is discussion regarding whether C must increase the probability of E in every background context, or at least in one, without decreasing it in the others. See Eells 1991: 94 and Hitchcock 2021: §2.6.

tude of the causal contribution of C to E is equivalent to the correlation between C and E that is not screened off by K_j. That is, the result of the following operation: $Pr(E|C{\cdot}K_j) - Pr(E|K_j)$.[84]

Returning to the example of university admissions, we see that the factor "applying to the most selective departments" makes a causal contribution to the factor-effect "rejection of application" and, as we have seen, we should hold it constant as part of the background context. Once we have done this, we find that the correlation between the factor "sex of the applicant" and the effect is screened off: both are statistically independent given the first factor.

Before concluding this section, it is worth moving from the conceptual level to the level of causal inquiry and noting the distinction between the set of properties whose possession actually makes a causal contribution to a factor E, and the properties whose possession *we believe* makes a causal contribution to E, given the information available at a given time. We might refer to the former as the "objective" homogeneity of a reference class, and to the latter as the "epistemic" homogeneity of a reference class.[85] Causal inquiries are based on epistemically homogeneous reference classes that are selected according to the background information available to us at a given time and in a given context. This suggests that a causal claim can always be false because it was made without sufficient information, i.e., when we think we know all the properties whose possession makes a causal contribution to the phenomenon of interest, but we overlook some of them.

In short, a probabilistic instrumental justification model links means to ends through probabilistic dependencies as characterised here.

6 ADVANTAGES OF THE PROBABILISTIC MODEL

Having formulated a model of justification based on the idea of probabilistic causal contribution, it seems useful to recover some examples to better illustrate the advantages of this model over the regularistic model when it is used to account for what is usually required in discrimination cases (and beyond) when assessing the justification of general rules or practices. This brings us back to what was suggested in §4.

I will take as my main example the CJEU case challenging an age limit of 30 years for recruitment to the "intermediate career in the fire service". I am talking about "Wolf v. Stadt Frankfurt am Main" (2010). Let us briefly recall that, according to the Court, the restriction was an "appropriate" and "necessary"

84 I simplify here the notation used in Eells 1991: 88.

85 In a similar but not identical sense, see Salmon 1971: 44, Salmon 2006: 63. A suggestion in this direction can also be found in Cartwright 1979: 433.

difference of treatment to ensure that those entering the service could perform the relevant activities "for a minimum of 15 to 20 years" in order to guarantee its proper functioning.

Now, the point I have been trying to make could essentially be refocused as a question of how the contribution that a difference of treatment must make to its end in order to be considered justified (for the sake of simplicity, I will hereafter speak of "the required contribution") is specified or can be reconstructed. When this contribution is specified in an unrestricted or categorical way, without allowing for partial concreteness, the regularistic model of justification seems suitable for evaluating the means by which it is pretended to be achieved. If, on the other hand, it is frequently specified, this model becomes too demanding.

In the fire recruitment case, the required contribution to the age limit would be *unrestrictedly* specified if it consisted of "ensuring that all persons entering the intermediate career in the fire service maintain the required physical condition for at least 15 years". This would only be successful if *none* of the new members lost the physical ability to perform their duties fifteen years after recruitment.

If the rule setting the age limit was intended to produce, by itself, an unrestricted contribution like the one just mentioned, the fact that a recruited person does not exceed the age of 30 (C) would have to be at least a "necessary condition" (in the sense analysed in §3) for him to retain physical ability after 15 years of incorporation (E).[86] Thus, if someone older than that age (~C) were to join in violation of the limit, that person would not retain the required capacity beyond that time (~E). It is thus assumed that there is a regular or universal relationship between the two factors, age and maintenance of fitness, of the type ~C→~E.[87]

If we make the proper adaptations, we can introduce what has been said into our basic schema of instrumental justification (presented in §2). To this end, by "AL" we denote the state in which all entrants would have been recruited at the age of 30 or less, and by "Action M" we denote the transition from the state "~AL", in which this criterion was not met, to the state AL. We also denote by "E" the situation in which, 15 years after entry, all new recruits have the physical ability to perform their duties. With these adaptations, the schema would read as:

(a) It is intended to bring about a state of affairs, E.
(b) ~AL → ~E.[88]
Therefore:
(c) Performing action M is instrumentally justified.

86 Assuming that this means is the only one that is used to achieve the purpose

87 Which can also be expressed (as we saw in §3) as E → C.

88 This can be read as follows: If people over 30 are hired (~LE), then not all new recruits will have the physical ability to perform their duties 15 years after the incorporation (~E).

This justification schema, based on universal or regularistic causal contributions such as ~ AL → ~E, is suitable to account for the reasoning when the required contribution is specified, as we have just done in an unrestricted way ("ensuring that all persons entering…").

Now consider the *frequentist* alternative for specifying the required contribution. It could be formulated as follows: "raising the probability that all persons entering the intermediate career in the fire service will maintain the required physical ability for at least 15 years". The required contribution would thus be presented as something gradual, whose unit of measurement is the frequency of occurrence of certain types of events.

By setting the contribution in this way, the legal rule could achieve it – and thus be justified – even if not all persons over the age of 30 would lose the required physical ability before completing 15 years of service (the condition is not sufficient), or if not all persons who would lose the required physical ability before 15 years of service would have entered the service after 30 years of age (the condition is not necessary). It would be sufficient if the probability of losing these capacities increased with age over 45. Or, in other words, that "very *few* officials over 45 years" still have them, as the CJEU stated.[89]

If by "AL" we denote the condition that all recruits must be recruited at the age of 30 or younger, and by "E" the condition that all recruits must still be physically able to perform their duties after 15 years of service, the required contribution, expressed in frequency terms, could be formalised in the following way:

$$Pr(E \mid AL \cdot K_j) > Pr(E \mid {\sim}AL \cdot K_j)$$

It reads as follows: Holding the background causal context (K_j) fixed, the probability of E occurring when AL occurs is greater than the probability of E occurring when AL does not occur.

If we call again "Action M" the transition from the state of affairs ~AL to the state of affairs AL, we can introduce these expressions into our basic schema of instrumental justification:

(a) It is intended to bring about a state of affairs, E.
(b) $Pr(E \mid AL \cdot Kj) > Pr(E \mid {\sim}AL \cdot Kj)$.
Therefore:
(c) Performing action M is instrumentally justified.

This justification schema, based on probabilistic causal contributions of the type $Pr(E|C{\cdot}K_j) > Pr(E|K_j)$, is the suitable model to account for the type of rea-

89 CJEU, "Wolf v. Stadt Frankfurt am Main", §41.

soning when the required contribution is specified in a frequentist way ("raising the probability that…").

As we have seen, each alternative for determining the required contribution has its own model of justification. But which of the two alternatives (and their respective models) is preferable? In the judgement we examined, the CJEU clearly opted for the second alternative, the frequentist version. Although it did not justify this selction, I believe there are reasons for it: It is an excellent way to deal with the consequences of the epistemological problem that follows. At least for generic cases, it is very difficult to know which conditions – alone or in combination with others – are sufficient and necessary to produce this or that effect on a regular basis, that is, to obtain justified and true beliefs about complete causal laws. Therefore, to require as a condition of justification for any difference of treatment that it be shown to make a regularistic causal contribution to its goal would be asking too much and would completely hamper the – systematically fallible – mechanism of decision-making based on general rules or criteria.[90]

The above problem arises in relation to the nature of the causal relationship relevant to the resolution of the case under consideration. It is very difficult, if not impossible, to know the combination of circumstances that must be present for someone to inevitably lose the physical fitness required to be a firefighter after 15 years. Recruitment at over 30 years of age is a factor which, according to the scientific information available to the CJEU, is not in itself sufficient to ensure this outcome. It does not appear to be a "necessary condition" (in the sense discussed in §3) for someone to lose the required skills. It is not unreasonable to assume that some people may become unfit well before their 45th birthday. Moreover, this factor does not seem to be a "sufficient condition" (again in the sense discussed in §3). It is not unreasonable to imagine cases, albeit exceptional, where officers have such privileged anatomy and training that they can live beyond the age of 45 in a condition that still allows them to carry out activities such as firefighting.

Thus, if the CJEU had applied a regularistic model of instrumental justification, it would have had to declare the introduction of the age limit at issue in this case discriminatory because it lacks "appropriateness". And arguably, more broadly, most differences of treatment established by general rules. But as we know, the Court did not so rule. Instead, it applied a probabilistic model of instrumental justification (in a way that can be reconstructed, as I did a few paragraphs ago). It was enough for the Court that the means in question made a probabilistic causal contribution to the achievement of its objective.

The advantages of the probabilistic model for capturing the requirements in discrimination cases when assessing the justification of general rules or practic-

90 This premise about the systematic fallibility of the mechanism of decision making based on general rules underlies Schauer's thesis summarised in §4(1).

es, as illustrated by the above case, are also evident in other relevant examples, such as the German Federal Constitutional Court case on tobacco labelling[91] or the ECtHR case on sex discrimination against migrants.[92] In this respect, the probabilistic model better expresses the reasoning that the courts actually used or would have used given sufficient evidence than the regularistic model. In the first case, a regularistic contribution between smoking (C) and cancer (E) of type $C \rightarrow E$ was not required, but a probabilistic contribution of type $Pr(E|C \cdot K_j) > Pr(E|K_j)$ was. In the second case, no regularistic contribution of type $C \rightarrow E$ would have been required between being a male migrant (C) and looking for work but not getting work, but a probabilistic contribution of type $Pr(E|C \cdot K_j) > Pr(E|K_j)$. A contribution, according to the ECtHR, that should have been "sufficiently important". This brings us to the issue we will address below.

7 FORMULATING LEVELS OF JUSTIFICATION

In sections §3 and §5 I characterised two different versions of the idea of *causal contribution*. For the reasons explained in §4 and §6, I have focused on the probabilistic version. I will now consider some of the regulatory opportunities that arise from understanding the "appropriateness" required to justify differences of treatment as a probabilistic causal contribution. In particular, I will look at the opportunities that arise for the strategy, common in anti-discrimination law, of requiring more robust justification ("very weighty" reasons) for certain kinds of cases by introducing different levels of the justification requirement.

To recapitulate, in §5 we found that the *probabilistic causal contribution* (P-CC) consists of a probabilistic dependence. An event C makes a P-CC to another event E if it produces a difference in the probability of the occurrence of instances of E, without being fully screened off by the causal contributions of the events that are part of the background causal context. As a concept, the P-CC has a quantitative and gradual character. It is expressed by probability functions, which, being positive, can take any numerical value in a range from above 0 to below 1. Its instances are graded by this measure: the higher the value, the greater the degree of contribution.[93]

When we combine this with the other pieces we have been working on, an issue arises that deserves attention. Instrumental justification in cases of discrimination is based on the premise that any action that is "appropriate" to achieve a legitimate aim is to be considered i-justified (if other conditions are also met).

91 See §4(5).

92 See §4(4).

93 If $Pr(E|C \cdot K_j) - Pr(E|K_j)$ were equal to 0, we would say that C makes no causal contribution to E. At the other extreme, if it were equal to 1, we could say that C is the sufficient and necessary cause of E.

Now, we note that if "appropriate" is understood in terms of probabilistic causal contributions, and given the gradual nature of the latter notion, it could always be asked how much contribution should be required? i.e., how much is enough? Anyone who has to decide whether a means-end relationship is "appropriate" will therefore inevitably have to assume, even if implicitly, some answer to this question: whether to accept that any contribution meets the requirement, or only a contribution above a certain (what?) degree. This decision would then involve two types of judgements: an empirical one about the degree of P-CC of a means in relation to an end, and an evaluative one about how much P-CC is sufficient for justification purposes.

If one wanted to avoid the case-by-case evaluative judgement and the unpredictability that this involves,[94] one could try – albeit with limited effectiveness, as we shall see – to define the P-CC required for justification as a categorical rather than a gradual concept. The point is to establish, at the regulatory stage, the level of justificatory requirement to be applied in each case, that is, the degree of P-CC to be considered *sufficient* and thus "appropriate" in this or that class of cases.

The solution can ride on a strategy well known in anti-discrimination law, while also contributing to its refinement. As I pointed out in the introductory section (§1), it is common to require a more robust justification for certain kinds of discrimination cases – those considered particularly harmful to the principle of equality – than for others: "very weighty" reasons. The case law and provisions I have mentioned thus far seem to specify this higher requirement by demanding not only an "appropriate" but also a "necessary" relationship between means and ends.

However, this way of increasing the justification requirement – by directly including the requirement of "necessity" – fails to take advantage of a regulatory opportunity that arises from the gradual nature of the P-CC, a feature that would allow for a higher causal contribution to be required (in addition to some efficiency), if deemed pertinent.[95] The greater the sacrifice to values other than the achievement of the objective of a difference of treatment, the stricter the scrutiny that could be applied and the higher the means-end contribution that

94 On the predictability of judicial decisions and their value in terms of autonomy and power distribution, see Laporta 2007: 127-149.

95 The picture is different, but only partially, in US jurisprudence. The US Supreme Court applies different levels of scrutiny depending on the type of unequal treatment at issue. In terms of means and ends, sometimes a mere "rational" relationship is sufficient, sometimes a "substantial" relationship is required, while at other times only a "narrow" relationship is accepted. See, among others, Tussman & tenBroek 1948, Tribe 1988: 1436-1454, Galloway 1989, Chemerinsky 2006: 677-709, Mathews & Sweet 2010 and Congressional Research Service 2012: 2048-2059. However, the problem of clarifying what degree of causal contribution is meant by each term ("rational", "substantial", "narrow") remains, and could be addressed with the conceptual tools offered here.

could be required as a condition for it to be considered "appropriate" for the purposes of justification.

In what follows, I will present and analyse two ways of categorically defining when there is a sufficient causal contribution (hereafter SuffCC) between a means and an end. One will represent a basic requirement, the other a high one. We will see that in both cases, the strategy of requiring different levels of justifiability is refined with regard to the requirement of "appropriateness". That is, the idea that some differences of treatment should make a greater contribution to the achievement of its end to be considered justified is given a more precise meaning. However, this raises other, not insignificant issues, which I will address in due course.

Let's turn to definitions, starting with the basic requirement:

D1 (basic level). There is a SuffCC between a means (M) and an end (E) if the former makes any positive causal contribution to the latter.

This could be formalised as $\text{SuffCC}(M, E) \equiv [Pr(E|M{\cdot}K_j) - Pr(E|K_j)] > 0$.

Under D1, the statement "The action M is SuffCC to bring about a state of affairs E" consists exclusively in a description of reality, that is, in the utterance of a statement with a descriptive function.

Considering that "any positive P-CC" means producing any unscreened-off increase in probability, we can note that the definition expresses a basic level of requirement, since it is compatible with the contribution having a minimum degree even slightly higher than 0. For D1, any contribution should be considered sufficient.

While the definition serves as a default criterion, we have already seen that for some differences of treatment it is not considered acceptable to require such a weak justification; instead, a more robust one is expected: "very weighty" reasons. This is what the ECtHR and other courts have expressed in some of the judgments cited in §1. It is also what the Plenary of the ECtHR suggested in the example discussed above (§4) about the admission of male migrants: even if they were found to have a greater negative impact on the labour market than the admission of female migrants, the Court was not convinced that this was "*sufficiently important* to justify the difference of treatment" in the interests of employment protection.[96]

Now, for such cases – and irrespective of the additional requirement that the means be "necessary" – stricter levels of SuffCC could be formulated. Suppose that a difference of treatment requires a "very strong"[97] justification and makes

96 Cf. "Abdulaziz, Cabales and Balkandali v. The United Kingdom", 1985, §79.

97 A difference on grounds of gender, race, etc.

a positive causal contribution to its objective, but the instrumental relationship is not considered sufficiently close.[98] In such a case, the distinction could be said to make some contribution to the achievement of the objective, *but insufficient* to meet the proportionality test corresponding to the grounds on which it is based. As such, it is unjustified and therefore discriminatory. This is a way of accounting for those cases where a difference of treatment makes a contribution to its objective but is nevertheless considered unjustified for normative reasons: because the sacrifice made in implementing it would only be justified if the contribution were greater (or because there is no contribution, however great, that would compensate for that sacrifice). Here, justification involves a balancing of the value of the contribution that the measure makes to its objective (recognising that the contribution may be gradual), on the one hand, and against the other disadvantage that its implementation entails, on the other.[99]

As far as I can see, there are at least two ways of leaving the basic level of the justification requirement, which I will call $D2_a$ and $D2_b$. For the sake of simplicity, I will formulate the definition of only one additional level – the *high* one.

> $D2_a$ (high level). There is a SuffCC between a means (M) and an end (E) if the former makes a positive causal contribution to the latter that exceeds a previously defined threshold.

This could be formalised as $\text{SuffCC}(M, E) \equiv [Pr(E|M{\cdot}K_j) - Pr(E|K_j)] > u$, where "u" denotes a specific value between plus 0 and minus 1.

As with D1, under $D2_a$ the statement "The action M is SuffCC to bring about a state of affairs E" consists exclusively in a description of reality, in the description that M makes a contribution that exceeds the applicable threshold.

Although this seems to be a satisfactory alternative, setting the threshold for a sufficient contribution *a priori* has a drawback. It renders the strategy insensitive to the particular characteristics of the phenomena in question and to what is known about the factors that constitute the underlying causal context. This is problematic because a P-CC could be relatively small and still be the known alternative that contributes most to achieving an intended state of affairs. So, discarding it would lead to discarding any effort to achieve the objective. In other scenarios, given the relative importance of a particular objective in a given area,

98 For example, by not having a universal or near-universal scope ("perfect proxy"), as would be required in US jurisprudence for gender-based distinctions, according to the reading of Case 2000 mentioned several notes above, at §4(1).

99 This evaluation is conceptually linked to the so-called "strict proportionality" test. According to the current understanding, for there to be proportionality in the strict sense, "the benefits of adopting the measure in question must clearly outweigh the restrictions it imposes on the conventional principles it affects" (CorteIDH, "Pavez Pavez v. Chile", 2022, § 69).

it could also be the case that small contributions are considered proportional to their "cost" to the principle of equity in any case.

The following definition avoids such a problem, while restoring another:

> $D2_b$ (high level). There is a SuffCC between a means (M) and an end (E) if the former makes a positive causal contribution to the latter that is positively evaluated by the interpreter.

This could be formalised as SuffCC(M, E) ≡ PE[Pr(E|M·K_j) − Pr(E|K_j)], where "PE[…]" denotes the positive evaluation, as sufficient, by the interpreter.

Under $D2_b$, and in contrast to the previous two definitions (D1 and $D2_a$), the statement "The action M is SuffCC to bring about a state of affairs E" has a mixed descriptive and evaluative function. It involves both a description, according to which M makes a causal contribution to E, and an evaluative judgement about its sufficiency. According to $D2_b$, the idea of SuffCC consists of a so-called *thick evaluative concept*.[100]

This alternative delegates the judgement of the sufficiency of the causal contribution of a means to an end to the interpreter. This gives it the flexibility that $D2_a$ lacks, but at the cost of making such an assessment on a case-by-case basis rather than at the general regulatory stage. The decision involves a balancing of the reasons, which in the kind of cases at issue here are typically between the harm or disadvantage associated with the difference of treatment in question (the exclusion of a particular group from access to certain goods) and the benefit associated with the contribution to the achievement of its aim.[101]

Taking stock, the proposed categorical definitions presented here (D1, $D2_a$, and $D2_b$) overcome the indeterminacy that results from translating the required means-end "appropriateness" as a mere P-CC. However, in the definitions expressing higher (non-basic) levels of justificatory requirement, a dilemma arises: a choice must be made between prefixing a sufficiency threshold ($D2_a$) or delegating it to the interpreter ($D2_b$), with the consequence that each regulative choice involves: insensitivity to context or the inclusion of evaluative elements in the idea of SuffCC.

8 CONCLUSIONS

In this paper, I have examined some aspects of the reasoning underlying the assessment of whether a difference of treatment is justified and therefore not covered by the prohibition of discrimination. Let me take stock of the results.

100 For an overview of these type of concepts, see Väyrynen 2021.

101 That is, it is an evaluation that is conceptually linked to the proportionality test in the strict sense.

It can be plausibly argued that[102] to say that a difference of treatment is "discriminatory" means, conceptually, to say that:

it is comparatively harmful to one or more persons;
it is based on the possession by those persons of certain legally protected characteristics (such as sex, race, etc.); and
it lacks *sufficient justification*.

Moreover, the assertion – in this discursive context – that a difference of treatment is "sufficiently justified" means that:

it is comparatively harmful to one or more persons;
it is based on the possession by those persons of certain legally protected characteristics (such as sex, race, etc.); and
it lacks *sufficient justification*.
it has a "legitimate aim";
it is "appropriate" to achieve it;
it is "necessary" to achieve it; and
it is "strictly proportionate".[103]

What does it mean – in this discursive context – to claim that a difference of treatment is "appropriate" to achieve its aim? That is the question I have tried to answer in this article.

The first step was to present the following basic schema for instrumental justification, an argument for assessing whether a difference of treatment is justified and therefore not prohibited as discriminatory:

(a) It is intended to bring about a state of affairs, E.
(b) Action M is appropriate to bring about E.
Therefore:
(c) Performing action M is instrumentally justified.

We have focused on the second premise of the argument: What does it mean to require, as a condition of justification, that a means be "appropriate" to an end?

102 See Giles 2023.

103 This is only a summary of the reconstruction made in §1. It omits many details, such as the fact that case law does not usually require the presence of all these elements as a condition for justifying all unequal treatment.

To answer this question, I adopted an argumentative strategy that can be summarised in three steps. The first step was to elucidate the vague requirement of "appropriateness" as a given *causal contribution*. The second step was to reconstruct the content assigned to the notion of causal contribution by two conceptions of causality: the regularistic and the probabilistic. Both were presented as the basis for two models of instrumental justification, a regularistic one and a probabilistic one.

The third step was to argue for an understanding of the requirement of "appropriateness" as a *probabilistic causal contribution*, and thus for the adoption of the probabilistic model of instrumental justification for cases of discrimination where general norms or practices are at issue. Why? Because it fits better with some theses about what should be required to justify these factors, and what is actually required by courts for this effect.

Such a translation offers some regulatory opportunities. As we saw, an event C makes a *probabilistic causal contribution* (P-CC) to another event E if it produces a difference in the probability of the occurrence of instances of E, without being fully screened off by the causal contributions of the events that are part of the causal context. As a concept, the P-CC has a quantitative and gradual character. If we translate the "appropriateness" of means and ends required to justify an action into a mere P-CC, one could always ask how much contribution should be required? So, anyone who has to decide whether a means-end relationship is "appropriate" will therefore inevitably have to assume some answer to this question. This decision would then involve two types of judgements: an empirical one about the degree of P-CC of a means in relation to an end, and an evaluative one about how much P-CC is sufficient for justification purposes.

To avoid a case-by-case assessment, I have explored various categorical definitions of sufficient causal contribution (SuffCC) for justification purposes. These are alternative options that could be adopted at the stage of legal regulation and help to refine the common strategy in anti-discrimination law of requiring more robust justification – "very weighty" reasons – for certain kinds of cases.

A dilemma arises with definitions that express a higher (non-basic) level of justificatory requirement. A choice must be made between prefixing a sufficiency threshold ($D2_a$) or delegating it to the interpreter ($D2_b$), along with the consequence that each regulative choice involves: insensitivity to context or the inclusion of evaluative elements in the idea of SuffCC.

Given the range of alternatives put forward, the claim that a difference of treatment is "appropriate" to achieve its aim could have one of three meanings, depending on the level of justification requirement adopted for each class of case:

D1 (basic level). The difference of treatment makes any positive causal contribution to the achievement of its aim.

D2a (high level). The difference of treatment makes a causal contribution to the achievement of its aim that exceeds a predetermined threshold.

D2b (high level). The difference in treatment makes a causal contribution to the achievement of its aim that is evaluated as sufficient by the interpreter.

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Hart's judicial discretion revisited

The Harvard Law Review recently, for the first time, published Hart's essay titled "Discretion". It is a carefully arranged version of the lecture which he gave at Harvard in 1956. This essay fills significant gap in Hart's work concerning judicial reasoning. In my paper attention is devoted to his conception of judicial discretion, its two main types (express and tacit), and his understanding of interpretation and rationality related to Hartian discretion. According to Hart, discretion is a form of decision-making in hard cases, which is rational and to some extent constrained by law. However, because no combination of legal rules and principles, properly interpreted, will always give only one legally right answer, the judge in some cases must resort to non-legal reasons, i.e. exercise discretion. Hart's insight that the law is not the sole ground for (judicial) decisions suggests that there is something "out there" (in our "practical universe") that plays a role in the legal "earthly" world, and consequently, in the judicial world as well.

Keywords: Hart, discretion, interpretation, practical rationality

1 INTRODUCTORY REMARKS

The key ideas and concepts about law presented by Herbert Hart in his seminal work, *The Concept of Law* (Hart 1994), have had a tremendous impact on the development of jurisprudence. Whether defending and further developing, or criticizing and using them as the basis for their own original ideas about law—the most significant contemporary legal theorists have regarded them as a convenient starting point.

One of the ideas that has always attracted a great deal of attention in legal theory is Hart's understanding of legal reasoning, which he presented in Chapter VII of the aforementioned book (primarily, in the first two sections). The key concepts on which he bases his conception of legal reasoning are the notion of the indeterminacy of law, the existence of easy and hard cases as a consequence of this indeterminacy, and the concept of discretion when making and justifying decisions in hard cases.

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The ideas that Hart presented in Chapter VII did not come out of thin air. As it is well known, he had already dedicated a section in his famous article "Positivism and the Separation of Law and Morals" to the issue of the open texture of language, the distinction between the core and penumbra of concepts, and easy and hard cases (Hart 1958: 606–615). However, only a few legal theorists were aware that there was another paper that Hart used to articulate his ideas about legal reasoning in *The Concept of Law*. One of them, Anthony Sebok, correctly notes that "(i)n chapter seven, he combined the argument about discretion from his Harvard paper with the core/penumbra argument from Positivism and the Separation of Law and Morals".[1] But what is the Harvard paper that Sebok is talking about? It is an article that ten years ago the Harvard Law Review published under the title "Discretion".[2] In fact, it is carefully ex post arranged version of the lecture that Hart held at Harvard's Legal philosophy discussion group during his sabbatical in America in 1956. This essay by Hart had never been published, and it has been almost entirely unknown.[3]

Bearing in mind his importance and influence on contemporary legal theory, every Hart manuscript that was unavailable to the professional public for so long is a compelling reason to explore how it fits into Hart's wider intellectual biography. However, it is not my intention to address this issue in this paper.[4]

Likewise, my goal is also limited in the sense that I am not addressing the important issues that have surrounded Hart's concept of discretion since the publication of *The Concept of Law*. These are the issue of congruency of the concept with Hartian positivism,[5] sustainability of his philosophical positions vis-à-vis language or meaning in the law,[6] the issue of the "strong" or "weak" nature of Hartian discretion,[7] etc.

I am interested in a more modest task that could be formulated through the following question: will the discovery and publication of the Hart's temporar-

1 Sebok 1999: 104

2 Hart 2013: 652–665.

3 Only a small group of scholars have known that Hart wrote an essay on discretion for the Legal Philosophy Discussion Group, and one of them was Anthony Sebok. He read Hart's manuscript and in a short section of one of his articles analysed some of the essay's themes. (Sebok 1999: 75, 99–100). The other scholars who have mentioned "Discretion" believed the essay had been lost completely (Shaw 2013: 670). However, as soon as it was published in the HLR, the article attracted the attention of the academic public. For instance, the following year its translation into Spanish appeared (cf. Hart 2014: 85–98).

4 In the same issue of the Harvard Law Review, this task was already performed by Nikola Lacey, Hart's biographer. She reflects "from a biographer's viewpoint, on the significance of 'Discretion' for our understanding of the trajectory of Hart's ideas" and "conclude by considering what contribution the essay makes to our overall interpretation and evaluation of Hart's legal philosophy" (Lacey 2013: 637).

5 Cf. Baylis 1992: 174–175; Himma 1999: 73–82.

6 Cf. Vila 2001: 43–76; Sebok 1999: 91–97.

7 Cf. Dworkin 1977: 31–33; Shiner 2011: 3–10.

ily lost manuscript about discretion refresh and advance our understanding of known Hart's ideas about it? And having in mind my opening claim about the attraction of his (undeveloped) conception of legal reasoning and discretion, I take instructive to explore how it fit into another of Hart's theses about the topic.

Briefly speaking, the rediscovered paper seems to be a sort of "transitional form", a missing link, between the final form of his ideas, explained in *The Concept of Law*, and the theses from "Positivism and the Separation of Law and Morals". However, it undoubtedly sheds light on the concept of discretion, which is an important part of his conception of legal reasoning, but nevertheless is not developed in *The Concept of Law*.[8]

One final caveat: in the taxonomy of discretion in law, Hart did not consider discretion solely in courts. He was concerned with other institutional settings where the concept plays a significant role as well. However, in this article I will deal exclusively with *judicial* discretion, because judges and courts are at the centre of Hart's attention, and the attention of other legal philosophers, when it comes to legal reasoning.

In the second section I will describe something what we have already known about Hart's understanding of the concept of discretion as it is presented in *The Concept of Law* and several other of Hart's well-known works. Next, I will look at the discovered manuscript and analyse the concept of discretion that is the central topic of the paper. Special attention will be paid to Hart's understanding of the general concept of discretion and taxonomy of discretion in law. In the fourth section, I will try to draw several tentative conclusions from Hart's considerations about judicial discretion (both from his previously published works and from the rediscovered Harvard lecture), that is, those related to his two main types of discretion, *express* and *tacit* discretion. The fifth section is devoted to conceptual clarifications regarding the two concepts that are closely related to the Hart's concept of (judicial) discretion: interpretation and rationality.

2 HART ON JUDICIAL DISCRETION – WHAT WE ALREADY KNEW

At the beginning I will briefly recall what is already known, namely what Hart said about *legal reasoning and adjudication generally* in his published papers, especially in *The Concept of Law* and the Holmes lecture, also held in Harvard, in Positivism and the Separation of Law and Morals, as well a in several other works.

8 The concept of discretion has especially entered the mainstream of theoretical discussions since the 1970s (cf. Vila 2001: 1–4).

I start with something which can perhaps be considered as his initial, theoretical and practical motivation for addressing these questions. As it is well known to legal philosophers, at the very end of the article about American jurisprudence (Hart 1983: 123–144), Hart depicted American jurisprudence as captivated by two extreme views, the Nightmare and the Noble Dream. The nightmare run as follows: the judges always make and never find the law when they decide the litigation. On the other hand, noble dreamers claim that judges never make the law, and the noblest of them all contend that in every legal case there is the right *legal* answer. However, Hart thinks that

> (l)ike any other nightmare and any other dream, these two are … illusions, though they have much of value to teach the jurist in his waking hours. The lesson is that sometimes judges do one and sometimes the other. It is … of course a matter … of very great importance which they do and when and how they do it (Hart 1983: 144).

This "matter of very great importance", Hart particularly considered in several works, beside this recently discovered paper, although he wrote them after it. What are his principal theses about this "matter"? In the "Positivism and the Separation of Law and Morals", the main conceptual tool in the struggle with problems of adjudication is the distinction between core and penumbra of meaning, which is the consequence of the open texture of language. In the article, Hart explains the difference between core and penumbra of meaning in the following way:

> If we are to communicate with each other at all and if, as in the most elementary form of law, we are to express our intentions that a certain type of behaviour be regulated by rules, then the general words we use ... must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some features in common with the standard case; they will lack others or be accompanied by features not present in the standard case (Hart 1958: 607).

Thus, most words, both in ordinary language and in law, have the core of a settled, *standard* meaning. This core meaning includes all the individual instantiations that the word, in a given language community, clearly covers.[9] Obviously, the standard meaning of a word is not understood by Hart in terms of necessary and sufficient conditions of its meaning.[10] To use the vocabulary of contemporary cognitive psychology, the standard meaning of words would

9 "General terms would be useless to us as a medium of communication unless there were such familiar, generally unchallenged cases". Therefore, "if anything is a vehicle a motor-car is one" (Hart 1994: 126).

10 As Marmor put it, "(a)lthough no single defining feature shared by all the standard examples (in the core) can be specified ... this does not mean that they are not standard examples" (Marmor 2005: 102).

be the same as the prototypical meaning. Otherwise put, such terms possess a so-called categorial vagueness (Devos 2003: 124).[11]

Therefore, there will often be cases (so-called borderline cases) that are not covered by the core meaning of the term, nor are they completely outside the scope of the meaning of that term, but we discover them in its penumbra. Thus, the natural language, due to the use of general terms in general legal rules, produces indeterminacy (or vagueness) in borderline cases.

However, while in his Holmes lecture Hart writes about the vagueness or open texture of *language* as a cardinal reason for the indeterminacy of law, later (in the Preface to Essays in Jurisprudence and Philosophy) he finds that the vagueness of language, in itself, does not have to lead to indeterminacy of law. The language in law has a normative function.[12] Therefore, it is an oversimplification to designate language conventions as the source of indeterminacy of law, as itself. Hart underlines that the judge can clearly determine the content of the rule using other resources beside plain meanings of words. Thus, Hart states that "the obvious or agreed purpose of a rule may be used to render determinate a rule whose application may be left open by the conventions of language".[13]

This subsequent correction and "concession" (Schauer 2007: 1129) is actually *the reverse side* of Hart's central idea as to why there is indeterminacy in law, which he described in *The Concept of Law*. Namely, it is not possible to regulate all future situations and combinations of facts with rules that clearly and precisely provide in advance the legal consequences of each of them and thus exclude the possibility of the "fresh choice between open alternatives".[14] It is necessary that such a choice sometimes exists, according to Hart,

> because we are men, not gods ... we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim. If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could com-

11 Categorically vague concepts do not have a clearly defined content, which means that it is not always clear whether a "narrower" concept falls under a given concept or not. With these concepts, there is an "internal" indeterminacy in terms of features that would be considered necessary and sufficient to bring a phenomenon under the concept (Devos 2003: 124). The most famous illustration of such a concept in legal theory is the concept of "vehicle" from Hart's example of the "no vehicles in the park" rule (Hart 1994: 126–128).

12 Application of rules means that the judge must decide that "words do or do not cover some case in hand", having in mind *practical consequences* involved in the decision (Hart 1958: 607).

13 Hart 1983: 8, 106.

14 Moreover, Hart adds that even if it were possible to achieve this, even if natural language does not have an open texture, this would not be desirable (Hart 1994: 128)

> bine were known to us, then provision could be made in advance for every possibility (Hart 1994: 128).[15]

The indeterminacy of law is, therefore, a consequence of the basic inability of people to predict the future, from which comes the ignorance of the facts that will appear and to which law should be applied. A consequence of this ignorance is the indeterminacy of the aims that we want to be achieved by law. Because of that, lawmakers cannot encompass and regulate completely all the cases that might require regulation or express aims with enough clarity to resolve all future cases without contestation (Hart 1994: 131–132).[16]

And, as a consequence of the indeterminacy of law, easy and hard cases before the courts can be distinguished. Easy cases are those in which there is general agreement that they fall within the scope of a rule, where there are no doubts about the content and straightforward applicability of a single legal rule (Hart 1983: 105–106). Indeed, legislators regulate a large number of situations with relatively clear rules, which do not leave room for choice between open alternatives. In other words, in easy cases, people will easily recognize the actions, circumstances or persons that are provided for in the rules, as instantiations of generic terms in the rules, and will simply and routinely apply them on particular cases.

On the other side, in so-called hard cases there are (legal) reasons both for and against one or more resolutions under consideration. In addition to hard cases where categorically vague concepts cause uncertainties, they also sometimes appear in the application of so-called legal standards. Namely, very aware of the described predicaments of the human condition (ignorance of fact and indeterminacy of aims), or precisely because of them, lawmakers often resort to the long-standing and prolific regulatory technique—they "produce" legal standards. Although they are indeterminate directives, standards are necessary legal "device" to achieve

> compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open,

15 In fact, Hart mentions for the first time the indeterminacy of aims and the ignorance of facts as reasons for the indeterminacy of law in the temporarily lost Harvard paper. These passages were not mentioned in the lecture from 1958, but they reappeared in *The Concept of Law*. Actually, as Shaw rightly notes, "Discretion was in some respects a rehearsal for parts of his later published work, the essay presented vivid examples, detailed explanation of ideas he would mention only in passing in other writings, and ideas that, in the context of his broader work, mark uncharted territory" (Shaw 2013: 694).

16 In the discovered paper, Hart uses "no vehicles in the park" not to ground the argument for indeterminacy of law in vagueness of language, but as an example to illustrate the idea that rules are indeterminate because no legislator can predict all the cases that might require regulation or determine aims without ambiguity in order to resolve all future litigations fully (Shaw 2013: 704).

> for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case (Hart 1994: 130).

As an illustration, Hart refers to the standard of due care in cases of negligence,[17] and explains that "owing to the immense variety of possible cases where care is called for, we cannot ab initio foresee what combinations of circumstances will arise nor foresee what interests will have to be sacrificed or to what extent".[18]

So, it is clear that Hart belongs to the long tradition of lawyers who understand the legal system as a body of rules, standards and principles that occasionally give place to indeterminacy and *open texture of law* in particular legal cases. But, what does the judge really do or should do when in a particular case he confronts legal indeterminacy? In other words, what does the judge really do or should do in hard cases? There is a belief that, if a particular legal rule proves itself as indeterminate in a given case, preventing the court from justifying its decision in the form of deductive syllogism, then the decision which the court gives is and can only be a legally unconstrained, arbitrary decision. It is also referred to as a notorious nightmare or at least as a bad dream. However, Hart does not think so.

> (I)t is obvious that … the dichotomy of logical deduction and arbitrary decision, if taken as exhaustive, is misleading. Judges do not generally, when legal rules fail to determine a unique result, intrude their personal preferences or blindly choose among alternatives; and when words like "choice" and "discretion" ... are used to describe decisions, these do not mean that courts do decide arbitrarily without elaborating reasons for their decisions—and still less that any legal system authorizes decisions of this kind (Hart 1983: 106–107).

Hence, Hart's answer to the conundrum from the beginning of this section is the "middle path".[19] In hard cases the judges do and should exercise discretion. But oddly enough, in his published works, he mentions this term very rarely. In one important statement, he says that "in every legal system a large and important field is left open for the exercise of *discretion* by courts ... in rendering initially vague standards determinate, in resolving the uncertainties of statutes".[20]

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17 Hart mentions the same example in the Harvard paper. Generally, in later works Hart often uses thoughts, analysis, even verbatim formulations from this paper.

18 Hart 1994: 133.

19 This "middleness" of Hart's thought vis-à-vis judicial reasoning is briefly explained by Shiner. "It is clear in Chapter 7 that some of Hart's main philosophical opponents are the rule-sceptics, those who deny any certainty anywhere in the legal system. How can such views be better countered than by simple straightforward reminders of just how much certainty there is in legal rule-making and rule-following? Others of Hart's opponents are the formalists, those who find complete certainty everywhere in the legal system. How can such views be better countered than by simple straightforward reminders of just how much flexibility there is in legal rule-making and rule-following?" (Shiner 2011: 12).

20 Hart 1994: 136, emphasis by author.

But, still it stands the strange fact that Hart did not define or analyse discretion anywhere. Or at least—almost nobody knows that he has.

3 HART ON JUDICIAL DISCRETION – WHAT DID WE NOT KNOW?

Let's turn now to Hart's misplaced essay and identify the basic tenets of the concept of discretion, which he extensively explained in it. In his lecture, Hart intended to set the stage for the future work of the Harvard discussion group, because discretion was the main subject of discussion that year. In this respect, he begins with a few conceptual questions about discretion. According to the exercise of his linguistic method, Hart believed that providing an account of a concept requires analysing the way native speakers use the words associated with that concept. Therefore, to analyse discretion, Hart investigates the standard uses of the word "discretion" in different contexts—legal and nonlegal—and then establishes the general features of the concept.[21]

Regarding the legal context, Hart considers a list of cases where the word "discretion" is used in the legal system. He does not mention discretion in courts alone, because it appears not only in judicial adjudication, but also in other institutional settings. Hart's taxonomy of discretion in law is not quite simple, however, for the purpose of this paper, it can be reduced to two main types. First, lawmakers explicitly delegate discretionary power to administrative officials or agencies—the powers, say, to issue licences for fishing, to set tax reliefs, to provide subsidies for start-up businesses, etc. In Hart's terminology, these are examples of "Express or Avowed Discretion". More important for this analysis, the court's application of legal standards in particular cases also belongs to this type of discretion (Hart 2013: 655), such as standards of due care in civil negligence, or the best interests of child. On the other hand, in cases of so-called "Tacit or Concealed Discretion", there is no explicit allocation of discretionary authority to an official. This type of discretion exists when legal rules do not provide one and only one legally acceptable result in a particular case. Key examples of this category are "disputable questions of interpretation" of statutory or other written legal rules (Hart 2013: 656).[22]

In accordance with his favourite philosophical method of conceptual analysis, Hart "enumerates" cases of standard use of the term discretion only in order to arrive at a definition of the concept of discretion by analysing them. Namely,

21 Hart intended to give a description of the core meaning of discretion: when we all agree that it is present, what is discretion? Therefore, he did not deal with penumbral situations that may or may not be classified as discretion. (Hart 2013: 654; Shaw 2013: 696).

22 In this context, Hart also mentions the use of precedents, but in the article, I deliberately avoid the idiosyncrasies of the common law system.

when it is taken that the word X denotes the concept "X", it is actually claimed that all those "situations" that are "covered" by that concept have a certain common structure or that they are constituted in a mutually coherent manner. In other words, we assume that all members of the set of phenomena that we commonly label with the same term are interconnected in a deeper, more significant way, and not just by the use of the same word to label them. Most often, there are also certain common characteristics that each member of the set possesses and because of which we classify all members of the given set as the same concept. To clarify these characteristics of the concept "discretion", Hart further analyses some extra-legal situations in which the term discretion is also used. Actually, as Shaw notes "the full contour of Hart's account began to take shape at this stage in the analysis, as he set out simultaneously to distinguish discretion from raw choice and from determinate rule application".[23]

Firstly, Hart concludes that it would be wrong to equate the exercise of discretion with the concept of choice, even though the two concepts are related. For instance, when someone at the cocktail party chooses to take a martini instead of a sherry, they do not exercise discretion, if the reason for the choice is their taste. Unlike this "mere" choice, "discretion is ... a near-synonym for practical wisdom or sagacity or prudence".[24] Even its etymology suggests that it is, "the power of discerning or distinguishing what in various fields is appropriate".[25] Therefore, in Hart's opinion, it would be absurd to speak of discretion when we make a choice according to our personal liking, prejudices or, simply, following a hunch or a whim. Discretion is exercised only when the choice is exhibited "as wise or sound", and that means, as justified by a "principle deserving of rational approval".[26]

Secondly, and more importantly for law, there is no discretion when we "choose" to respect a clear rule. For instance, when the national anthem is played and you stand up, the answer to the question "why did you do this?" is not "because I wanted to", but you will refer to the clear rule that dictates such behaviour in the particular situation. And although it can be said that you rightly "choose" to stand up, according to Hart "it would be misleading to describe [it] as the exercise of a discretion".[27] Briefly speaking, "if the answer is clear … and there is no plausible way the decision could go differently consistent with the rules being applied, the decision does not involve discretion".[28]

To establish more definitive elements of the concept of "discretion", Hart calls on us to imagine a young hostess who is throwing her first dinner party

23 Shaw 2013: 698.
24 Hart 2013: 656.
25 Hart 2013: 656.
26 Hart 2013: 657.
27 Hart 2013: 658.
28 Shaw 2013: 700.

and faces the dilemmas: should she use the best knives for this occasion (beautiful old silver) which are well suited for snowy tablecloth and the classy glasses. On the other hand, the knives are heavy, not very sharp, and a little bit pretentious. Generally, the hostess's aims are relatively clear: to have a beautiful dinner table, but also to please her guests. How will she reach the decision? Having in mind the aims, "costs and benefits", maybe even advices from an older cousin, "the hostess … thinks out the possible disasters and some possible good consequences from the courses before her: she *balances* one consideration against another".[29]

Based on all the previous considerations, Hart summarises his explanations of *the core* of the concept of discretion through six features. First, there is no "clear right" decision. Second, "[t]here is not a clear definable aim", which would conclusively determine the content of the decision, because "we … have to weigh and choose between or make some compromise between competing interests and thus render more determinate our initial aim".[30] Third, the consequences of possible decisions are not clearly known in advance. Fourth, "[w]ithin the vaguely defined aim of a successful dinner party, there are distinguishable constituent values or elements (beauty of the table, comfort of the guests, etc.), but there are no clear principles or rules determining the relative importance of these constituent values or, where they conflict, how compromise should be made between them".[31] Fifth, words like "wise" and "sound" make more sense when describing discretionary decisions than words like "right" or "wrong". Sixth, Hart believes that discretionary decisions are defended in two different ways if they are called into question: justification and vindication (Hart 2013: 660).

Now let's get back to the law. According to his own words, the basic classification of discretion in the law

> [I]s designed to emphasize the contrast between the cases where the sphere to be controlled is recognized ab initio as one demanding control by the exercise of discretion [Avowed Discretion] rather than by specific rules … and on the other hand cases where there is an initial attempt to regulate by specific rules but these are found in the course of actual application not to yield a unique answer in specific cases because combinations of circumstances … are outside the range of concrete applications considered at the time of the formulation of the rule. This is the common choice of disputable questions of interpretation of statutes or written rules. (Hart 2013: 656).

Judges confront hard cases, observing both kinds of discretion. When they decide about applicability of legal standards (such as "due care in cases of civil negligence" or "best interests of a child") judges have *express* or *avowed* discretion. On the other hand, when the indeterminacy of law is about vagueness of legal rules, then it is *tacit* discretion at play. In relation to this basic taxonomy,

29 Hart 2013: 659. Emphasis by author.

30 Hart 2013: 663.

31 Hart 2013: 659.

Hart believes that the optimal conditions and factors that affect the exercise of express discretion are different from those that affect the exercise of tacit discretion. For example, Hart states that "where discretion is used in the course of judicial determinations in the attempt to apply rules, the weight of factors such as consistency with other parts of the legal system will be prominent, whereas they may be at their minimum in cases of Avowed Discretion".[32] In the following section, I will attempt to (re)construct the Hartian image of these two types of discretion in more detail.

However, before that, at the end of this section it should be mentioned, that Hart does not stop his work at the conceptual level. He continues his lecture with remarks about the place and institutional and normative importance of discretion in a legal system. First, he asks "must we accept discretion or tolerate discretion, and if so, why?" The answer to that question is well-known, because it was later reiterated in *The Concept of Law*. Briefly, the reasons why we must accept discretion in the law are two predicaments of human conditions: ignorance of fact and indeterminacy of aims. There is no need here to repeat what was said about it in the previous section.

Second, in the lost essay, Hart also considers normative questions like "What values does the use of discretion menace, and what values does it maintain or promote?"[33] Hart's answer is that discretion is the best way of resolving cases with no clear answer, i.e. the virtue that allows such inevitable cases to be ruled by law instead of whim (Shaw 2013: 703; Hart 2013: 661– 665). Otherwise put, in borderlines cases, and the cases in which they must apply legal standards, judges *should* decide discretionally, because only in deciding so, they do not make arbitrary decisions. On the other hand, if judges decide by whim, personal preferences, or prejudices, they indulge in some other kind of game other than the game of the legal system, to borrow Hart's own word. One of the basic rules of the "rule of law" game is that judges should be guided by law and *reason* rather than political predilection, personal passion, or prejudice. Consequently, judges should not decide hard cases in accordance with individual preferences but in accordance with the directives of law *comprehended by reason* (Vandevelde 2011: 241). According to Hart, only discretionary decision-making in hard cases is in line with the idea of the rule of law. Therefore, his idea of discretionary decision-making is not only a description of the part of the court's practice but also the normative principle of good judicial practice. In that sense, Hart's Harvard paper also carries strong normative message.

32 Hart 2013: 665.

33 Hart 2013: 652.

4 (RE)CONSTRUCTION OF HART'S TYPOLOGY OF JUDICIAL DISCRETION

The principal difference between "express" (avowed) and "tacit" discretion is that the former made no pretence to setting out standard instances of a rule at the core, while the latter offered a set of standard instances through the authoritative written language of the statute. Even though it is usually endorsed "to describe the distinction between rules and discretion in terms of a distinction between rules and standards",[34] Hart considers both rules and standards as potential "sources" for exercising discretion.

Both kinds of discretion, Hart believes, must be exercised rationally. In both ("express" and "tacit") forms discretion occupied a middle position between whim and the "choice" of following clear rules and principles. However, he also believes that these two types of discretionary decision-making require attention to different factors (Hart 2013: 656). Therefore, this (re)construction will examine what Hart claims about two basic types of judicial discretion, taking into account both his ideas that were already known and as those that we have recently come to know.

4.1 Express (avowed) discretion

Legal standards, such as "due care" or "best interests of the child", are the cases of so-called "extravagant", excessive vagueness (Endicott 2011: 18–19). Their fundamental property is that they "include" a multidimensional evaluation with (at least some) incommensurable constitutive elements.[35] Excessively vague terms are also vague in the basic meaning of the term "vagueness": they have a core of clear meaning and a penumbra (Hart 2013: 663). However, in the case of these terms, whether something is in the penumbra is determined by a series of mutually incomparable dimensions or factors, which distinguishes them from categorical vagueness involving the presence or absence of typical characteristics of the term.[36]

Precisely because of this indeterminacy of the factual predicate, the standards do not offer a single correct answer to legal questions *in every case*. However, even in such "no-single-correct-answer" cases they do provide some constraints. For example, if an officer orders a sergeant to select the three expe-

34 "where rules, under this terminology, are highly precise, and standards are broad and open-ended" (Schauer 2005: 11).

35 Distinguishing this type of concepts, Hart calls them "multidimensional generalities" (Hart 1958: 607).

36 What makes legal standards attractive to legislators is precisely this "elusiveness" of reference, which stems from their multidimensionality. The reference of such terms can change from context to context, and this makes them suitable for the legislator, which uses them to leave it up to the courts to determine what they "mean" in each specific case.

rienced soldiers from his platoon to scout enemy positions (Dworkin 1977: 31–32), the general framework for selecting soldiers exists—the sergeant will not be able to rationally justify the selection of three novices for that task. However, if it happens that there are more than three experienced privates in the platoon, the sergeant—if he decides discretionally, in accordance with Hart's understanding of discretion—will take into account other factors in the selection. For example, he can consider specific experience in the execution of the specific type of task, the current physical and mental condition of the soldiers, the fact that some of them know the local terrain better than others and so on and so forth. Finally, in these further considerations, if there are several "candidates" for the execution of the task, and some of them better satisfy one factor while others better satisfy another, the sergeant will rationally balance between different factors, and then he will make his choice.

Similar can be said for legal standards such as the standard of "due care" (Hart 2013: 663) or "the best interests of the child". For example, "the best interests of the child", which guides the judge when deciding where the child will live after the parents' divorce, is a multidimensionally vague concept, as there are many potential dimensions or factors that the judge takes into account when making the decision (Vandevelde 2011: 96). These factors include "external" ones, such as the cultural and moral values of the community. On the other hand, internal factors are related to the child's personal characteristics, such as the child's wishes, age, and gender, their physical and emotional needs, as well as the suitability and ability of the parents to meet the child's needs (Vlašković 2011: 355–361). The latter includes the parents' financial, health, and mental states, their current family circumstances, their occupations, quality of their relationship with the child, etc. When dealing with borderline cases, the judge will weigh different factors, as Hart describes in the example of a hostess organising dinner party. Although these factors are, broadly speaking, subordinate to the child's interest, it does not mean that they cannot be in conflict, and the judge, if they are in conflict, will choose the ones they consider more important.

As can be seen, the example described has elements that Hart attributes to the concept of discretion (analysing the case of the hostess and her dinner party),[37] because in both situations there is no "clear right" decision and "a clear definable aim", although this vaguely defined aim ("the best interests of the child") undoubtedly excludes certain factors and answers from the outset.[38] In addition, this general aim includes "distinguishable constituent values or elements but there are no clear principles or rules determining ... where they

37 "Nearly every one of the factors which characterize the dinner party situation may be found in the legal literature concerning discretion in the Law" (Hart 2013: 660).

38 General terms as "a successful dinner party" "excludes quite definitely a number of determinate things such as the discomfort of the guests, ugly appearance of the table, and so on" (Hart 2013: 659).

conflict, how compromise should be made between them".[39] Therefore, as in the case of the dinner party, the decisionmaker must rely on her own reasonableness, sagacity and experience (or "older cuisine") in weighing different factors.

Finally, it is clear that no matter how they decide in hard cases of application of the legal standard, the judge does not interpret the law, strictly speaking, that is, they do not attribute meaning to the words from the standard.[40] As Endicott stated about the standard of reasonableness: "If ... the law requires you to do what is reasonable, you will need a technique other than interpretation in order to identify the reasons at stake".[41]

One of the most important among these techniques, in my opinion, is a sense of appropriateness that develops through life experience in the community. Application of legal standards, as instances of excessive vagueness, rely on the experiences and understandings of a particular community. On the one hand, the diversity of concrete experiences and understandings condensed into an indeterminate (vague) formulation is the reason for their indeterminacy; but on the other hand, it contributes to their reference in a specific context remaining dependent on that context, based on the general understanding of the community about what is an appropriate pattern of behaviour in a particular situation that the standard prescribes "here and now". This allows legal subjects to have an idea of how to conform their behaviour to the standard in a specific situation, for example, most parents will know what is "in the best interests of the child". However, this can also be helpful for a judge who is a member of the same community when applying such a standard. On the other hand, as Barak observes, the exercise of discretion can be informed by the experiences and perspectives that develop within a narrower, *legal* community, i.e., by "the professional views of the legal public" (Barak 2005: 208).

Finally, it seems that Hart himself takes the similar route. Namely, he argues that when it comes to discretion, the focus should be on "the study of what standards we appeal to when looking back upon a range of discretionary decisions we say typically such things as, 'That was a satisfactory compromise between different values'". He mentions "*the judgment of a plurality of impartial spectators*" as one of the two possible standards (Hart 2013: 665).[42] It is clear that this "plurality of spectators" can be none other than (members of) the (wider or narrow) community.

39 Hart 2013: 659.

40 "(A)lthough it is true that determining what behaviour is 'unreasonable', or what decision is in 'the best interests of the child' is in the totally formal sense a process of subsumption under those words ... these formal similarities may mask substantial, non-formal differences" (Schauer 2012: 314).

41 Endicott 2012: 109.

42 It is clear that Hart, at this point, evokes the old idea of Adam Smith's "impartial spectator" procedure (Alexy 2009: 11).

4.2 Tacit discretion

According to Hart, tacit discretion appears, among other situations, when courts *interpret* statutes in a particular case. It is mentioned in section three that Hart, as an example of tacit discretion, refers to cases that cannot be classified as belonging to the core of categorically vague concepts but are located in their penumbra (for instance, whether an electric scooter is a "vehicle" in terms of the "no vehicles in the park" rule). How does a judge reason when a borderline case appears—a case that falls under a concept that is located in the penumbra of a categorically vague concept? It seems that the (re)construction of Hart's ideas from the analysed article, as well as from his subsequent works, can proceed in the following direction.

In penumbral cases, the judge cannot directly and routinely apply the rule, because "such unprovided cases will certainly have some features in common with the clear standard cases and yet differ from them in respects which are relevant".[43] In such hard cases, the judge is, of course, bound by the relevant rule or set of rules. The judge must not ignore the applicable rule; that is, they are obligated to include it as a basis for their decision-making, which is why in such cases judges resort to interpretation.[44]

However, Hart argues that in order to come to a solution that is not predetermined by the rule[45] judges use (tacit) discretion in their interpretation. In the next section I will consider in more details the relationship between discretion and interpretation in Hart's theory. At this point, I will only highlight the difference, which is recognizable from the (re)construction of Hart's thesis on discretion, between the "discretion" that exists in the course of interpretation and the discretion that appears (and which, in my opinion, is the Hartian discretion, "properly so called") when none of the traditional formal interpretative arguments[46] can serve as a prevailing reason for a decision in the hard case. What is the difference here?

43 Hart 2013: 662.

44 "(W)here a statute is involved, particular regard must be had to the exact words used. The fixed verbal formulae of the statute, then are, in a particular way, always essential 'material' on which 'interpretation' does its work" (Summers & Taruffo 1991: 475).

45 When it is said that "it is not predetermined by the rule", this does not mean that it is not predetermined by the meaning of a single term (as is the case with the example of "no vehicles in the park"). As Raz argues: "(P)roblems of interpretation are rarely problems of the meaning of one term or phrase. They are more often than not questions of the interpretation of sentences, or of articles in statutes or in constitutions" (Raz 1998: 177).

46 Insights presented in the well-known book on comparative theory and practice of interpretation (MacCormick & Summers 1991) served as a convenient heuristic framework for this analysis. In one of the summary chapters of the book, the difference between formal and substantive reasons for a court decision is emphasized as follows: "(F)ormal (interpretative) reasons are ones that arise essentially from authoritative sources of law including the statute itself and related statutes, any constitution, any precedent on the meaning of the statute,

Namely, when it comes to the "factors" that influence a judge's decision in a hard case, Hart mentions some of them here and there. For instance, one of these factors that Hart points out in Harvard paper is the legal system. Namely, he says that "where discretion is used in the course of judicial determinations in the attempt to *apply rules* the weight of factors such as *consistency* with other parts of the legal system will be prominent".[47] The purpose that may be attributed to the rules is the latter. Namely, judges resort to "some general aim or purpose which some considerable relevant area of the existing law can be understood as exemplifying or advancing and which points towards a determinate answer for the instant hard case".[48]

There is no doubt that these Hart's words actually describe some of the commonly accepted interpretative reasons for judicial decisions (arguments from statutory purpose, systemic arguments).[49] Therefore, the judge will endeavour to decide a hard case without resorting to Hartian discretion ("properly so called"), by using systemic and purposive interpretation. For instance, it is often possible to identify purposes *in a standard case* that can be, *by using analogical reasoning*,[50] applied to determine whether the penumbral case can or cannot be resolved in the same way as the standard, easy case. Or, it would be possible to ascribe to the *rule* the meaning which coheres best with a legal principle or principles "operative within the field in which the case falls".[51]

On the other hand, as it is well known, hard cases are "hard" precisely because the interpretative arguments that are applicable in those cases can lead judges in different directions. As Hart himself observes, "[m]ay not the legal system contain conflicting principles? May not a given rule or set of specific rules be equally well explained by a number of different alternative hypotheses? If so, will there not be need at these higher levels for judicial choice … ?"[52]

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any precedent on interpretational method, any relevant regulations or official interpretations, any general principles of law, the logic of relevant legal concepts, any authoritative policies in the area, and official *travaux preparatoires*". On the other hand, "substantive reasons include rightness reasons arising under moral norms, goal reasons arising from possible social policy goals, and various institutional reasons arising from features of legal institutions and processes" (Summers & Taruffo 1991: 488–89). The force of the latter "depends more or less on their weight" and is not dependent on a connection with authoritative sources, to which formal reasons are attached. In the following pages, I will refer to the first reasons as legal, and the second as non-legal.

47 Hart 2013: 665. Emphasis by author.

48 Hart 1994: 274.

49 In another context, as will soon become apparent, Hart mentions other interpretative arguments, such as arguments appealing to general legal principles or arguments from analogy.

50 Cf. Dajović 2021: 747–749.

51 "The legal character of such principles may be grounded in the constitution, or in general statutory law, in non-constitutional case-law, or in a pervasive legal tradition" (Summers & Taruffo 1991: 466).

52 Hart 1983: 136.

Indeed, when judges must decide, faced with conflicting interpretative reasons, they will be forced, when making a decision, to "choose" between them. However, is this the kind of "choice" Hart would qualify as an exercise of discretion? Some ways of judge's "choosing" between conflicting interpretations certainly are not choices at all.[53] But when, for instance, the conflict between different interpretative arguments (for example, between linguistic arguments and argument from intention) is consistently resolved by "choosing" one of the interpretive doctrines (textualism vs. intentionalism), it can be said that such a "choice" is an exercise of discretion, as it is justified by certain principled, doctrinal beliefs about how the law should be interpreted.

Still, in my opinion, this situation is not encompassed by the Hartian "core meaning" of (the concept of) discretion. This can be easily noted by comparing such a situation with the key characteristics that Hart identifies as properties of the concept of discretion. Let us go back to the case of the young hostess and at least three characteristics of the framework of her reasoning:

- there is not a clear definable aim, which would *conclusively* determine the content of the decision;
- there are no clear principles or rules determining the relative importance of constituent values or, where they conflict, how compromise should be made between them—because of that she should *balance* different considerations;
- words such as "wise" and "sound" make more sense to describe discretionary decisions than words such as "right" or "wrong".

If we compare this with the application of (any) normative doctrine of interpretation, we can see that it is not applied through balancing, but rather, it is applied because it is based on clear, definable principles. Besides, "choice" of doctrine cannot be characterized as "wise" or "sound", as it is not contextualized but rather predetermined by a "chosen", accepted doctrinal position, regardless of the circumstances of the specific case.

However, there is one way of resolving the conflict of interpretive reasons that *does* involve the elements of Hart's definition of discretion. This is the process of weighing conflicting arguments. "An argument is outweighed when the reasons behind that argument or the evidence in support of it are not as strong

53 Summers and Taruffo note several distinct modes of resolution for conflicts of interpretative arguments. For instance, "when two or more arguments come into conflict, one argument may rationally prevail because (1) the other argument proves to be, on close analysis, unavailable inasmuch as the very conditions required for it to exist simply are not present; (2) the other argument (or arguments) is deprived of all or most of its prima facie force by the prevailing argument, a process we call cancellation; (3) the other argument (or arguments) is mandatorily subordinated pursuant to a general rule or maxim of priority" (Summers & Taruffo 1991: 480).

as those behind or supporting a competing argument".[54] When such weighing and balancing is based on *substantive* reasons (see note 46), there is no predetermined principle by which the conflict is resolved. Instead, there is a weighing of different, opposing interpretative arguments and reasons, and the outcome of the balancing is based on rational choices. MacCormick and Summers describe this weighing as follows:

> [I]n this case, the weight attached to an interpretation on the ground that it favours some goal or upholds some state of affairs or concept of rightness is dependent wholly on the degree of value attached to the relevant goal or state of affairs or concept of rightness from the standpoint of economics, or political or moral principle. … [T]hese substantive reasons do not have to be conceived or represented as system-independent ... But the point is that substantive reasons carry a weight dependent on general practical reasoning or on the considered judgement of the interpreter, from the point of view of economics, politics or ethics, or all three in combination (MacCormick & Summers 1991: 521, emphasis by author).

In these instances, the court must make a decision in a hard case, but it cannot ground it on authoritative (formal) reasons from the sources of law, and it cannot find an answer to the disputable question of law in permissive sources of law,[55] or it cannot decide the case by using widely accepted methods for interpreting legal texts (intention, system or purpose). The only way that court can rationally decide how to apply the rule in such a case is to resort to substantive, non-legal reasons. It ushers the judge in the field of some kind of (limited) open-ended reasoning, or reasoning on the balance of reasons, as Raz names it (Raz 1986: 41–42; Raz 1999: 36).

As Hart states in his second and more famous Harvard essay, if a judge cannot provide a definite answer to a legal question in penumbral cases, i.e. to rationally ground it on a clear rule, the criterion of rationality cannot be based on deducing the decision from premises (the rule and the facts of the case). "What is it then", Hart asks "that makes such decisions correct or at least better than alternative decisions?" And his answer is: "[T]he criterion which makes a decision sound in such cases is some concept of what the law ought to be".[56]

Finally, it appears that everything that has been said confirms Hart's thesis that different factors play different roles in different types of discretion, and that judicial application of "tacit" discretion is much more limited compared to ex-

54 Summers & Taruffo 1991: 480–481.

55 "The legal system does not require (judge) to use these sources, but it is accepted as perfectly proper that he should do so...(S)uch writings are recognized as 'good reasons' for decisions. Perhaps we might speak of such sources as 'permissive' legal sources to distinguish them ... from 'mandatory' legal or formal sources such as statute" (Hart 1994: 294).

56 Hart 1958: 608. In this respect, for instance, it should remind that Hart deemed as "the chief and very great merit of … natural law approach is that it … fosters awareness of the way in which unspoken assumptions, common sense, and moral aims influence the law and enter into adjudication" (Hart 1983: 11).

press discretion, both in terms of the cases in which it is applied to, and in terms of the alternatives available to it. Therefore, it seems too strong to claim that judges' discretion is "not bound by standards set by the authority concerned".[57] This cannot be the case with tacit discretion, because it is more limited by the applicable interpretative arguments in a specific case than by loosely formulated legal standards in the exercise of express discretion.

However, in order to fully understand Hart's concept of judicial discretion, two additional clarifications need to be made. This need apparently comes from the considerations in these two subsections. Namely, the *concept of interpretation* is important both for understanding tacit discretion, and for Hart's understanding of legal reasoning. On the other hand, the *concept of rationality* is crucial for both types of discretions that Hart analyses. The next section will look at these concepts and their relationship to Hart's concept of judicial discretion.

5 TWO ADDITIONAL CLARIFICATIONS OF HART'S CONCEPT OF JUDICIAL DISCRETION

5.1 Discretion and interpretation

Legal sources (statutes, by-laws, precedents, etc.) reduce the number of possible alternatives available to a judge when deciding a particular case. Moreover, in easy cases, the available legal reasons unambiguously guide the judge towards a single possibility. Therefore, the decision-making process in such cases is routine and straightforward. But what happens in hard cases, i.e. in cases where there is indeterminacy of law, where there are different, legally admissible answers?

When a judge is faced with a penumbral case *where the formulation of rule* does not provide a single legal answer, it does not mean that they should immediately resort to (full-fledged Hartian) discretion. They still have certain legal "devices" (formal, legal reasons[58]) at their disposal to justify their decision, although no longer in the form of a clear authoritative linguistic meaning of a legal rule.

Therefore, the penumbral case can be resolved by *interpreting* the rules in the context of the legal system and legal principles and values that can determine which of the possible meanings of the legal rule the judge will ascribe in the specific factual circumstances of the case. Such a "solution" is reached through the traditionally accepted interpretative arguments within the legal community.

However, when discussing the concept of discretion, its place in the legal system, and its justification, Hart does not consider the relation of that concept

57 Shiner 2011: 14.

58 See note 46.

to the concept of interpretation, and the similarities and differences between the two. After all, what does Hart say about interpretation itself?

Hart used the word "interpretation" only with regard to the penumbra, not the core (Hart 1958: 610). In *The Concept of Law*, Hart described "plain" cases as those *that do not need interpretation* because the recognition of what to do is "unproblematic or 'automatic'".[59] According to this claim, it seems that both interpretation and discretion have the same function and effects: if every discretion is a law-making activity (as Hart believes) and if interpretation also creates a law (because it is undertaken only in hard cases, i.e. when the law cannot be applied routinely and when there are different, legally acceptable answers), is there a difference between interpretation and discretion? In *The Concept of Law*, Hart clearly implies that there is. In that place, he notes that "[c]anons of 'interpretation' cannot eliminate, though they can diminish, these uncertainties [of meaning]; for these canons are themselves general rules *for the use of language*, and make use of general terms which themselves require interpretation".[60]

Apparently, according to that sentence, it seems that Hart reduces interpretation to linguistic canons. However, as it was demonstrated in the previous section, some of Hart's theses could be (re)constructed in the sense that in hard cases he takes into account other generally accepted canons of statutory interpretation or interpretative arguments.[61]

In that sense, he explicitly states that "a legal system often has other resources besides the words used in the formulations of its rules which serve to determine their content or meaning in particular cases".[62] For example, Hart emphasizes that an agreed purpose of a rule can help a judge to ascribe, through purposive interpretation, a meaning to the words in the context of a legal rule "different from that which they have in other contexts".[63]

In addition, systemic interpretive arguments can also be helpful to the judge in hard cases. Thus, Hart noted that "[v]ery often in deciding such [indeterminate] cases courts cite some general principle ... which a considerable area of the existing law can be understood as exemplifying or advancing".[64]

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59 They are the familiar and constantly recurring cases, "where there is general agreement in judgments as to the applicability of the classifying terms" (Hart 1994: 126).

60 Hart 1994: 126. Emphasis by author.

61 "(W)e set forth 11 major types of arguments and advance our 'universalist' thesis that all systems in our study share these as a common core of good reasons for interpretative decisions ... and classif(y) all 11 of the major types of (interpretative) argument in terms of four basic kinds: linguistic, systematic, teleological-evaluative and intentional" (MacCormick & Summers 1991: 3, 5–6).

62 Hart 1983: 8.

63 Hart 1983: 8.

64 Hart 1983: 7.

Nevertheless, Hart is explicit that all "this endeavour can [not] render law fully determinate", and can just defer, but not eliminate the moment for discretion in cases where formal (legal) interpretative reasons run out. As Shiner states, following Hart: "[A]nalogies and general principles may not dispose of the matter, and that is the point at which the judge must proceed by the exercise of discretion. In other words, discretionary law-making by judges begins at the moment when the ability of existing law to be dispositive ends".[65]

That moment when discretion enters the scene, Barak explains with a vivid analogy: "It is as though the law stops walking at an intersection, and the judge must decide—without a clear and precise standard—which direction to take. Discretion is the freedom to choose between multiple legal solutions".[66] For Hart, this does not mean that these decisions were reached solely on the basis of legal reasons, but rather that they are not contrary to possible alternatives that are all legally acceptable. In fact, at this "interpretative crossroad" the judge engages in reasoning that is not limited to legal reasons. Moreover, Hart explicitly points out that on such occasions, they reason more like a legislator than like a lawyer:

> [I]n any hard case different principles supporting competing analogies may present themselves and a judge will often have to choose between them, relying, like a conscientious legislator, on his sense of what is best and not on any already established order of priorities prescribed for him by law (Hart 1994: 275).

In my opinion, this passage, as well as what was said in the previous section, undoubtedly shows that in cases where discretion is exercised, the judge resorts to what, in that section, I termed non-legal reasons. Our experience (as lawyers and citizens) with the legal system suggests that law has a "limited domain", which means that legal reasons for (judicial) decisions and their justifications represent only a subset of all possible reasons that are applicable to decision-making and justification in practical action in a specific case. "Law ... is a domain in which at least some reasons, arguments, and facts available in other decisional domains are not available in the domain of the law".[67] The large majority of (judicial) decisions on rights and duties are made on the basis of the legal reasons (including formal interpretative reasons and arguments).

However, Hart undoubtedly, although implicitly, claims that in exercising discretion, one goes beyond this limited domain of legal reasons and enters into

65 Shiner 2011: 14.

66 Barak 2005: 208

67 Alexander & Schauer 2007: 1581

the field of non-legal reasons,[68] because if legal reasons are ultimately of no help in some of the hard cases, judges resort to those other (substantive) reasons.[69]

At the end of this section, it is pertinent to remind that the relationship between the concepts of interpretation and discretion in Hart's theory is primarily important in the context of tacit discretion. Interpretation does not have the same role in penumbral cases of categorical ambiguity and in hard cases that are "result" of excessive vague concepts, such as legal standards.

Namely, resolving indeterminacies as to the content of the law does not necessarily involve interpretation. It means that there is "no necessary link between indeterminacy and interpretation".[70] The judge's reasoning in particular cases of the application of legal standards best illustrates this thesis. As stated in subsection 4.1., when the legislator leaves it to the judge to determine the content of multidimensionally vague terms, the judge in a specific hard case will usually not do so by interpretation, but by reasoning about what they consider to be proper, reasonable, or convenient in the case. For instance, in hard cases where the judge must decide what constitutes "respect for private life" under the European Convention on Human Rights or what is in "the best interests of the child" under the Convention on the Rights of the Child (Art. 3), "determining the undetermined" is not, according to Endicott, an interpretative task.[71]

5.2 Discretion and rationality

The second important question that Hart did not answer in his Harvard paper (nor later), concerns the relationship between the concept of discretion and the concept of rationality, namely, what "rational" means in the context of discretion (Shaw 2013: 707). This is a crucial question, because Hart emphasizes that discretion is a way of decision-making grounded on rational principles or "rational approval" (Hart 2013: 657). If rationality "limits" (judges') decision-making when exercising discretion, then, undoubtedly, it would be helpful if

68 Sebok considers that Hart's idea of differentiating between core and penumbral cases is reflected in the type of reasoning used by judges when making decisions in each type of case. He asserts that "the difference between the core and penumbra was the type of reasons that counted in each category. The sort of reasons that governed decision making in the core were different in kind from the reasons permitted in the penumbra" (Sebok 1999: 86). However, as I have tried to explain, that is not entirely correct, because a judge may resort to legal reasons even when resolving a hard case through interpretative arguments, i.e. through formal legal reasons, but it is true in the sense that non-legal reasons are only used in penumbral and not in core cases.

69 Of course, the field of available substantive (non-legal) reasons can also be limited by law. For example, in modern secular states, religious texts cannot be invoked as sources of (non-legal) reasons when applying the law.

70 Endicott 2012: 111.

71 Endicott 2012: 114. See note 40.

Hart had explained those limitations in more detail. Still, there is no such explanation.[72]

Hart connects the rationality of a discretionary decision to the manner in which the choice has been reach. Accordingly, a decision is rational if the judge, when deciding hard case, uses of experience[73] in the field and deliberately excludes private interests and prejudices. But Hart takes "the word 'manner' here must be understood to include not only narrowly procedural factors … but also the determined effort to identify what are the various *values* which have to be considered and subjected in the course of discretion to some form of compromise or subordination".[74]

Apart from this mentioning of values, Hart elsewhere stresses that discretionary decisions are based, as it is said, on "principle[s] deserving of rational approval" (Hart 2013: 657). But what are the rational principles on which discretion is based? The need to exercise it arises precisely in situations when "there remains a choice to be made by the person to whom the discretion is authorized which is not determined by principles which may be formulated beforehand".[75]

Obviously, it is not enough to say that a decision is rational if it is based on values and principles rather than subjective factors such as whim, intuition, or prejudice. It is clear that racists and homophobes can also be "principled", but Hart certainly would not agree that decisions based on such "principles" are consistent with his understanding of exercising judicial discretion. After all, the exercise of discretion takes place within the framework of contemporary legal systems, which reject such "principles".

However, as it is well known, Hart is a moral non-cognitivist. He does not believe that, for example, moral (or political) principles are based on an undisputed value (integrity of law or specific conception of distributive justice, etc.). For instance, the "best interests of the child" standard in a hard case can be applied by a judge by invoking such a doctrine (take for example Aristotle's conception of the "good life"). However, Hart emphasizes that, ultimately, it is a matter of the judge's discretionary choice, and that there are different general principles, equally practically rational, that could justify their decision.

As evidenced by the example of exercising discretion that Hart describes (both in legal and non-legal contexts), it seems that he is inclined not to understand discretion simply as a choice between principles or a compromise of principles on which a decision should be based. It is also important that the decision

72 "Indeed, a weakness of his essay is that he did not discuss in more detail how, precisely, the demand for rationality constrains decisionmaking" (Shaw 2013: 707).

73 This is explained in more detail at the end of subsection 4.1.

74 Hart 2013: 664.

75 Hart 2013: 661. "… although the factors which we must take into account and conscientiously weigh may themselves be identifiable" Hart continues (Hart 2013: 661).

is "wise"[76] in the sense that it balances opposing principles, gives preference to one of them, or applies them in an optimal way *in the specific case*. In this way, practical wisdom, which has the basic characteristic of contextualizing general principles and adapting to the specificities of a particular hard case, emerges as the primary virtue of a rational judge in exercising discretion. Metaphorically said, a wise (rational) judge is "cross-eyed": observing with one eye the relevant general principles and values, and with the other, the circumstances of the specific case, in order to optimally apply those principles and values, choosing the decision that will be the most suitable mean for their realization. Therefore, for a decision to be rational, it is not only important that it is based on reasonable principle and their balancing, but also that the decision itself is a proper and well-chosen means of applying the principle.[77]

In order to fully understand, after all, what Hart means by rationality, it seems that a useful conceptual clarification can be made between rationality and reasonableness. For example, according to von Wright, rationality is "goal-oriented" and is manifested through the formal correctness of reasoning, the skill of choosing the appropriate means for a certain goal, and empirical confirmation. In contrast, reasonableness is "concerned with the right way of living, with what is thought good or bad for man" (Wright 1993: 173).[78] However, from everything that has been said so far, Hart does not take up this distinction. In fact, when it comes to exercising discretion, it seems that he undoubtedly combines these two concepts into one. The words of Alexy depict this "merged" concept well.

> [R]easonableness and rationality are the same or at least more or less the same. This interpretation is often indicated where the adjective "practical" is added to "rationality". "Practical rationality" then refers to all criteria that practical reason has to apply in order to determine whether a practical judgment is correct (Alexy 2009: 6).

Considering that "reasonableness invites one's attention more directly to some special features of practical rationality ... in focusing on a special form of argument, namely, balancing",[79] it becomes clear that Hart's "rationality" could be conceptualized as *practical rationality*. This means that his understanding of rationality is concerned with the practical aspects of decision-making and the

76 Is there Hartian discretion at all, if not "wise", "sound"? Is not an expression "wise discretion" for Hart pleonasm? For instance, for Barak "wisdom is a component of discretion" (Barak 2005: 2013).

77 "He seemed to have expected sound discretionary reasoning to display not just logical integrity but also a form of practical wisdom, associating the term discretion with practical wisdom or sagacity or prudence" and with words like 'wise' and 'sound' (Shaw 2013: 707).

78 Von Wright says about the relationship between these two concepts: "The reasonable, is, of course, also rational—but the 'merely rational' is not always reasonable" (von Wright 1993: 173). According to this interpretation, the criteria of rationality form a subclass of the criteria of reasonableness.

79 Alexy 2009: 6.

ability to balance different considerations in a given situation. Therefore, Hart's concept of rationality can be seen as encompassing both means-ends reasoning and balancing of practically relevant values and interests.

Eventually, one of the features of the Hart's concept of discretion that is particularly important for its rationale character is the "defence" of discretionary decision. In the case of the hostess, Hart stresses, she can *vindicate* it by effects—if the dinner was pleasant and the guests left satisfied, her decisions were confirmed as wise and rational. On the other hand, she can defend her decision by appealing to "controlling principles or values as applied to the case" and by striking impartial "compromise between them where they conflicted".[80] This *justification* of a discretionary decision generally involves a reconstruction of the process through which the decisionmaker reached the decision, and an elaboration of reasons that influenced this process (Shaw 2013: 702). And it is clear that in the case of judicial discretion, the only way to make a defence of decision is justification, not vindication, because the judge cannot defend their decision retrospectively, based on the effects it has achieved.

6 CONCLUSION

In Postscript to the second edition of *The Concept of Law*, Hart himself confessed that he "said far too little in [the] book about the topic of adjudication and legal reasoning".[81] Concerning the concept of discretion, he did even less. For instance, in *The Concept of Law*, and in the Postscript to the second edition, Hart mentions the word only a few times. But now we can say that this gap is, to a certain extent, filled with rediscovered paper of Hart's Harvard lecture about discretion.[82]

Hart argues that discretion is a necessary component of any legal system, because positive law is inherently indeterminate. Therefore, there will be cases that require the judges to "make" rather than merely to "find" law, i.e. to exercise discretion. Discretion is a specific form of decision-making, which is rational and to some extent constrained by law. But Hart was very clear that no perfect combination of legal rules and principles, properly balanced, would *always* give us only one right answer.[83] In spite of all legal constraint and rational elements

80 Hart 2013: 660.

81 Hart 1994: 259.

82 "The ideas in "Discretion" are consistent with what little Hart did say on the subject in later years but they are far more comprehensive. The essay fills significant gap in Hart's work" (Shaw 2013: 674).

83 The reason for this is, as Hart repeatedly insisted, that we are humans, not gods, and if I could add, not even "superheroes" like Hercules. "For Hercules, who masters all the legal and moral materials, there are single right answers to hard cases. Among mere mortals, though, hard cases are contested due to epistemic limitations" (Poscher 2012: 138).

of the judicial decision-making process, Hart firmly believed that "after we have done all we can to secure the optimum conditions for its exercise", (discretion) is a form of *rational* choice—choice constrained to a certain extent by the law and institutional role of the decisionmaker, but choice all the same (Hart 2013: 665; Shaw 2013: 724). In short, it is an illusion that judges never reach the point where they must choose between conflicting principles or values, without further guidance in the form of some higher *legal* principle or value. Therefore, there is something "out there" (in our practical universe, so to speak) that plays and should play a certain role in our legal "earthly" world, and consequently, in the judicial world as well.

On one occasion, Patterson observed that "[f]rom the vantage point of the present, Hart's discussion of discretion is simple and unsophisticated", and that "[i]n fact, Hart's entire discussion of adjudication is of largely historical interest".[84] Patterson made this assessment before Hart's Harvard manuscript appeared, and perhaps he would change it today. Nevertheless, even if we accept Paterson's assessment, the fact remains that Hart's understanding of legal reasoning and discretion, *viewed historically*, establishes a convenient, although basic, conceptual framework and indicates theoretical "markers" for contemporary debates about judicial adjudication and reasoning. In light of what we have learned from the discovered manuscript, this assertion seems even more well-founded. Metaphorically speaking, his thoughts about discretion and judicial reasoning are like a good old X-ray machine. It is true that new, more precise and better diagnostic machines, like scanners and MRI, have been invented, but it can still "visualize" the anatomy and uncover potential pathologies of the "organism" of judicial reasoning.

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84 Patterson 2009: 119.

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Pushing the boundaries of deliberative constitutionalism

From judicial dialogue to inclusive dialogue

Deliberative constitutionalism is a theory that has arrived at the centre of the academic debate in recent decades. Its novelty and interest lie in the fact that it offers a way to escape the objections to judicial review through a commitment to the premises of deliberative democracy. In this context, however, a question needs to be clarified: who can legitimately participate in this constitutional dialogue, in order for the objections to judicial review to be avoided? The argument of this article is that, while deliberative constitutionalism is a promising alternative that takes note of the objections to judicial review as well as the deliberative turn in democratic theory, not all of its variants take both of these aspects seriously. To assuage the objections to judicial review, we need a variant of deliberative constitutionalism that is oriented towards inclusive dialogue, and which addresses the whole constitutional system, rather than only intrajudicial, transjudicial and interinstitutional dialogue.

Keywords: deliberative constitutionalism, deliberative democracy, judicial review, countermajoritarian difficulty

1 INTRODUCTION

The present article coincides with the emergence and expansion of deliberative constitutionalism. Possibly, this theory is one of the most innovative contributions offered by constitutional theory in recent decades.[1] According to the common core of deliberative constitutionalism, the premises of deliberative democracy—mainly reasoned dialogue as a condition for the legitimacy of political decisions[2]—assuage the objections to judicial review.[3] In this way, deliberative constitutionalism does not conflict with judicial review, but is rather directed at justifying its legitimacy through democratic deliberation.[4] Judicial review, despite allowing the invalidation of the democratic will by judges who are not elected by the people, does not entail a lack of legitimacy when it is the result of, and when it promotes, dialogue on constitutional issues.

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1 Bateup 2006: 1109; Dixon 2007: 393; Fredman 2015: 448; Kong & Levy 2018: 626; Valentini 2022: 1-2; *inter alia*.

2 On deliberative democracy, see Habermas 1996.

3 On the countermajoritarian objection, see Bickel 1962.

4 Kong & Levy 2018: 634.

In this context, a question arises that requires more attention: which actors can legitimately participate in this constitutional dialogue, so that it offers an effective solution to the objections to judicial review? Faced with this question, the common core of deliberative constitutionalism divides into at least four variants that offer very different answers. According to these variants, the legitimacy of judicial decisions depends on, in turn, an *intrajudicial dialogue* among the judges of a court, a *transjudicial dialogue* among the courts, an *interinstitutional dialogue* among the political institutions, or an *inclusive dialogue* among the institutions and society.

Within the framework of this controversy, this article will argue that, although deliberative constitutionalism is a promising theory that takes note of the objections to judicial review and the deliberative turn in democratic theory, not all of its variants really take both of these aspects seriously. Only a deliberative constitutionalism whose deliberative network does not reduce to the judges of a court, the courts, or the institutions, but rather includes all the institutions and people that are potentially affected, will have the potential to legitimize judicial review in particular and political decisions in general. Additionally, this systemic view, far from focusing on any single source of legitimation, attends to the multiple interactions within the constitutional system, understood as an interrelated set of diverse sources of legitimation that contribute to the political decision-making process.

To support this argument, the present article has the following structure. In the next three sections, it presents and criticizes theories of intrajudicial dialogue (section 2), transjudicial dialogue (section 3), and interinstitutional dialogue (section 4). Then it presents and defends the theory of inclusive dialogue (section 5), before concluding (section 6).

This work is justified for at least two reasons. First, something is provided here that does not exist elsewhere in the literature: a clear and comprehensive map of deliberative constitutionalism, which distinguishes and analyses in detail the various theories held by the most prominent scholars of constitutional dialogue. This is necessary because constitutional dialogue has now become ubiquitous, and yet it is unclear to what extent reference is made to such dialogue. Second, a more auspicious theory of constitutional dialogue is further developed here, one that makes sense of the objections to judicial review as well as deliberative democracy. This is important because standard constitutional theory has displayed a systematic lack of interest in both of these aspects.

Before starting, two clarifications are necessary. On the one hand, my aim is not to deny the potential of other theories of dialogue. Rather, I intend to show that, despite this potential, their scope of inclusion does not go far enough, thus their responses to the objections to judicial review are insufficient. Moreover, I do not wish to insinuate that the three theories criticized here omit other ven-

ues or forms of dialogue. Instead I will try to highlight that, rather than attending to the entire constitutional system, they pay greater attention to dialogue among the judges of a court, among different courts, and among different institutions, respectively.

2 INTRAJUDICIAL DIALOGUE

According to the theory of intrajudicial dialogue, deliberation among the judges of the same court, or between them and their clerks, legitimizes judicial decisions. This theory, according to Gutmann & Thompson, focuses "on the importance of extensive moral deliberation within one of our democratic institutions—the Supreme Court". From this perspective, "judges cannot interpret constitutional principles without engaging in deliberation, not least for the purpose of constructing a coherent view out of the many moral values that our constitutional tradition expresses".[5]

The main exponent of this theory is Rawls. In his opinion, the court is not "antimajoritarian", because its internal dynamics are those of an "exemplar" of a deliberative forum. Unlike other branches of government, it functions as a venue in which judges must deliberate and justify their positions on the basis of "public reasons". Under the Rawlsian "ideal of public reason", "citizens are to conduct their fundamental discussions within the framework of what each regards as a political conception of justice based on values that the others can reasonably be expected to endorse and each is, in good faith, prepared to defend that conception so understood".[6] In a framework of "pluralism", then, the requirement of "reciprocity" is only respected if, when making political decisions in the public forum, instead of appealing to particular points of view or the reasons of "comprehensive conceptions", "public reasons" are appealed to. Based on this kind of dialogue, Rawls offers a way to overcome the objections to judicial review.

Ferejohn & Pasquino, in similar terms, takes up the "exemplary" deliberative character of courts suggested by Rawls to justify the judicial review. According to these authors, public reason, as a characteristic of good deliberation, resides in the courts, while there is a decreasing scale of deliberative demands depending on the degree of distance from society: courts, public bodies, parliament, and the suffrage of society. Thus at one extreme lies suffrage, which is a reason-free zone, in which only the number of votes counts; while at the other extreme are the courts with their demanding deliberative burden, whose obligation to receive and give reasons resides in their lack of institutional ties with society.[7]

5 Gutmann & Thompson 1996: 45.

6 Rawls 1995: 231-240, 226.

7 Ferejohn & Pasquino 2002: 22, 24, 26.

Zagrebelsky is another exponent of this theory. For him, the court "has a centre" in the "chamber where deliberations take place". "More than a physical place", this is "a spiritual space" in which "heated discussions" take place, and where "a renewed openness to dialogue and availability to cooperation" unfolds. "This shutting away", as he puts it, "implies a common effort to reject external pressure", as "it breaks all contact with the outside world" and the "judges find themselves alone among themselves", so that "what is outside, the world due to which they meet, only continues its existence in the representations of those who are inside". Zagrebelsky adds: "No outsider is admitted into this work. Voices from outside should no longer resonate, because the deliberation room is a place of autonomous interpretation [...]. Conversely, voices from within must remain inside. Nothing that is said should leave a trace, only the little that is reserved for the resolution that is intended to be public. The closed circle of judges, beyond the four walls of the deliberation room, defines a boundary that configures its own space. The words spoken and the positions assumed must remain rigorously reserved".[8]

Despite the merits of this theory, Gutmann & Thompson criticize "the tendency to designate some institutions as forums for reason and others as arenas of power". Indeed, "courts are not the only or necessarily the primary province of deliberation", so this theory "neglects the way in which other institutions can contribute to a more deliberative public policy as well as a better understanding of rights". Thus, it "leave[s] little or no room for deliberation in everyday politics", since "the tasks of moral deliberation and the defense of rights are assigned to an institution that is supposed to be above politics—the Supreme Court". While they do not deny that Rawls's theory "leaves room for such discussion", they find it "puzzling" that he "stops short of arguing that a well-ordered democracy requires extensive deliberation to resolve moral disagreements", inasmuch as "he does not propose that citizens or their representatives discuss moral disagreements about these principles in public forums", but makes do with "a solitary process of reflection, a kind of private deliberation […] in which a veil of ignorance obscures our own personal interests, including our conception of the good life, and compels us to judge on a more impersonal basis".[9]

Dryzek also objects that "Rawls downplays the social or interactive aspect of deliberation, meaning that public reason can be undertaken by the solitary thinker". Thus Dryzek considers courts to be deliberative institutions only in a limited sense.[10] In the same vein, Benhabib points out that the scope of the public sphere is limited in Rawls's theory, as it does not pay the same attention

8 Zagrebelsky 2008: 15, 17, 19, 20 (my translation).

9 Gutmann & Thompson 1996: 358, 34, 347, 37.

10 Dryzek 2000: 15-16.

to society.[11] Lafont likewise notes the "narrow juricentric perspective" of this theory, which "focuses on the internal workings of courts without paying sufficient attention to the political system within which the courts operate", while omitting "the perspective of the citizenry".[12]

Meanwhile, Gargarella points out that defenders of this theory of dialogue must explain how its commitment to the equal status of all people is compatible with this privileged role of the courts and with its mistrust of society. They have to explain, in turn, why the deficits of legislative and social deliberation need not be reproduced in the courts.[13] This objection is relevant insofar as judicial deliberations, in most countries, are closed. The secret system of deliberation implies that only judges—and in some courts also their clerks—are empowered to enter and intervene in the plenary sessions where the resolutions of judicial cases are addressed. So only the final text of the judgement, with its foundations and operative part, is made public.[14] Although the judgement is public, the previous dialogue that takes place within the court remains closed to other institutions and citizens. Neither one nor the other can follow the intrajudicial dialogue or participate in it openly, nor can they access the various draft judgements or discuss them.

Under these conditions, Kramer has objected to the "myth" of the conversation inside the constitutional court, since today most of the judges seldom read more than a "bench memo" or "the parties' submissions". Judges "almost never meet to discuss a drafted opinion and they never work out their reasoning as a group", that is to say, they only have meetings that are "as short as possible", "with little or no actual debate or discussion". The role of judges "consists mainly of dictating the outcome, instructing the clerks on how an opinion should look", since they "rely on law clerks to prepare a case for them".[15]

Concerning this point, Bello Hutt has argued that "idealizations of the courtroom as the forum in which ideal aspects of deliberative democracy are instantiated, are misguided".[16] In particular, he has criticized Mendes's proposal, which, like Rawls, seeks to overcome the objections to judicial review by arguing that courts are optimal forums for deliberation: "special deliberators".[17] Furthermore, Mendes does not explicitly state that the court's deliberative sessions should be public, since "a degree of secrecy" seems appropriate for deliberation, which can be jeopardized if it is public.[18] Therefore, according to Bello

11 Benhabib 1996: 75.

12 Lafont 2020: 226.

13 Gargarella 2005: 28, 29, 32.

14 Atienza 2017: 12, 13.

15 Kramer 2004: 239-240.

16 Bello Hutt 2018: 1121, also 1122, 1123.

17 Mendes 2013: 4.

18 Mendes 2013: 164-166.

Hutt, given that "access to the courtroom is limited by the very structure of judicial procedures", "we are in no position to know whether judges are deliberative during the parts of the procedure in which they gather to decide".[19] In the same vein, Atienza argues: "It certainly seems important that we know in some detail which are the real processes of deliberation and decision-making in these institutions, and that we consider what could be done and what changes could be introduced".[20] However, there is currently a lack of mechanisms for assessing intrajudicial deliberation.[21]

In short, the potential of intrajudicial dialogue to justify judicial review is the most restricted compared to the other theories that will be discussed below. However, these criticisms by no means ignore the importance of developing courts whose internal functioning operates more deliberatively, publicly and accessibly. However, a dialogue focused mainly on the internal dynamics of the courts omits other instances of dialogue that are equally or more important, such as those that take place with parliament, social movements and authorities. As a correlate, this theory does not succeed in assuaging the objections to judicial review, nor in adequately considering the deliberative turn in democratic theory. Since judges are given a privileged voice, if not the last word, this type of dialogue is linked to strong judicial review.

3 TRANSJUDICIAL DIALOGUE

According to the theory of transjudicial dialogue, deliberation among courts of one country, among courts of different countries, between them and international courts, or among the international courts themselves, legitimizes judicial decisions. This theory, in Ferreres Comella's words, suggests that "courts should consult each other when interpreting jusfundamental texts", since "dialogue among judges appears to be the most reasonable method for channelling possible conflicts".[22] Or in the words of Bustos Gisbert: "Judicial dialogue is the communication among courts that is derived [...] from taking into account the jurisprudence of another court (foreign or alien to one's own legal system) in order to apply one's own law".[23]

Within this theory, Slaughter offers a typology: *horizontal* dialogue, when the interaction is between courts with the same status, be they national or supranational; *vertical* dialogue, when the interaction is between courts of different statuses, national and supranational; and finally *mixed* dialogue, when

19 Bello Hutt 2018: 1121, 1139, also 1123, 1136.

20 Atienza 2017: 16 (my translation).

21 Bello Hutt 2018: 1146.

22 Ferreres Comella 2005: 231 (my translation).

23 Bustos Gisbert 2012: 21 (my translation).

the two previous interactions are combined.[24] In this context, Slaughter argues that constitutional and international courts from "all over the world"—e.g. the International Court of Justice, the International Criminal Court, the European Court of Human Rights, the Inter-American Court of Human Rights, the Court of the European Union—resolve the cases before them through a "transjudicial" "colloquy". This dialogue is characterized by "persuasion" rather than "coercion".[25] Similarly, L'Heureux-Dubé does not conceive of this interaction between "courts all over the world" in terms of "reception" or a "one-way transmission", but rather as a "dialogue". Thus, "[n]o longer is it appropriate to speak of the impact or influence of certain courts on other countries, but rather of the place of all courts in the global dialogue on human rights".[26]

Along the same lines, Moreso "privileges judicial dialogue". In his opinion, courts "will adopt more perspicuous decisions […] if they take into account in their reasoning the justifications offered by courts of other jurisdictions, nationals of other constitutional or international democracies". Although Moreso affirms that he "could also try to base this practice on ideas about the Habermasian community of dialogue", he prefers to base it on a Rawlsian idea of "reflective equilibrium", albeit "broader". In his opinion, interpretations of the constitution and precedents are not conclusive; rather there are various ways of deciding that are consistent with them. On the basis of Dworkin's distinction, he suggests that if judges do not find conclusive arguments in favour of a decision in the "dimension of adequacy", then they must turn to the "dimension of justification", and here reflective equilibrium is crucial. They must establish what is the most coherent way to harmonize the legal materials with the principles that best reconstruct their constitutional practice. If they limit themselves to their domestic practice, then the reflective equilibrium they will reach will be narrow, but they will broaden their vision if they turn to what other courts have done. In short, this theory focuses on "a global and cosmopolitan conversation among all the high courts".[27]

Also, the so-called "Ius Constitutionale Commune in Latin America" (*Ius Constitutionale Commune en América Latina*, ICCAL) addresses inter-American dialogue from a primarily juricentric perspective. In this sense, Von Bogdandy, despite admitting that "dialogue is used to qualify various phenomena of the new public law", prefers to limit himself to "dialogue among courts". In this framework, he conceives inter-American judicial dialogue as a setting where the decisions of the national courts can be controlled by the Inter-American Court of Human Rights, while the latter's decisions can be rejected

24 Slaughter 1994: 103-112.

25 Slaughter 1994: 99, 101, 122.

26 L'Heureux-Dubé 1998: 40.

27 Moreso 2018: 73, 80, 83-84, 88-89 (my translation).

by them. This, in his opinion, "encourages the jurisdictional bodies to rationally justify their rulings, because such argumentation is essential to demonstrating that a decision is not arbitrary".[28] Similarly, Morales Antoniazzi affirms that "jurisdictional dialogue and conventionality control" constitute "key tools for consolidating the protection of democracy and human rights", and that through them "the *ius constitutionale commune* is being developed".[29]

The paradigm of this theory is Dworkin's. "Law as integrity" requires that the courts, when deciding cases, conceive of themselves as authors of a "chain novel".[30] From this point of view, judicial activity is conceived as a text written by various co-authors, who successively delegate it over time and must respect the argumentative thread of the past, while adding something else to it. Unlike the positivist thesis that courts have discretion when a lawsuit cannot be resolved by a predetermined solution, Dworkin holds that courts must work to reach the correct answer through moral reasoning, in accordance with "law as integrity".

However, the "novel" that is the law is primarily written by judges, since it is not open to conversation among equals. In other words, the problem is the dominant place that it grants to jurisprudence over the interpretations and constitutional narratives that derive from interactions among other actors, such as governmental bodies and society. Yet, as Habermas warns, "the administration of justice" is only one "part of a more encompassing process" of rationalization.[31] In Waldron's words, "the right of rights", that is, social participation in common affairs, "is called seriously into question" when basic affairs are transferred from the people and their representative institutions "to a handful of men and women, supposedly of wisdom, learning, virtue, and high principle who, it is thought, can alone be trusted to take seriously the great issues".[32] Dworkin's approach, as Gargarella affirms, is "devoid of what makes the very idea of dialogue attractive, that is, the assumption of parity". In other words, this dialogue is distorted "by the privileged position of judges, which gives their voice a special authority", because when they express their position "it gains strength and solidifies, making it extremely difficult for citizens and their political representatives to make changes to it, even after many years of discussion and political mobilization".[33]

In conclusion, although the theory of transjudicial dialogue offers a broader deliberative network than intrajudicial dialogue to justify the judicial review, its scope of inclusion is also limited, since it still concerns a dialogue between

28 Von Bogdandy 2014: 14-15 (my translation).

29 Morales Antoniazzi 2014: 298, 299, 291 (my translation, original in italics).

30 Dworkin 1986: 238.

31 Habermas 1996: 5.

32 Waldron 1999: 213.

33 Gargarella 2005: 23-24 (my translation).

judges; hence the "juricentric" character of both the theory of intrajudicial dialogue and the theory of transjudicial dialogue.[34] These criticisms, to repeat, do not deny the importance of judicial dialogue, but rather insist that this dialogue is insufficient, since it excludes or omits dialogue among other actors. As a result, it also fails to assuage the objections to judicial review in light of the deliberative turn in democratic theory. So, like the previous theory, this type of dialogue grants a privileged voice to judges, and continues to be linked to strong judicial review.

4 INTERINSTITUTIONAL DIALOGUE

According to the theory of interinstitutional dialogue, deliberation between courts and other institutions legitimizes judicial decisions. What is distinctive about this theory, according to Tremblay, is that "courts and the legislatures participate in a dialogue regarding the determination of the proper balance between constitutional principles and public policies". In other words, "an institutional dialogue may occur anywhere legislatures are able to reverse, modify, avoid, or otherwise reply to judicial decisions nullifying legislation".[35] According to Bateup, this theory focuses on the "interactions between courts and the political branches of government in the area of constitutional decision-making". Thus it emphasizes that "the judiciary does not (as an empirical matter) nor should not (as a normative matter) have a monopoly on constitutional interpretation".[36]

One of the first figures of interinstitutional dialogue was Fisher, who shows that constitutional practice does not reduce to a judicial monologue, and that the court does not have the last word; rather, in Bickel's terms, there is a continuous "colloquy".[37] Fisher refers to a "coordinated construction", in which the executive and the legislature share a role with the judiciary in interpreting the constitution.[38] A further paradigm of this theory is Hogg & Bushell's famous article on weak judicial review in Canada, according to which, "[w]here a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue".[39] In short, works such as these have stimulated a debate that has contributed to rethinking judicial review so that it is not seen as being exclusively in the hands of the court, but rather a "dialogue" between the courts and the other branches of government.

34 Roach 2016: 384.
35 Tremblay 2005: 617, 618.
36 Bateup 2006: 1109.
37 Fisher 1988: 3.
38 Fisher 1988: 231.
39 Hogg & Bushell 1997: 79.

From a similar angle, according to Young, "dialogue describes a practice in which reason-giving courts are able to adjudicate rights, but elected and accountable legislatures are given the final word on the shape of the obligations that flow from them. At base is the expectation that both branches attempt to provide reasonable interpretations of constitutional provisions".[40] Meanwhile, Dixon, while suggesting that legitimacy requires abandoning strong judicial review, underlines that courts have the conditions, capacity and responsibility to assume an active and dialogic role to counteract the "blind spots" and "burdens of inertia" in the process of rule-making and enforcement. This dialogue, according to her, is "the most desirable model of cooperation between courts and legislatures".[41]

One difficulty of the theories of intrajudicial and transjudicial dialogue lies in the fact that, during the course of "ordinary politics", they defend the privileged voice of the courts against the other branches of government, although in "extraordinary politics" some do admit the possibility of reversing jurisprudence through constitutional amendments.[42] Another problem, as mentioned above, is that the deliberative network appears to be restricted to an exchange among judges and courts. In contrast, the potential of the theory of interinstitutional dialogue consists in its broadening the network of agents who participate in deliberation, in such a way that it focuses on the interaction between the courts, the executive branch and parliament.

To conclude, the theory of interinstitutional dialogue incorporates dialogue between courts and parliaments. In addition, this theory is characterized by its thinking of links of collaborative dialogue among the branches of government, rather than veto mechanisms that are not very susceptible to dialogue.[43] Here, then, lies its potential to assuage the countermajoritarian objection to judicial review. However, despite the theory of interinstitutional dialogue's greater potential, its focus often reduces to a binary dialogue: one between parliament and the courts. Hence the importance of taking a step towards a theory in which the last word is not reduced to a binary issue between parliament and the courts—that is, to strong or weak judicial review.

5 INCLUSIVE DIALOGUE

According to the theory of inclusive dialogue, deliberation among judges, courts, political branches and society legitimizes judicial decisions. This theory, according to Bateup, seeks to "foster the legitimacy" through "systems of

40 Young 2012: 249-250.

41 Dixon 2007: 391, 393.

42 This distinction between two expressions of democracy, extraordinary law-making and ordinary law-making, is due to Ackerman 1991: 290.

43 Kahana 2002: 248-274.

constitutional dialogue in a way that recognizes the central place of the people in ongoing discussion about fundamental values".[44] In the same vein, Kong & Levy note that this theory focuses on "democratic deliberation, both within institutions of public power (including the courts) and within wider society".[45] As Bakker states, the theory of inclusive dialogue treats the "the people as a constitutional actor", which "encompasses the idea that different governmental branches and the people interact in ways that shape the dominant views of constitutional interpretation".[46] Under these conditions, "the normative appeal" of the theory of inclusive dialogue "is the society-wide nature of dialogue, which is rather different than the strictly institutional accounts".[47]

The theory of inclusive dialogue takes a "systemic approach", in the sense that it shifts attention from "individual sites" and their unique manifestations, traditionally understood as "the best possible single deliberative forum", with "capacity sufficient to legitimate most of the decisions"—e.g. society, parliament or the courts—to "the interdependence of sites within a larger system".[48] Hence, despite the similarities between the theories of interinstitutional dialogue and inclusive dialogue, the former is concerned with how "legislatures and courts negotiate over the content of a law and its impact on rights", while the latter is concerned with "broad systemic deliberation—among ordinary citizens, media, civil society groups, and branches or departments of government".[49]

In this framework, the theory of inclusive dialogue's response to the question of who should deliberate takes Habermas as its reference. According to the "discourse principle", "just those norms deserve to be valid that could meet with the approval of those potentially affected, insofar as the latter participate in rational discourses".[50] From this perspective, dialogue does not reduce to the institutional sphere; rather there must be, rather than isolation, a "two-track" connection with sensitivity between the institutional and social spheres in the formation of opinion and political will.[51] Under these conditions, the question of who should make the decisions does not reduce to defining a venue with a privileged voice—whether this be parliament, the courts, or society—but rather depends on reciprocal deference to the "force of the better argument".[52]

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44 Bateup 2006: 1166.

45 Kong & Levy 2018: 634.

46 Bakker 2008: 216, 220.

47 Bateup 2006: 1164.

48 Mansbridge et al. 2012: 1-2. For a useful analysis of constitutionalism understood as a joint formula, rather than as a set of isolated elements, see Martí 2014.

49 Kong & Levy 2018: 634.

50 Habermas 1996: 127.

51 Habermas 1996: 304-308.

52 Habermas 1996: 103, 166, 228, 305-306.

On this last point, Fredman notes that the theory of inclusive dialogue "goes beyond" interinstitutional dialogue, "by focusing not simply on the final decision, whether legislative or judicial, but also on the quality of the deliberation in both arenas (and potential in relation to civil society too)".[53] She also agrees that the "conversation" about law and justice is not just a "professional matter" of professors, litigants, judges and political representatives, but also includes different social groups—politicians, activists, the socially excluded. This conversation highlights the importance of "cooperation" and gives greater legitimacy to political decisions.[54]

Within the Habermasian tradition, Forst also warns of the error of according "priority to teleological values which are supposed to ground a just or good social order, where those who are subjected to this order do not feature in it as authors".[55] Similarly to Waldron—who also highlights the centrality of the institutional question[56]—Forst notes that it tends to be forgotten that "*the first question of justice is the question of power*",[57] which perpetuates "alienation" insofar as these values are not submitted to the justificatory authority of those involved.[58] For this reason, Forst argues that the principles of autonomy and dignity demand that those who are subjected "should be the *subjects*" and "not merely the *objects*" of justification.[59] This entails an "obligation" and a "right" "to justification", that is, to give, receive and challenge reasons.[60] Hence the "content of human rights is to be justified discursively",[61] that is, through an inclusive dialogue.

In the same vein, Gutmann & Thompson claim that "deliberative labor should not be divided so that representatives give reasons while citizens merely receive them", but rather "all institutions of government have a responsibility for deliberation",[62] which should be extended "throughout the political process" to "any setting in which citizens come together on a regular basis to reach collective decisions about public issues—governmental as well as nongovernmental institutions".[63] Lafont, writing in the same tradition, endorses a "holistic" theory, which is not limited to the courts or parliament. According to this theory of inclusive dialogue, judicial review is understood as a participatory mechanism of society for triggering public deliberation. Thus judicial review empowers citi-

53 Fredman 2015: 449.
54 Fredman 2008: 245-247.
55 Forst 2014: 4.
56 Waldron 1999: 231.
57 Forst 2014: 34; italics in original.
58 Forst 2014: 5-6.
59 Forst 2014: 3; my italics.
60 Forst 2014: 35.
61 Forst 2014: 64.
62 Gutmann & Thompson 1996: 358.
63 Gutmann & Thompson 1996: 12.

zens with equal communicative power "to call the rest of the citizenry to put on their robes".[64] The same goes for Gargarella, who advocates "an open and persistent collective dialogue", which includes "dialogue between authorities, but extends far beyond it" and "reserve[s] a central, rather than marginal, role for the citizenry".[65] Similarly, Post & Siegel call for "an ongoing and continuous communication" between representative government, the courts, and a mobilized citizenry.[66]

Valentini likewise starts with a systemic conception of deliberative democracy and defends a dialogue that, far from being limited to courts or institutions, "attends to the whole set of actors, processes, and sites, that perform institutional and non-institutional activities of deliberation".[67] Bello Hutt, also arguing from a systemic conception, rejects the premise that "interpreting the constitution is exclusively a judicial endeavour", while defending constitutional deliberation in multiple institutional and popular forums as a condition of legitimacy.[68]

Here it is also worth keeping in mind those works that have proposed democratic and deliberative mechanisms for the formation, transformation and understanding of society's political opinion. In this sense, Fishkin has defended the so-called "deliberative polls", whose objective is to conduct a consultative vote at the end of a meeting between citizens chosen by lottery to deliberate on controversial issues in a guided, publicly broadcast, and technically informed manner.[69]

Ackerman also argues that the constitution "is the subject of an ongoing dialogue" that includes the "people",[70] and he emphasizes the importance of "*legitimation through a deepening institutional dialogue between political elites and ordinary citizens*".[71] More recently, Fishkin and Ackerman have proposed the so-called "deliberation day". Its objective is to establish an annual holiday during which the interested citizens meet in their neighbourhoods to consultative vote after publicly deliberating on controversial issues, drafting proposals, and electing a representative. In a larger assembly, all the representatives from the smaller assemblies then deliberate on the proposals, make decisions, and subsequently return to their smaller assemblies to explain the outcomes.[72]

Several works have enriched Fishkin and Ackerman's proposals, as they have conferred upon society a significant role not only in the process of formation,

64 Lafont 2020: 13, 226-227.
65 Gargarella 2013: 208.
66 Post & Siegel 2007: 9.
67 Valentini 2022: 6.
68 Bello Hutt 2017: 11.
69 Fishkin 1991: 1-10, 82-104.
70 Ackerman 1991: 5, also 22.
71 Ackerman 1993: 85; italics in original.
72 Ackerman & Fishkin 2004: 7.

transformation and understanding of political opinion, but also in the decision-making in the creation of ordinary norms, the adjudication of specific cases, and the constitutional reform. Regarding the first aspect, Leib has proposed, along with the classic triad of powers, a "popular branch of government" that reserves a more important place for society in deliberation and decision-making on the creation of ordinary norms.[73]

Regarding the second aspect, Spector has justified a "bimodal" system that maintains existing constitutional review while adding a democratic mechanism of constitutional review through "constitutional juries" selected by lottery and as an "optional right" for plaintiffs in cases where they do not trust the constitutional court and prefer to evade it.[74] Ghosh also has gone further by suggesting the replacement of strong constitutional review for what he has considered a more representative, deliberative, democratic and freedom-respecting alternative, that is, a "citizens' court" formed through sortition.[75]

Regarding the third aspect, Zurn has suggested that the arbitration of constitutional procedures that guarantee the legitimacy of the production of law should be in charge of a constitutional court—as the one in the European model— along with a flexible three-stage constitutional amendment processes: in the first stage, proposals can originate from a government decision or popular initiative; then, these proposals must be debated and approved by "civic constitutional fora" organized as deliberative democratic assemblies; and finally, such proposals must be debated in citizens "deliberation day" and ratified by the vote of the society at large.[76]

73 Leib 2004. Despite how enriching his proposal is, Leib does not resolve objections to constitutional court. On the one hand, the decisions of the fourth popular branch require a supermajority (2004: 83), so the possibilities of discussing and reversing judicial decisions become difficult and unlikely, as happens in the framework of rigid and counter-majoritarian mechanisms of constitutional reform. On the other hand, the constitutional court retains the final authority over the decision of the popular branch of government (2004: 12, 22, 72).

74 Spector 2009: 111-124. Despite the appeal of this proposal, it is limited to a small group of rights, those involving claims of citizenship against political representatives. Spector is sceptical about the effectiveness of juries when the rights of minorities against majorities are at stake and, in such cases, he leans towards a counter-majoritarian institution as a more effective alternative.

75 Ghosh 2010: 345-352. Ghosh's "citizens' court" must make decisions by a supermajority, these decisions can be vetoed by a supermajority in congress, its scope is limited to cases of rights violations, and these cases are selected based on an advisory opinion from a council of judges formed by lottery. As can be seen, this jury, at the end of the day, is left in a situation like that of the constitutional court of the strong model, since its decisions can only be reversed by a supermajority. But with an addition, unlike almost all constitutional courts that can invalidate norms by a simple majority, the jury can only do so by a qualified vote.

76 Zurn 2007: 274-341. Zurn considers that a democratic and deliberative constitutional amendment mechanism allows responding to the rulings of the constitutional court. In addition, Zurn goes further than the previous theories because it places the final authority in the hands of the society. Also, Zurn's civic constitutional fora, unlike Spector and Ghosh, does not have

In similar terms, with the aim of dissolving the counter-majoritarian objection through constitutional dialogue between the branches of government and society, Colón-Ríos has advocated for the democratization of the constitutional amendment procedure. This would be achieved through a "non-constituent assembly"—without the power to create a new constitution—that can be activated in response to a controversial judicial decision, by popular initiative or by the legislature's call to the electorate. This assembly would then elaborate and present an alternative constitutional interpretation or constitutional amendment for the majority decision of the electorate. The goal would be to validate the challenged law and nullify the judicial ruling.[77]

In conclusion, the theory of inclusive dialogue goes a step beyond previous theories. In effect, it encompasses intrajudicial, transjudicial and interinstitutional dialogue, while adding a further dialogue: that of society, among itself, and with its institutions. This theory does not conceive of the social groups or people affected as passive objects—on whose interests, needs and demands institutions must deliberate and decide—but rather as autonomous participants. In this way, it offers the most inclusive answer to the question of who should deliberate on constitutional matters. In other words, it takes seriously the democratic or inclusive aspect of deliberative democracy.

Notwithstanding this potential, many works that advocate the theory of inclusive dialogue, at the end of the day and with some independence from that process, assign a privileged voice to a political authority that has been determined in advance. In contrast, some other works discussed here not only argue for an inclusive dialogue, but also call for a continuous and systemic dialogue that does not endorse the idea of a privileged voice or a last word had by a particular venue, but rather holds that a decision must depend on the strength of the arguments.

6 CONCLUSION

While deliberative constitutionalism seeks to overcome the objections to judicial review by engaging with the premises of deliberative democracy, the argument of this article has been that, while the four theories discussed seek to amend judicial review's lack of legitimacy through constitutional dialogue, only the theory of inclusive dialogue has the normative potential to achieve this. Indeed, this constitutional variant is oriented towards inclusive dialogue. At the same time, it does not focus on any single source of legitimation, but instead incorporates a broader variety of dialogue within the constitutional system.

to resolve specific cases, but must issue general and clear norms useful for resolving a series of specific cases in a consistent manner.

77 Colón-Ríos 2013: 353-366.

Yet neither a sceptical nor a naive stance should be adopted towards the inclusive dialogue proposed in this article. On the one hand, one should not be sceptical because of the empirical impediments, obstacles and difficulties that make a more deliberative constitutionalism unlikely. Indeed, the causes of problems in adverse contexts are often external and prior to democratic deliberation, and such contexts do not necessarily imply that this theory is impractical or useless, but rather constitute challenges that reaffirm the importance of deliberative constitutionalism. These contexts, then, do not inevitably require an alternative model, but rather call for deliberative constitutionalism's consistent implementation. On the other hand, one should not succumb to the wishful thinking that institutions will necessarily behave according to this theory, mainly because existing constitutional systems often provide few, if any, institutional incentives for political decisions to follow the ideal of deliberative constitutionalism. In this sense, although including society in the dialogue is "a significant theoretical contribution", we should not ignore the fact that "society-wide dialogue is unlikely to take place"; and we should not "[underplay] the institutional aspects of constitutional dialogue" but rather explore the institutional possibilities by means of which this dialogue could take place.[78]

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78 Bateup 2006: 1168.

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C Ignacio Giuffré*

Ampliando las fronteras del constitucionalismo deliberative

Del diálogo judicial al diálogo inclusivo

El constitucionalismo deliberativo es una teoría que en las últimas décadas ha adquirido un lugar en el centro de la discusión académica. Su novedad e interés radica en que ofrece una salida a las objeciones al control judicial mediante el compromiso con las premisas de la democracia deliberativa. Ahora bien, en este contexto hay una cuestión que requiere ser aclarada: ¿quiénes pueden participar legítimamente en ese diálogo constitucional para ofrecer una salida efectiva a las objeciones al control judicial? El argumento del presente artículo es que, si bien el constitucionalismo deliberativo es una alternativa promisoria que toma nota de las objeciones al control judicial, así como también del giro deliberativo de la democracia, no todas sus variantes toman realmente en serio ambos aspectos. Para matizar las objeciones al control judicial es necesaria una variante del constitucionalismo deliberativo que se oriente al servicio del diálogo inclusivo y que atienda a todo el sistema constitucional, en vez de solamente al diálogo intrajudicial, transjudicial e interinstitucional.

Parablas clave: Constitucionalismo deliberativo, democracia deliberativa, control judicial, dificultad contramayoritaria

1 INTRODUCCIÓN

El *contexto* del presente artículo coincide con el actual proceso de emergencia y expansión del constitucionalismo deliberativo. Posiblemente, esta teoría sea una de las contribuciones más novedosas que ha ofrecido la teoría constitucional en las últimas décadas.[1] Según el núcleo común del constitucionalismo deliberativo, las premisas de la democracia deliberativa –principalmente el diálogo razonado como condición de legitimidad de las decisiones políticas–[2] matizan las objeciones al control judicial.[3] De este modo, el constitucionalismo deliberativo no está en las antípodas del control judicial, sino que se orienta a justificar su legitimidad a partir de la deliberación democrática.[4] El control judicial, pese a que permite la invalidación de la voluntad democrática por parte

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1 Bateup 2006: 1109; Dixon 2007: 393; Fredman 2015: 448; Kong & Levy 2018: 626; Valentini 2022: 1-2; entre otros.

2 Sobre la democracia deliberativa, ver Habermas 2008.

3 Sobre la objeción contramayoritaria, ver Bickel 1962.

4 Kong & Levy 2018: 634.

de jueces que no son elegidos por el pueblo, no entraña una falta de legitimidad cuando es el resultado del, y cuando promueve el, diálogo sobre los asuntos constitucionales.

En este contexto, se abre una *pregunta* que exige mayor atención: ¿qué actores pueden participar legítimamente en este diálogo constitucional para que ofrezca una salida efectiva a las objeciones al control judicial? Frente a tal pregunta, el núcleo común del constitucionalismo deliberativo se diluye, al menos, en cuatro variantes que ofrecen respuestas muy diversas. Según cada variante, la legitimidad de las decisiones judiciales depende de un *diálogo intrajudicial* –entre los jueces de un tribunal–, un *diálogo transjudicial* –entre los tribunales–, un *diálogo interinstitucional* –entre las instituciones políticas– o un *diálogo inclusivo* –entre las instituciones y la sociedad.

En el marco de esta controversia, el *argumento* del presente artículo es que, si bien el constitucionalismo deliberativo es una teoría promisoria que toma nota de las objeciones al control judicial y del giro deliberativo de la democracia, no todas sus variantes toman realmente en serio ambos aspectos. Solo un constitucionalismo deliberativo cuya trama deliberativa no se reduzca a los jueces de un tribunal, a los tribunales ni a las instituciones, sino que incluya a todas las instituciones y las personas potencialmente afectadas, tendrá el potencial para legitimar el control judicial en particular y las decisiones políticas en general. Adicionalmente, esta mirada sistémica, lejos de centrarse en una sola fuente de legitimación, atiende a las múltiples interacciones dentro del sistema constitucional, entendido como un conjunto interrelacionado de diversas fuentes de legitimación que contribuyen al proceso de toma de decisiones políticas.

A fin de sostener este argumento, el artículo tiene la siguiente *estructura*. En cada una de las tres primeras partes, expone y critica las teorías del diálogo intrajudicial (2), transjudicial (3) e interinstitucional (4). Frente a ellas, luego, expone y defiende la teoría del diálogo inclusivo (5). Finalmente, formula algunas conclusiones (6).

La *justificación* de este trabajo obedece, al menos, a dos razones. Primera, aquí se brinda algo inexistente en la literatura: un mapa claro y amplio del constitucionalismo deliberativo, que distingue y analiza con detalle las teorías más prominentes del diálogo constitucional. Esto es necesario porque en la actualidad el diálogo constitucional ha devenido omnipresente, sin embargo, no está claro con qué alcance se hace referencia a dicho diálogo. Segunda, aquí se desarrolla con mayor profundidad una teoría constitucional dialógica que es más auspiciosa, una que recobra el sentido tanto de las objeciones al control judicial, así como de la democracia deliberativa. Esto es importante porque la teoría constitucional predominante ha mostrado una falta de atención sistemática por ambos aspectos.

Previo a comenzar, dos *aclaraciones* son necesarias. Por un lado, el objetivo no es negar el potencial de otras teorías del diálogo. Más bien, pretende ponerse

de manifiesto que, pese a dicho potencial, su alcance en términos de inclusión no llega demasiado lejos y, por lo tanto, sus respuestas a las objeciones al control judicial resultan insuficientes. Por otro lado, el objetivo tampoco es insinuar que las tres teorías objeto de crítica omiten otras sedes o formas de dialogo. En cambio, procura destacarse que ellas, en vez de atender a todo el sistema constitucional, prestan mayor atención al diálogo, respectivamente, entre los jueces de un tribunal, entre los distintos tribunales o entre las instituciones.

2 DIÁLOGO INTRAJUDICIAL

Para la teoría del *diálogo intrajudicial,* la deliberación entre los jueces de un mismo tribunal o ellos y sus relatores legitima las decisiones judiciales. Esta teoría, según Gutmann y Thompson se centra "en la importancia de una amplia deliberación moral dentro de una de nuestras instituciones democráticas: el Tribunal Supremo". Desde esta mirada, "los jueces no pueden interpretar los principios constitucionales sin participar en la deliberación, sobre todo con el fin de construir una visión coherente a partir de los numerosos valores morales que expresa nuestra tradición constitucional".[5]

El exponente principal de esta teoría es Rawls. A su juicio, la corte "no es antimayoritaria" porque la dinámica a su interior es la de un foro deliberativo "ejemplar". A diferencia de otras ramas de gobierno, funciona como una sede en la cual los jueces deben deliberar y justificar sus posiciones sobre la base de "razones públicas". El "ideal de la razón pública" rawlsiano exige "conducir [las] discusiones fundamentales en el marco de lo que cada cual considera una concepción política de la justicia fundada en valores que los demás puedan razonablemente suscribir y que cada cual está dispuesto, en buena fe, a defender tal concepción así entendida".[6] En un marco de "pluralismo", entonces, solo se respeta la exigencia de "reciprocidad" si, a la hora de tomar decisiones políticas en el foro público se apela, en vez de a los puntos de vista particulares o las razones de "concepciones comprehensivas", a "razones públicas". A partir de este tipo de diálogo, Rawls intenta matizar las objeciones al control judicial.

Ferejohn y Pasquino, en términos similares, retoman el carácter deliberativo "ejemplar" de los tribunales sugerido por Rawls para justificar el control judicial. Según ellos, la razón pública, en tanto característica de la buena deliberación, reside en los tribunales, en tanto hay una escala decreciente de exigencias deliberativas según sea el grado de distancia con la sociedad: los tribunales, los organismos públicos, el parlamento y el sufragio de la sociedad. Así pues, en un extremo se ubica el sufragio, que es una zona libre de razones, en la cual

5 Gutmann & Thompson 1996: 45.

6 Rawls 1995: 231-240, 226.

solo cuenta la cantidad de votos; mientras que, en el otro extremo, se ubican los tribunales con una demandante carga deliberativa, y cuya obligación de recibir y dar razones reside en la escasez de vínculos institucionales con la sociedad.[7]

Zagrebelsky también puede ser encasillado dentro de esta teoría. Para él, la corte "tiene un centro" en la "cámara donde tienen lugar las deliberaciones". Se trata, "más que de un lugar físico", de "un espacio espiritual" en el cual se desarrollan "encendidas discusiones", donde se despliega "una renovada apertura al diálogo y disponibilidad a la cooperación". "Este encerrarse", según sus palabras, "significa el esfuerzo común por rechazar la presión que viene de afuera", pues "interrumpe todo contacto con el exterior" y los "jueces se encuentran solos consigo mismos", de modo que "(l)o que está afuera, el mundo en función del cual se reúnen, sólo continúa su existencia en las representaciones de quien está adentro". Según añade el autor, "(n)ingún extraño es admitido en ese trabajo. Las voces de fuera no deben ya resonar porque la sala de deliberaciones es lugar de autónoma interpretación […] Inversamente, las voces de dentro deben quedar dentro. Todo lo que se dice no debe dejar huella, sólo lo poco que se reserva a la resolución destinada a ser pública. El círculo cerrado de los jueces, más que las cuatro paredes de la sala de deliberaciones, define una frontera que configura un espacio en sí. Las palabras dichas y las posiciones asumidas deben permanecer rigurosamente reservadas".[8]

Pese al atractivo de esta teoría dialógica, Gutmann y Thompson critican la "tendencia a designar algunas instituciones como foros de la razón y otras como arenas del poder". En efecto, el tribunal no es "el único ni necesariamente el principal ámbito de deliberación", de modo que esta teoría "descuida la forma en que otras instituciones pueden contribuir a una política pública más deliberativa". Así, "deja poco espacio" para "la deliberación en la política cotidiana", y "un obstáculo" en tal sentido se manifiesta cuando "las tareas de la deliberación moral y de la defensa de los derechos se asignan a una institución que se supone que está por encima de la política: el Tribunal Supremo". Aunque no niegan que la teoría de Rawls "deja espacio para la discusión", advierten "desconcertante" que "no llegue a argumentar que una democracia bien ordenada requiere una amplia deliberación para resolver los desacuerdos morales", por cuanto para "concretar los principios de justicia, no propone que los ciudadanos o sus representantes discutan los desacuerdos morales sobre estos principios en foros públicos", sino que basta "un proceso solitario de reflexión" donde "un velo de ignorancia oscurece los intereses personales, incluida nuestra concepción de la vida buena, y nos obliga a juzgar sobre una base más impersonal".[9]

7 Ferejohn & Pasquino 2002: 22, 24, 26.

8 Zagrebelsky 2008: 15, 17, 19, 20.

9 Gutmann & Thompson 1996: 358, 34, 347, 37.

Dryzek también critica que "Rawls resta importancia al aspecto social o interactivo de la deliberación, lo que significa que la razón pública puede ser alcanzada por la reflexión solitaria". En estos términos, Dryzek considera la corte como una institución deliberativa en un sentido limitado.[10] En la misma línea, Benhabib recalca que la esfera pública en Rawls tiene alcance limitado, por cuanto no presta igual atención a la sociedad.[11] Lafont, de igual modo, llama la atención sobre la "perspectiva juriscéntrica" de esta teoría, en tanto "(s)us análisis se centran en el funcionamiento interno del tribunal", a la vez que omiten la "perspectiva ciudadana".[12]

Por otro lado, Gargarella puntualiza que esta teoría del diálogo debe explicar cómo es que el compromiso con el igual estatus de todas las personas resulta compatible con ese papel privilegiado de la corte y con la desconfianza hacia la sociedad. Tienen que explicar, a su vez, por qué los déficits de la deliberación legislativa y social no han de reproducirse en la corte.[13] Esta objeción es pertinente en la medida que las deliberaciones judiciales, en la mayoría de los países, son cerradas. El sistema de deliberación secreto implica que únicamente los jueces –y en algunas cortes también sus relatores– están habilitados para entrar e intervenir en los plenos donde se abordan las resoluciones de las causas judiciales. Entonces, la publicidad se reduce al texto definitivo de la sentencia, con sus fundamentos y su parte dispositiva.[14] Si bien la sentencia es pública, el diálogo previo que se desarrolla dentro de la corte perdura vedado para las demás instituciones y los ciudadanos. Ni unas ni otros pueden seguir el diálogo intrajudicial ni participar abiertamente en él, así como tampoco pueden acceder a los diferentes proyectos de sentencia ni a discutirlos.

Bajo estas condiciones, Kramer objeta el "mito" de la conversación al interior de la corte, pues los jueces "nunca se reúnen para discutir el borrador de una opinión y nunca desarrollan su argumentación en grupo", es decir que, no se dedican a "discutir las opiniones de cada uno en detalle y con detenimiento", sino solo tienen reuniones "lo más cortas posible" y "pocas veces leen más que el «memo de la judicatura» o las presentaciones de las partes". Más bien, el "papel de los jueces consiste fundamentalmente en resolver los resultados", pues "confían a los relatores la preparación de un caso en su nombre".[15]

Sobre este punto, Bello Hutt ha planteado que las "idealizaciones de la sede de la corte como el foro en el que se plasman los aspectos ideales de la democracia deliberativa son erróneas".[16] Específicamente, ha criticado la propuesta

10 Dryzek 2000: 15-16.
11 Benhabib 1996: 75.
12 Lafont 2020: 226.
13 Gargarella 2005: 28, 29, 32.
14 Atienza 2017: 12, 13.
15 Kramer 2011: 294.
16 Bello Hutt 2018: 1121, también 1122, 1123.

de Mendes, quien, al igual que Rawls, intenta matizar las objeciones al control judicial con el argumento de que "las cortes constitucionales son escenarios óptimos para la deliberación".[17] A más de ello, Mendes no toma partido a favor de que las sesiones deliberativas de las cortes constitucionales sean públicas, pues "una cuota de secretismo" es "apropiada" para la deliberación, la cual puede quedar en jaque si es pública.[18] Por eso, según replica Bello Hutt, dado que el "acceso a la sede de corte está limitado por la propia estructura de los procedimientos judiciales", "no estamos en condiciones de saber si los jueces son deliberativos durante las partes del procedimiento en las que se reúnen para decidir".[19] En la misma línea, Atienza sostiene que "parece desde luego importante que conozcamos con algún detalle cuáles son los procesos reales de deliberación y de toma de decisión de esas instituciones, y que nos planteemos qué cabría hacer, qué cambios se podrían introducir".[20] Sin embargo, hoy se carece de mecanismos para evaluar la deliberación intrajudicial.[21]

En definitiva, el potencial del diálogo intrajudicial para justificar el control judicial es el más restringido respecto de las demás teorías que han de abordarse más adelante. Ahora bien, estas críticas de ningún modo desconocen la relevancia de tender hacia cortes cuyo funcionamiento interno opere en términos más deliberativos, públicos y accesibles. Sin embargo, un diálogo centrado mayormente en la dinámica interna de las cortes omite otras instancias de diálogo igual o más importantes, tales como aquellos que se desarrollan con el parlamento, los movimientos sociales y las autoridades. Como correlato, esta teoría no consigue la morigeración de las objeciones al control judicial ni la consideración adecuada del giro deliberativo de la democracia. Pues, los jueces tienen una voz privilegiada, cuando no la última palabra. De allí que este tipo de diálogo se vincula con un control judicial fuerte.

3 DIÁLOGO TRANSJUDICIAL

Para la teoría del *diálogo transjudicial,* la deliberación entre los tribunales de un país, los tribunales de distintos países, ellos con los internacionales o los tribunales internacionales entre sí legitima las decisiones judiciales. Esta teoría, en términos de Ferreres Comella, sugiere que "los tribunales deben ¨dialogar¨ entre sí al interpretar los textos iusfundamentales", de modo que el "diálogo entre jueces aparece como el método más razonable para encausar los posibles

17 Mendes 2013: 11.
18 Mendes 2013: 164-166.
19 Bello Hutt 2018: 1121, 1139, also 1123, 1136.
20 Atienza 2017: 16.
21 Bello Hutt 2018: 1146.

conflictos".[22] O en palabras de Bustos Gisbert, "el diálogo judicial es la comunicación entre tribunales derivada […] de tener en cuenta la jurisprudencia de otro tribunal (extranjero o ajeno al propio ordenamiento jurídico) para aplicar el propio Derecho".[23]

Dentro de esta teoría, Slaughter ofrece una tipología: el diálogo *horizontal*, cuando la interacción es entre los tribunales con el mismo status –sea nacional o supranacional; el diálogo *vertical*, cuando la interacción es entre los tribunales de distinta jerarquía –nacionales y supranacionales: y, por último, el diálogo *mixto*, cuando las dos interacciones anteriores se combinan.[24] En este marco, Slaughter plantea que los tribunales constitucionales e internacionales "de todo el mundo" –v. gr. el Tribunal Internacional de Justicia, la Corte Penal Internacional, el Tribunal Europeo de Derechos Humanos, la Corte Interamericana de Derechos Humanos, el Tribunal de la Unión Europea– resuelven las causas a su cargo a través de "un coloquio" o una "comunicación" de tipo "transjudicial". Ese diálogo se caracteriza por la "persuasión", antes que por la "coacción".[25] En términos similares, L'Hereux-Dubé no concibe la interacción entre "los tribunales de todo el mundo" en términos de "recepción" o "trasmisión unidireccional", sino como un "diálogo". De modo tal que, "no es apropiado hablar del impacto o la influencia de ciertos tribunales en otros países, sino del lugar de todos los tribunales en el diálogo global sobre derechos".[26]

En la misma línea, Moreso "privilegia el diálogo judicial". A su juicio, los tribunales "adoptarán decisiones más perspicuas" "si toman en cuenta en su razonamiento las justificaciones ofrecidas por Tribunales de otras jurisdicciones, nacionales de otras democracias constitucionales o internacionales". Si bien Moreso afirma que "podría también intentar fundar esta práctica en las ideas acerca de la comunidad de diálogo habermasiana", prefiere hacerlo mediante la idea rawlsiana del "equilibrio reflexivo", aunque más "amplio". A su juicio, las interpretaciones de la constitución y los precedentes no son concluyentes, sino que hay varias formas de decidir que no son contrarias a tales materiales disponibles. Sobre la base de la distinción de Dworkin, plantea que, si los jueces en la "dimensión de adecuación" no hallan argumentos concluyentes a favor de una decisión, deben acudir a la "dimensión de la justificación" y aquí el equilibrio reflexivo es crucial. Deben establecer cuál es el modo más coherente de armonizar los materiales jurídicos con los principios que mejor reconstruyen su práctica constitucional. Ahora bien, si se limitan a su práctica doméstica, el equilibrio reflexivo que alcanzarán será estrecho, pero ampliarán su visión si

22 Ferreres Comella 2005: 231.
23 Bustos Gisbert 2012: 21.
24 Slaughter 1994: 103-112.
25 Slaughter 1994: 99, 101, 122, 136.
26 L'Heureux-Dubé 1998: 17, 21, 40.

acuden a lo que han hecho otros tribunales. En definitiva, esta teoría se centra en "una conversación global y cosmopolita entre todos los altos tribunales".[27]

También el denominado *Ius Constitutionale Commune en América Latina (ICCAL)* aborda el diálogo interamericano desde una mirada primordialmente juriscéntrica. En tal sentido, Von Bogdandy, si bien admite que el "diálogo se utiliza para calificar varios fenómenos del nuevo derecho público", prefiere limitarse "al diálogo entre tribunales"; en ese marco, concibe el diálogo judicial interamericano como un escenario donde las decisiones de los tribunales nacionales pueden ser controladas por la Corte Interamericana de Derechos Humanos, a la vez que las decisiones de esta pueden ser rechazadas por aquellos; esto, a su juicio, "impulsa a los órganos jurisdiccionales a fundamentar racionalmente sus fallos, porque tal argumentación es esencial para demostrar que una decisión no es arbitraria".[28] En términos semejantes, Morales Antoniazzi afirma que "el diálogo jurisdiccional y el control de convencionalidad" constituyen "herramientas clave para ir consolidando la protección de la democracia y de los derechos humanos", y a través de ellas "se está gestando el *ius constitutionale commune*".[29]

El paradigma de esta teoría es Dworkin. El "derecho como integridad" requiere que los tribunales al resolver los casos se conciban como autores de una "novela en cadenas".[30] Desde esta mirada, la actividad judicial es concebida como un texto escrito por una diversidad de coautores, que lo van delegando sucesivamente a lo largo del tiempo y que deben respetar el hilo argumentativo del pasado, a la vez que deben añadir algo más a dicho hilo. A diferencia de la tesis positivista según la cual los tribunales tienen discreción cuando un determinado litigio no se puede resolver mediante una solución predeterminada, Dworkin sostiene que los tribunales deben trabajar por alcanzar la respuesta correcta mediante un razonamiento moral de acuerdo con el "derecho como integridad".

Sin embargo, la "novela" que es el derecho es escrito primordialmente por jueces, pues no se abre a la conversación entre iguales. En otras palabras, el problema es el lugar preponderante que concede a la jurisprudencia por sobre las interpretaciones y narrativas constitucionales que abrevan de la interacción entre otros actores, tales como los órganos de gobierno y la sociedad. Sin embargo, como advierte Habermas, "la práctica de decisiones judiciales" es solo una "parte del proceso más amplio de racionalización".[31] En palabras de Waldron, "el derecho de los derechos", esto es, la participación social en los asuntos comunes "se pone seriamente en peligro" cuando se traslada el manejo de los asuntos básicos desde el pueblo y sus instituciones representativas "a un

27 Moreso 2018: 73, 80, 83-84, 88-89.

28 Von Bogdandy 2014: 14-15.

29 Moralez Antoniazzi 2014: 298, 299, 291; el resaltado es original.

30 Dworkin 1986: 238.

31 Habermas 2008: 67.

puñado de hombres y mujeres, supuestamente sabios instruidos, virtuosos y de altos principios".[32] El planteamiento de Dworkin, como afirma Gargarella, está "desprovisto de aquello que confiere atractivo a la propia idea de diálogo, esto es, el supuesto de la paridad". En otras palabras, ese diálogo resulta distorsionado "por la privilegiada ubicación de los jueces, que confiere a su voz una autoridad especial", pues cuando expresan su posición "la misma adquiere fuerza y se solidifica, tornándose extremadamente difícil, para los ciudadanos y sus representantes políticos, operar cambios sobre ella, aun luego de largos años de discusión y movilización política".[33]

En conclusión, aunque la teoría del diálogo transjudicial ofrece una trama deliberativa más amplia respecto del diálogo intrajudicial para justificar el control judicial, su alcance en términos de inclusión también es limitado, pues sigue vinculada a un diálogo entre jueces. De allí, el carácter "juricéntrico" tanto de la teoría del diálogo intrajudicial como de la teoría del diálogo transjudicial.[34] Estas críticas, de nuevo, no niegan la importancia del diálogo judicial, sino que insisten en que dicho diálogo es insuficiente, pues excluye u omite el diálogo entre otros actores. Como resultado, tampoco logra matizar las objeciones al control judicial a la luz del giro deliberativo de la democracia. Pues, al igual que la teoría anterior, este tipo de diálogo concede una voz privilegiada a los jueces, y sigue vinculado a control judicial fuerte.

4 DIÁLOGO INTERINSTITUCIONAL

Para la teoría del *diálogo interinstitucional,* la deliberación entre los tribunales y las demás instituciones legitima las decisiones judiciales. Lo distintivo de esta teoría, según Tremblay, es que "los tribunales y las legislaturas participan en un diálogo sobre la determinación del balance adecuado entre los principios constitucionales y las políticas públicas". En otras palabras, "un diálogo institucional puede producirse en cualquier lugar en el que las legislaturas puedan revertir, modificar, evitar o responder de cualquier otro modo a las decisiones judiciales que anulan la legislación".[35] A criterio de Bateup, esta teoría se centra en "las interacciones entre los tribunales y los poderes políticos del gobierno en el ámbito de la toma de decisiones constitucionales", de modo que hace hincapié en que "el poder judicial no tiene (como cuestión empírica) ni debería tener (como cuestión normativa) el monopolio de la interpretación constitucional".[36]

32 Waldron 2005: 254.
33 Gargarella 2005: 23-24.
34 Roach 2016: 384.
35 Tremblay 2005: 617, 618.
36 Bateup 2006: 1109.

Uno de los primeros representantes del diálogo interinstitucional fue Fisher, quien muestra que la práctica constitucional no se reduce a un monólogo judicial y que la corte no tiene la última palabra, sino que, en los términos que retoma de Bickel, hay un "coloquio continuo".[37] Fisher habla de una "construcción coordinada", en la cual "los poderes ejecutivo y legislativo comparten necesariamente con el poder judicial un papel importante en la interpretación de la Constitución".[38] Otro paradigma de esta teoría es el famoso artículo de Hogg y Bushell, según el cual, "(c)uando una decisión judicial está abierta a la revocación, modificación o anulación legislativa, entonces tiene sentido considerar a la relación entre la Corte y el órgano legislativo competente como un diálogo".[39] En suma, trabajos como estos abrieron un debate que ha contribuido a repensar el control judicial, antes que en exclusivas manos de la corte, en términos de un "diálogo" entre ella y las demás ramas de gobierno.

Desde un ángulo similar, a criterio de Young, "el diálogo describe una práctica en la que los tribunales […] pueden adjudicar derechos, pero las legislaturas elegidas y responsables tienen la última palabra sobre la forma de las obligaciones que se derivan de ellos. En la base está la expectativa de que ambas ramas intenten ofrecer interpretaciones razonables de las disposiciones constitucionales".[40] Por su parte, Dixon, si bien sugiere que la legitimidad exige abandonar el control judicial fuerte, a la vez, destaca que la corte tiene las condiciones, la capacidad y la responsabilidad de asumir un rol activo y dialógico para contrarrestar los "puntos ciegos" y las "cargas de inercia" en el proceso de creación y aplicación de las normas. Este diálogo, según ella, es "el modelo más deseable de *cooperación entre los tribunales y las legislaturas* en la aplicación de los derechos socioeconómicos".[41]

Una dificultad de las teorías del diálogo intrajudicial y transjudicial radica en que, durante el curso de la "política ordinaria", defienden la voz privilegiada de la corte frente a las restantes ramas de gobierno –aunque en la "política extraordinaria" sí que algunas admiten la posibilidad de revertir la jurisprudencia mediante enmiendas constitucionales.[42] Otro problema, como se dijo, estriba en que la trama deliberativa aparece restringida al intercambio entre los jueces y las cortes. En contraste, el potencial de la teoría del diálogo interinstitucional consiste en que amplía la trama de los agentes que participan en la deliberación, de modo tal que se concentra en la interacción entre la corte, el poder ejecutivo y el parlamento.

A modo de conclusión, la teoría del diálogo interinstitucional atiende al diálogo entre los tribunales y los parlamentos. Además, esta teoría se caracteriza

37 Fisher 1988: 3.

38 Fisher 1988: 231.

39 Hogg & Bushell 1997: 79.

40 Young 2012: 249-250.

41 Dixon 2007: 391, 393; el resaltado es agregado.

42 La distinción entre dos expresiones de la democracia, la "política ordinaria" o de gobierno y la "política extraordinaria" o constitucional, pertenece a Ackerman 1991.

por pensar en vínculos de diálogo colaborativo entre las ramas de gobierno, antes que en mecanismos de veto que resultan poco proclives al diálogo.[43] Aquí, entonces, reside su potencial para matizar la objeción contramayoritaria del control judicial. Ahora bien, sin perjuicio del mayor potencial de la teoría del diálogo interinstitucional, a menudo su foco se reduce a un diálogo binario, un diálogo entre el parlamento y la corte. De allí la importancia de dar un paso hacia una teoría en la cual la última palabra no se reduzca a una cuestión binaria entre el parlamento y la corte, es decir, a un control judicial fuerte o débil.

5 DIÁLOGO INCLUSIVO

Para la teoría del *diálogo inclusivo,* la deliberación entre los jueces, los tribunales, los órganos de gobierno y la sociedad legitima las decisiones judiciales. Esta teoría, según Bateup, "no privilegia las contribuciones judiciales", sino que tiene en cuenta "el debate constitucional en toda la sociedad". Así, busca "reforzar la legitimidad" mediante "un sistema de diálogo constitucional que reconozca el lugar central del pueblo en el debate sobre los valores fundamentales".[44] En igual sentido, Kong y Levy destacan que esta teoría se centra en "la deliberación democrática, tanto *entre las instituciones* del poder público –*incluidos los tribunales*– como *en la sociedad en la general*".[45] También Bakker subraya que la teoría del diálogo inclusivo sitúa al "pueblo como actor constitucional", de modo que "el diálogo constitucional abarca la idea de que las diferentes ramas gubernamentales y el pueblo interactúan para interpretar los principios constitucionales".[46] Bajo tales circunstancias, "el atractivo normativo" de la teoría del diálogo inclusivo "es la naturaleza social del diálogo, que es muy diferente de los modelos estrictamente institucionales".[47]

La teoría del diálogo inclusivo es sistémica en el sentido que desplaza la atención desde los "lugares individuales" y sus "únicas manifestaciones", tradicionalmente entendidos como "los mejores foros deliberativos" y con "la capacidad suficiente para legitimar la mayoría de las decisiones" –v. gr. la sociedad, el parlamento o la corte–, hacia "la interdependencia de los lugares dentro de un sistema más amplio".[48] De ahí que, pese a las similitudes entre las teorías del diálogo interinstitucional y del diálogo inclusivo, la primera atiende a cómo "las legislaturas y los tribunales negocian sobre el contenido de una ley y su impacto en los derechos", mientras que la segunda atiende a la "amplia deliberación sis-

43 Kahana 2002: 248-274.

44 Bateup 2006: 1157, 1164, 1166.

45 Kong & Levy 2018: 634; el resaltado es original.

46 Bakker 2008: 216, 220.

47 Bateup 2006: 1164.

48 Mansbridge, Bohman, Chambers, Christiano, Fung, Parkinson & Warren 2012: 1-2.

témica –entre los ciudadanos de a pie, los medios de comunicación, los grupos de la sociedad civil y las ramas o departamentos del gobierno".[49]

En este marco, la respuesta de la teoría del diálogo inclusivo ante la pregunta sobre quién debe deliberar tiene como referente a Habermas. Según el "principio del discurso", "válidas son aquellas decisiones (y sólo aquellas) en las que todos los que pudieran verse afectados concurren a prestar su asentimiento como participantes en discursos racionales".[50] Desde esta perspectiva, el diálogo no se reduce a la esfera institucional, sino que debe haber, antes que aislamiento, una "doble vía", con sensibilidad y conexión, entre las esferas institucional y social en la formación de la opinión y la voluntad política.[51] Bajo estas condiciones, la cuestión atinente a quién debe tomar las decisiones no se reduce a la definición de una sede con una voz privilegiada –sea en el parlamento, la corte o la sociedad–, sino que depende de la deferencia recíproca ante "la fuerza de los mejores argumentos".[52]

Al respecto de este último punto, Fredman destaca que la teoría del diálogo inclusivo "va más allá" del diálogo interinstitucional "al centrarse no solo en la decisión final, ya sea legislativa o judicial, sino también en la calidad de la deliberación en ambos ámbitos (y potencialmente en relación con la sociedad civil también)".[53] Por otro lado, ella también coincide con que la "conversación" sobre el derecho y la justicia no es una "cuestión profesional" de profesores, litigantes, jueces, representantes políticos, sino que incluye a diferentes grupos sociales, políticos, activistas, excluidos; esta conversación pone de manifiesto la importancia de la "cooperación" y dota de mayor legitimidad a las decisiones políticas.[54]

Desde la tradición habermasiana, Forst advierte el error de asignar "prioridad a valores teleológicos que han de servir de base a un orden justo", "sin que en este orden aparezcan quienes están sometidos a este orden como autores del mismo".[55] En términos similares a Waldron –quien también resalta la centralidad por la pregunta institucional–,[56] para Forst suele olivarse que "la primera pregunta de la justicia es aquella acerca del poder",[57] lo cual perpetúa la "alienación", en tanto esos valores no son sometidos a la autoridad de justificación de los mismos implicados.[58] Por eso, Forst argumenta que los principios de autonomía y dignidad exigen que "los sometidos mismos son los que deben ser los

49 Kong & Levy 2018: 634.
50 Habermas 2008: 172.
51 Habermas 2008: 381-386.
52 Habermas 2008: 382, 300, 301.
53 Fredman 2015: 449.
54 Fredman 2008: 245-247.
55 Forst 2014: 18-19.
56 Waldron 2005: 275.
57 Forst 2014: 43.
58 Forst 2014: 20.

sujetos y no solo los *objetos* de la justificación".[59] Esto entraña un "derecho" y un "deber" "de justificación", es decir, de dar, recibir y desafiar las razones.[60] De allí que el "contenido de los derechos humanos debe ser determinado discursivamente",[61] que es tanto como decir mediante un diálogo inclusivo.

En igual sentido, Gutmann y Thompson sostienen que "la labor deliberativa no debe dividirse de modo que los representantes den razones y los ciudadanos se limiten a recibirlas", sino que "todas las instituciones de gobierno tienen una responsabilidad de deliberación",[62] la cual debe "extenderse a todo el proceso político", a "cualquier escenario en el que la ciudadanía se reúna de forma regular para tomar decisiones colectivas sobre cuestiones públicas, tanto en instituciones gubernamentales como no gubernamentales".[63] Lafont, desde la misma perspectiva, suscribe una teoría "holística", la cual no se limita a la corte ni al parlamento. Según esta teoría del diálogo inclusivo, el control judicial es entendido como un mecanismo participativo a disposición de la sociedad para desencadenar la deliberación pública. Así, el control judicial empodera de igual poder comunicativo a los ciudadanos para "llamar a los demás a ponerse la toga" e iniciar el proceso de control constitucional.[64] Otro tanto sucede con Gargarella, quien aboga por "un proceso abierto y persistente de diálogo colectivo, es decir, uno que incluye el diálogo entre poderes, pero que no se agota en él. Este diálogo público, que incorpora a la propia ciudadanía en su centro, y no en los márgenes, necesita incentivarse y respaldarse también constitucionalmente".[65] En términos similares, Post y Siegel apelan a una "comunicación constante y continua" entre el gobierno representativo, los tribunales y la ciudadanía movilizada.[66]

Del mismo modo, Valentini parte de una concepción sistémica de la democracia deliberativa y defiende un diálogo que, lejos de limitarse a los tribunales o las instituciones, atiende a "toda la gama de actores, procesos y foros que desarrollan actividades deliberativas de manera formal o informal".[67] Bello Hutt, también desde una concepción sistémica, se aparta de la premisa según la cual "la interpretación de la constitución es exclusivamente una actividad judicial", a la vez que defiende la deliberación constitucional en múltiples foros institucionales y populares como condición de legitimidad.[68]

59 Forst 2014: 17; el resaltado es agregado.
60 Forst 2014: 42.
61 Forst 2014: 84.
62 Gutmann & Thompson 1996: 358.
63 Gutmann & Thompson 1996: 45.
64 Lafont 2020: 13, 226-227.
65 Gargarella 2014: 365.
66 Post & Siegel 2013: 51, 53.
67 Valentini 2022: 6.
68 Bello Hutt 2017: 11.

Aquí también cabe tener presente aquellos trabajos que han propuesto mecanismos democráticos y deliberativos para la formación, la transformación y el conocimiento de la opinión política de la sociedad. En tal sentido, Fishkin ha defendido los llamados "sondeos deliberativos", cuyo objetivo es realizar una votación con fines consultivos al final de una reunión entre ciudadanos elegidos por sorteo para deliberar sobre asuntos controvertidos de manera guiada, difundida públicamente y a partir de informes técnicos.[69]

Ackerman, también concibe que "la Constitución es objeto de un diálogo continuo" que incluye al "pueblo",[70] a la vez que apela a la "*legitimación mediante la profundización del diálogo institucional entre las élites políticas y los ciudadanos*".[71] Más recientemente, con la ayuda de Ackerman, Fishkin ha propuesto las denominadas "jornadas de deliberación ciudadana", cuyo objetivo es establecer un feriado al año a fin de que los ciudadanos interesados puedan reunirse en sus vecindarios para votar con fines consultivos luego de deliberar públicamente sobre cuestiones controvertidas, elaborar propuestas y elegir un representante para que, en una asamblea mayor con los demás representantes de las asambleas menores, deliberen sobre las propuestas, tomen una decisión y retornen a sus asambleas menores para explicar lo sucedido.[72]

Varios trabajos han enriquecido las propuestas de Fishkin y Ackerman, pues le han concedido a la sociedad un papel importante no solo en el proceso de formación, transformación y conocimiento de la opinión política, sino también en la toma de decisiones en la elaboración de las normas ordinarias, la adjudicación de casos concretos y la reforma constitucional. En cuanto a lo primero, Leib ha propuesto la creación, junto a la tríada clásica de poderes, de un "cuarto poder de gobierno popular" que le reserva a la sociedad un lugar más importante en la deliberación y decisión sobre la creación de las normas ordinarias.[73]

En cuanto a lo segundo, Spector ha justificado un sistema "bimodal" que mantiene el control de constitucionalidad existente, a la vez que añade un mecanismo democrático de control de constitucionalidad mediante "jurados constitucionales" seleccionados por sorteo y como "derecho opcional" de los demandantes en los casos en los cuales no confían en la corte y prefieren eva-

69 Fishkin 1991: 1-10, 82-104.

70 Ackerman 1991: 5, también 22.

71 Ackerman 1993: 85; el resaltado es original.

72 Ackerman & Fishkin 2004: 7.

73 Leib 2004. Pese a lo enriquecedora que es su propuesta, Leib no resuelve las críticas al control judicial. Por un lado, las decisiones del cuarto poder popular requieren de una supermayoría (2004: 83), de modo tal que las posibilidades de discutir y revertir las resoluciones judiciales se tornan difíciles e improbables, tal como sucede en el marco de mecanismos de reforma constitucional rígidos y contramayoritarios. Por otro lado, la corte conserva la autoridad final sobre el resultado de la deliberación de la rama de gobierno popular (2004: 12, 22, 72).

dirla.[74] También Ghosh ha ido más allá al sugerir el reemplazo del control de constitucionalidad fuerte mediante lo que ha considerado una alternativa más representativa, deliberativa, democrática y respetuosa de la libertad política, esto es, una "corte constitucional ciudadana" conformada mediante el sorteo.[75]

En cuanto a lo tercero, Zurn ha sugerido que el arbitraje de los procedimientos constitucionales que garantizan la legitimidad de la producción del derecho esté a cargo de una corte constitucional –como la vigente en el modelo europeo–, junto con procesos de enmienda constitucional flexibles de tres etapas: en la primera, se formulan las propuestas que pueden tener como origen una decisión del gobierno o una iniciativa popular; luego, dichas propuestas deben debatirse y aprobarse por "foros constitucionales cívicos" organizados como asambleas democráticas deliberativas; y, finalmente, tales propuestas deben ser debatidas en "jornadas de deliberación ciudadana" y ratificadas por el sufragio de la sociedad en general.[76]

En términos similares, con el objeto de disolver la objeción contramayoritaria mediante un diálogo entre las ramas de gobierno y la sociedad, Colón-Ríos ha defendido la democratización del procedimiento de enmienda constitucional mediante una "asamblea no-constituyente" –sin poder para crear una nueva constitución–, que puede activarse ante una decisión jurisdiccional controvertida, por iniciativa popular o convocatoria de la legislatura al electorado, a fin de que dicha asamblea elabore y somete a decisión mayoritaria del electorado una interpretación constitucional alternativa o una enmienda constitucional para validar la ley cuestionada y anular la sentencia.[77]

74 Spector 2009: 111-124. Pese al atractivo de esta propuesta, se limita a un grupo reducido de derechos, aquellos que involucran reclamos de la "ciudadanía frente a los representantes políticos". Spector se muestra escéptico frente a la "eficacia" de los jurados cuando están en juego los derechos de las "minorías frente a las mayorías" y, en tales casos, se inclina por una institución contramayoritaria como alternativa más efectiva.

75 Ghosh 2010: 345-352. La corte ciudadana de Ghosh debe adoptar las decisiones mediante una supermayoría, tales decisiones pueden ser vetadas mediante el voto súpermayoritario del congreso, su ámbito de actuación se ciñe a casos de violaciones de derechos, y dichos casos se seleccionan a partir de un dictamen consultivo de un consejo de jueces conformado por sorteo. Como puede verse, este jurado, al final del día, queda en una situación análogo a la de un control judicial fuerte, pues sus decisiones solo pueden revertirse mediante supermayoría. Pero con un añadido, a diferencia de casi todos los tribunales que pueden declarar la inconstitucionalidad de las normas por mayoría simple, el jurado solo puede hacerlo mediante un voto calificado.

76 Zurn 2007: 274-341. Zurn considera que un mecanismo de enmienda constitucional democrático y deliberativo permite responder a las sentencias de la jurisdicción constitucional. Además, Zurn va más allá que las teorías anteriores, en tanto sitúa la autoridad final en manos de la sociedad. Asimismo, el jurado ciudadano de Zurn, a diferencia de Spector y Ghosh, no debe resolver casos concretos, sino que debe emitir normas generales y claras útiles para resolver una serie de casos concretos de forma coherente.

77 Colón-Ríos 2013: 353-366.

Sin perjuicio del atractivo de estos minipúblicos, no hay que soslayar las advertencias de Lafont, en el sentido de que no debe sustituirse la "macrodeliberación" por la "microdeliberación", pues la "deferencia ciega" de la sociedad a las decisiones de un grupo de ciudadanos seleccionados al azar constituye un "atajo lotocrático" que va contra el ideal de autogobierno.[78]

Como conclusión, la teoría del diálogo inclusivo supone un paso más respecto de las teorías anteriores. En efecto, abarca el diálogo intrajudicial, transjudicial e interinstitucional, a la vez que, a la suma de esos diálogos, añade un escenario adicional: la sociedad entre sí y con las instituciones. Esta teoría no concibe a los grupos sociales o personas afectadas como un objeto pasivo sobre cuyos intereses, necesidades y demandas deben deliberar y decidir las instituciones, sino como participantes autónomos. De esta forma, ofrece la respuesta más inclusiva a la pregunta relativa a quién debe deliberar sobre los asuntos constitucionales. Dicho de otro modo, toma en serio el aspecto democrático o inclusivo de la democracia deliberativa.

Más allá del carácter promisorio de la teoría del diálogo inclusivo, muchos de los trabajos de este grupo, al final del día y con cierta independencia de ese proceso, suelen asignar una voz privilegiada a una autoridad política determinada de antemano. En cambio, otros trabajos aquí analizados no solo sostienen un diálogo inclusivo, sino que además defienden un diálogo continuo y sistémico. Este diálogo no está ligado a la idea de una voz privilegiada o una última palabra en un determinado lugar, sino a la idea de que la toma de decisiones ha de depender de la fuerza de los argumentos.

6 CONCLUSIONES

Si bien el constitucionalismo deliberativo procura revertir las objeciones al control judicial mediante el compromiso con las premisas de la democracia deliberativa, el argumento de este artículo fue que, aunque las cuatro teorías analizadas pretenden relativizar la falta de legitimidad del control judicial mediante el diálogo constitucional, solo la teoría del diálogo inclusivo tiene el potencial normativo para ello. En efecto, esta variante constitucional se oriente al diálogo inclusivo. A su vez, no se centra en una sola fuente de legitimación, sino que capta una gama más amplia de instancias dialógicas dentro del sistema constitucional.

Ahora bien, de la defensa del diálogo inclusivo que ofreció este artículo, no debe adoptarse una postura escéptica ni otra ingenua. Por un lado, no debe caerse en el escepticismo frente a los impedimentos, los obstáculos y las dificultades empíricas que tornan improbable la posibilidad de alcanzar un constitucionalismo más deliberativo. En efecto, a menudo las causas de los problemas en con-

78 Lafont 2020: 10-11.

textos adversos son ajenas y preexistentes a la deliberación democrática, además tales contextos no implican necesariamente que esta teoría sea impracticable o inútil, sino, más bien, constituyen desafíos que reafirman la importancia del constitucionalismo deliberativo. Estos contextos, entonces, no requieren inexorablemente un modelo alternativo, sino más bien su realización consecuente. Por otro lado, no debe caerse en la ingenuidad de pensar que las instituciones se comportarán necesariamente de acuerdo con esta teoría. Principalmente, porque los sistemas constitucionales vigentes suelen ofrecer pocos, si es que algunos, incentivos institucionales para que las decisiones políticas se adecuen al ideal del constitucionalismo deliberativo. En tal sentido, si bien la inclusión de la sociedad en el diálogo "es una contribución teórica importante", no hay que desconocer que "es poco probable que se produzca un diálogo constitucional a escala social", ni hay que "subestimar los aspectos institucionales del diálogo constitucional", sino que hay que avanzar sobre las posibilidades institucionales a través de las cuales este diálogo podría desarrollarse.[79]

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Jürgen Habermas

HOW IS LEGITIMACY MADE POSSIBLE VIA LEGALITY?

Jürgen Habermas*

How is legitimacy made possible via legality?

The author defends the thesis that the autonomization of the legal system cannot entail a complete dissociation of law from morality on the one hand, and politics on the other. Even law which has become positive does not sever its internal ties with morality and politics. The first section roughly outlines how modern law, with the help of rational law, has differentiated itself from the traditional complex of morality, law and politics. The middle section deals with the question of how an idea of the constitutional state emerges from the collapse of rational law, which does not have to merely stand impotent in relation to a society of high complexity and accelerated change. In the final section, the author examines how law and morality simultaneously complement and intertwine with each other today from an internal perspective.

Keywords: law and morality, law and politics, modern natural law, rule of law, legitimacy, legality, procedural rationality

I want to defend the thesis that the autonomization of the legal system cannot entail a complete dissociation of law from morality on the one hand, and politics on the other. Even law which has become positive does not sever its internal ties with morality and politics. In the first part, I will roughly outline how modern law, with the help of rational law, has differentiated itself from the traditional complex of morality, law and politics. In the middle section we will deal with the question of how an idea of the constitutional state[a] emerges from the collapse of rational law, which does not have to merely stand impotent in relation to a society of high complexity and accelerated change. In the final part,

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* Professor emeritus at Goethe University, Frankfurt (Germany) | This is an English translation of the following article by Jürgen Habermas: "Wie ist Legitimität durch Legalität möglich?" Kritische Justiz 20, no. 1 (1987): 1–16, https://doi.org/10.5771/0023-4834-1987-1-1. The German article is based on Habermas' Tanner Lectures on Human Values (1986). I translated this article prior to coming across Kenneth Baynes' translation of the lectures. This translation is not simply an alternative translation of the Tanner lectures originally translated by Baynes, but a translation of a revised version of them that Habermas chose to publish subsequently in German but which has never been previously translated. Translated by Linh Hoai Mac.

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a *Translator's note:* I translate 'Rechtsstaat' as 'constitutional state.' Elsewhere, it has been translated more loosely as 'democracy' [demokratischen Rechtsstaat], 'government,' etc. See Habermas 1998.

I want to examine how law and morality simultaneously complement and intertwine with each other today from an internal perspective.

1 RATIONALITY AND POSITIVITY: THE INTERTWINING OF LAW, POLITICS, AND MORALITY

(1) If we want to make clear to ourselves why the differentiation of law from politics and morality in no way dissolves completely its internal entanglement with them, then a review of the development of positive law is called for. In Europe, this process of differentiation stretched from the end of the Middle Ages up until the major codifications of the eighteenth century. In common law countries, customary law was also transformed by Roman law under the influence of academically-educated lawyers; in the process, it is gradually adapted to the commercial conditions of an emerging capitalist economy and bureaucratized control of the self-formed territorial state. I want to reduce this complicated, varied, difficult-to-survey process to a single point that is of interest to us in our legal-philosophical context. What the positivization of law signifies philosophically can be better explained against the background of the tripartite structure of the disintegrating medieval legal system.

From a certain distance one recognizes in our domestic traditions counterparts to those three elements which according to the insights of comparative legal sociology were typical of the legal culture of ancient empires.[1] The legal system is always undergirded by a sacred law exegetically administered by theological and juridical experts; its core forms the bureaucratic law posited by a king or emperor, who is at the same time the supreme judge, in accordance with sacred legal traditions. As a rule, both types of law transform the unwritten customary law, which in the last instance trace back to tribal legal traditions. In the Middle Ages in Europe, things were somewhat different, insofar as the canon law of the Catholic church continued the highly legal-technical and conceptual level of *classic* Roman law without interruption, whereas the sovereign law composed of imperial decrees and capitularies was already at least connected with the idea of Roman imperial rule before the rediscovery of the Code of Justinian. Customary law itself was owed to the mixed Romano-Germanic legal culture of the Western Roman provinces and was passed on in written form since the twelfth century. But the structure known from all advanced civilizations – the branching into religious and secular law – essentially repeated itself, whereby sacred law is integrated into the order of the cosmos or the event of salvation that formed the horizon of one of the great world religions. This divine or natu-

1 Unger 1976.

ral law is not at the disposal of the political rulers. Rather, it provides the legitimizing framework within which the ruler exercises his secular rule over the functions of jurisdiction and bureaucratic legislation. In this context, M. Weber speaks of "The dual realms of traditional rule."[2]

The traditional character of law survives even in the Middle Ages. All law borrows its mode of validity from the divine origin of natural law as understood by Christianity. New law can only be created in the name of the reformation or restoration of the good old law. The attachment to traditional legal understanding already contains an interesting tension that exists between both elements of the sovereign's law. As the supreme judge, the ruler is subordinated to sacred law. Only thus can his legitimacy be translated into worldly power. From the reverent safeguarding of the sacrosanct legal order stems a legitimacy premium for exercising political rule in general. At the same time, the ruler at the top of an administration organized according to offices also makes use of law as a medium that confers a collective obligation to his commands, for example in the form of edicts and enactments or decrees. On the one hand, law as the means of bureaucratic exercise of rule can admittedly fulfil the regulatory function only so long as, on the other hand, it simultaneously retained its non-instrumental, indisponible[b] character in the form of sacred legal traditions that the ruler must respect in the administration of justice. Between both of these moments – the indisponibility of law stipulated by legal conflict settlement, and the instrumentality of law that serves as the ruling order in its own right – an unresolved tension exists. It remains unobtrusive as long as the sacred basis of law is not contested and the foundation of customary law in tight adherence to tradition is firmly anchored in daily practice.[3]

(2) If one now proceeds from the fact that in modern societies precisely these two conditions may increasingly go unfulfilled, then one can explain the positivization of law as a reaction to such changes.[4] To the extent that religious worldviews give way to privatized powers of faith and the common law traditions become absorbed by scholarly law by way of modern usage, the tripartite

2 Cf. Schluchter 1980.

b *Translator's note:* Following Baynes, and at Del Caro's suggestion, I translate 'unverfügbaren' and 'Unverfügbarkeit' as 'indisponible' and 'indisponibility' respectively. For the English etymology and a discussion of Habermas' usage, see Ryba 2019: 39. Ryba interprets 'indisponible', which Habermas left undefined in the original text, as characterising 'the moment when law is understood as having an existence in *relative* independence from religion and politics but one in which the connection is not completely broken' (emphasis in original). Credit to Del Caro, who also found the usage indisposability and nondisposability, for directing me to Ryba's article. William Rehg has also translated the term as 'noninstrumentalizable.' See Habermas 1998 and Habermas 1992. Habermas also appears to use 'unverfügbaren' and 'nicht-instrumentellen' ['non-instrumental'] interchangeably. See Habermas 1992: 582.

3 Cf. Schlosser 1982.

4 The Internal Aspect Neglected [by] The Functionalist Interpretation of the Positivization Impetus; cf. Luhmann 1983.

structure of the legal system must fragment. Law shrinks down to one dimension and occupies only the space which until then had been taken up by bureaucratic sovereign rights. The political power of the ruler liberates itself from the bond with sacred law and becomes sovereign. To it falls the task of using its own power to fill by means of political legislation the gap that the theologically-administered natural law left behind. Henceforth, all law flows from the sovereign will of the political legislator. Legislation, enforcement, and implementation of statutes become three moments within a single politically-controlled circular process; they remain so afterwards, when they differentiate themselves institutionally in accordance with state powers.

As a result, the relationship between the two moments of the indisponibility and the instrumentality of law changes. With sufficient differentiation of roles, and therein after all lies the significance of separation of powers, the legislative programs are of course imposed on the administration of justice. But can a similarly obligatory authority still emanate from arbitrarily changeable political law as it previously did from inviolably-sacred law? Does positive law even preserve the binding character of law akin to the sovereign administrative right of a traditional legal system if it can no longer borrow its own mode of validity from a prior and superior law? Legal positivism has time and again given affirmative answers to these questions.[5] In one version, law is in general deprived of its affirmative character and only defined instrumentally: it is valid as the command of a sovereign (Austin). In the process, the moment of indisponibility disappears as a metaphysical residue. The other version of legal positivism firmly maintains the premise that law can fulfil the core function of conflict settlement only so long as applied law preserves the moment of indisponibility. But this moment is allowed to adhere only to the form of positive law, no longer to natural law contents (Kelsen). From this perspective, the legal system which is separate from politics and morality, with jurisdiction as its institutional core, remains the only place where law can, on its own strength, safeguard its form and therewith its autonomy. Both versions result in the consequence that the meta-social guarantee of legal validity conferred by sacred law can be omitted *without replacement*.

The historical origins of modern as well as traditional law speak against this thesis. Law generally comes before the so-called development of political, i.e. state organized rule, whereas state-sanctioned law and legally-organized state power in the form of political rule arise concurrently.[6] It appears that archaic legal development first made possible the onset of a political ruling power in which state power and state law were mutually constituted. Under this constellation it is hard to imagine that law could ever be either absorbed completely into

5 Hörster 1972.

6 On the following cf. Wesel 1984.

politics or be dissociated from politics entirely. Additionally, one can show that certain structures of moral consciousness have played an important role in the occurrence of this symbiosis of law and state power. Moral consciousness plays a similar role in the transition from traditional law to secular positive law secured by the state monopoly of force and placed at the political legislator's disposal. The moment of indisponibility that at the same time forms an indispensable counterbalance to the political instrumentalization of the legal medium in modern law is owed to the entanglement of politics and law with morality.

(3) This constellation appears for the first time with the symbiosis of law and state power. In Neolithic tribal societies,[7] there are typically three mechanisms in force for the regulation of inner conflicts: practices of self-help (feud and blood revenge); the ritual invocation of magical powers (oracles, trial by combat); and arbitrational mediation as a peaceful equivalent for violence and witchcraft. Such intermediaries still lack the competence to bindingly or authoritatively decide a dispute between the parties and to enforce the judgment against tribal loyalties. In addition to the characteristic of enforceability, courts and legal proceedings were also lacking. Furthermore, law still remains so tightly connected with custom and religious ideas that genuine legal phenomena are difficult to differentiate from other phenomena. The concept of justice underlying all forms of conflict settlement is interwoven into the mythical interpretation of the world. Revenge, retribution, and compensation serve the restoration of a disrupted cosmological order. This order, which was constructed from symmetries and mutuality, equally extends to individual persons and kinship groups as well as nature and society as a whole. The seriousness of crimes is measured by the consequences of the action, not by the intention of the perpetrator. A sanction has the meaning of compensation for damage caused, not that of a punishment of a perpetrator who was guilty of a norm violation.

These concretized concepts of justice do not yet allow the separation of legal questions from questions of fact. In archaic legal proceeding, normative judgments, prudent balancing of interests, and factual claims flow into one another. There is a lack of concepts such as accountability and liability; intent and negligence are not differentiated. What counts is the damage objectively caused. There is no separation of civil law from criminal law; all legal infringements are, to some degree, offences which demand compensation. Such distinctions are only possible when a completely new concept arises and revolutionizes the world of moral ideas. I mean the concept of a legal norm that is situation-independent, superior to, thus prior to the disputing parties as well as the impartial arbitrator and generally recognized as binding. Around this core solidifies what L. Kohlberg calls a conventionally-moral consciousness. Without such a normative concept, the arbitrator can only persuade the disputing parties to

7 Cf. Wesel 1984: 329 ff.

compromise. In the process, he may assert as influence the personal reputation founded on his status, his wealth or his age. But he lacks political power; he cannot yet appeal to the impersonally binding authority of law and the moral insight of the concerned parties.[8]

I now propose the following thought experiment: Let's presuppose for a moment that conventional legal and moral ideas arise prior to the emergence of such a thing as state authority. Then an arbitrating chieftain could for example already base himself on the binding character of the recognized legal norms; but he could not yet add the factually compelling character of a state capability to impose sanctions to the moral binding nature of his judgment. Nevertheless, the role of the chieftain whose leadership role was hitherto solely based on factual influence and prestige would have to change profoundly. Three processes are important in this scenario. Such a chief, as a preserver of intersubjectively acknowledged norms, would first partake in the aura of the laws administered by him. The normative authority of law would be transferred from the competence of the magistrate and unified under the sole authority of the chief. The factual power of the influencer would imperceptibly be transformed into the normatively authorized power of a commander who can then make collectively binding decisions. Secondly, the quality of the judicial decision would thereupon itself have to change. Behind the morally binding legal norms would no longer stand only the tribe's pressure to conform or the factual influence of a prominent member, but also the threat of sanction by a legitimate ruler. Thus an ambivalent mode of validity of state law which fuses recognition and coercion would emerge. Thirdly, however, with these changes, the political ruler would gain a vehicle with the help of which he could establish an organization with distinct offices and exercise his rule bureaucratically. Thus, besides the aspect of the indisponibility of objective law, law also obtains an instrumental aspect as means of organization.

Even though these considerations also have an empirical content,[9] I am concerned first and foremost with the clarification of conceptual relations. Only in world views that become ever more complex do a moral consciousness of the conventional stage develop; only an awareness of traditionally-anchored and morally-binding norms enabled the conversion of actual power into normative power; only the disposal of legitimate power allowed the political enforcement of legal norms; only binding law can be used for the organization of state power. If one analyses this entanglement of religiously-embedded morality, legally-legitimized rules and legally-formed state-organized administration in detail, the untenability of both of the legal positivist concepts mentioned above will be clear.

(4) The reduction of legal norms at the command of the political legislator signifies that law dissolves, so to speak, into politics. But the concept of the

8 Pospíšil 1982.

9 Eder 1976; Habermas 1976.

political itself thereby disintegrates. Under this premise, political rule can no longer be understood as legally-legitimized power in any case, since a law that has become completely disposable via politics loses its legitimizing force. As soon as legitimation is conceived as the internal achievement of politics, we give up *our* concepts of law and politics. The same consequence ensues for the other view, that positive law would be able to maintain its autonomy on its own, i.e. through the dogmatic contributions of a law-abiding justice that became independent vis-à-vis politics and morality. As soon as legal validity forfeits each moral connection to aspects of justice extending beyond the decision of the legislator, the identity of law is itself diffused. Afterwards, those self-same legitimizing viewpoints by which the legal system could be defined in terms of the preservation of a specific structure [would] disappear.

Presupposing that modern societies cannot at all dispense with law (and also cannot retain the pseudonym of "law" while operating a functionally equivalent but *totally different kind* of praxis), the positivization of law already creates a consequential problem on conceptual grounds. For the disenchanted sacred law – and for a customary law that has become empty and insubstantial – an equivalent must be found which can obtain a moment of indisponibility for positive law. Such an equivalent first developed in the form of rational law that is indeed not only legal-philosophical, but has also had an immediate legal-dogmatic meaning for the major codification and the judicial practice of legal training.[10] I wish, in this context, to draw attention to two points: a) a new, post-traditional stage of moral consciousness articulates itself in rational law, which predicates modern law on precepts and turns it into rational procedure; b) social contract theories were developed in opposed directions depending on whether the positivization of law as such or the requirement for a justification arising therefrom brings to the fore a phenomenon in need of explanation. Either way, however, they have been able to produce no plausible connection between the moments of the indisponibility and the instrumentality of law.

Ad a). Rational law responds to the collapse of natural law justified religiously and metaphysically and to the demoralization of a politics that is increasingly naturalistically construed and converted into the assertion of self-interest. As soon as a state with a monopoly of force obtains an exclusive access to law in the role of the sovereign legislator, law that has been degraded to a means of organization is threatened with the loss of any relation to justice and therewith its genuine character. When the positivity of law has become dependent on a state sovereign, the problem of justification does not disappear, it only shifts to a narrowed foundation of a post-metaphysical secular ethics decoupled from [traditional] worldviews.

10 Wieacker 1969: 249 ff.

The basic figure of civil private law is the contract. Contractual autonomy empowers private legal persons to create subjective rights. In the idea of the social contract, this thought figure is now used in an interesting way, to morally justify rule exercised in the forms of positive law – legal rule: A contract which any autonomous individual makes with all other autonomous individuals can only contain what all can reasonably desire given their own self-interest. In this manner, only those regulations that have the unforced consent of everyone can come to pass. This basic idea reveals that the reason of modern natural law is essentially practical reason – the reason of an autonomous morality. This requires that we distinguish between norms, justifying principles and procedures – procedures according to which we examine whether norms in the light of valid principles may count on general acceptance. Inasmuch as such a procedure for the founding of legally constituted political regulations is taken into account with the idea of the social contract, positive law is subjected to moral principles. From a developmental perspective, this raises the likely hypothesis that during the transition to modernity, in turn, a change in moral consciousness has fulfilled the role of pacemaker for legal development.

Ad b). Rational law has appeared in various versions. Authors like Hobbes focus more on the phenomenon of arbitrary changeability; authors like Kant are more preoccupied by the justification deficit of law that has newly become positive. As is well known, Hobbes developed his theory according to premises which strip positive law as well as political power of all moral connotations; the law enacted by the sovereign is supposed to get by even without a reasonable equivalent for disenchanted sacred law. Hobbes naturally gets caught in a performative contradiction with a theory which offers its addressees just such a rational equivalent. The manifest content of his theory, which explains the morality-free operation of completely positivized law, contradicts the *pragmatic* role of the same theory, which certainly wants to explain to its readers why they could have had good reasons as free and equal citizens to decide upon subjection to an absolute state power.

Kant later makes explicit the normative assumptions implicitly made by Hobbes and from the beginning develops his legal doctrine within the framework of his moral theory. The general legal principle that objectively underlies all legislation arises from the categorical imperative. From this chief principle of legislation in turn follows the original subjective right of anyone, to obligate every other legal peer [fellow human being endowed with rights] to respect his freedom, provided only that it agrees with the equal freedom of all in accordance with general laws. Whereas for Hobbes, positive law is ultimately a means of organization of political rule, it retains, for Kant, a significant moral character. But even, in these fully developed versions, rational law struggles with the self-imposed task of rationally explaining the conditions of legitimacy of

legal rule. Hobbes sacrifices the indisponibility of law for its positivity, but with Kant natural or moral law derived *a priori* from practical reason gains the upper hand, so much so that law threatens to be absorbed in morality: law is downgraded to a deficient mode of morality.

Kant builds the moment of indisponibility into the moral foundations of law in such a way that positive law is subsumed under rational law. Thanks to this rational-legal prejudice, no room remains for the instrumental aspect of law of which the political legislator makes use for his organisational tasks. After the canopy of Christian natural law collapsed, the pillars of naturalistically-disenchanted politics on the one hand, and of law transposed into political decision on the other hand, remain standing as ruins. Kant reconstructs the crumbled edifice through a simple substitution: autonomously-justified rational law is supposed to occupy the place vacated by religious-metaphysical natural law. Thereby, the mediating function of jurisprudence indeed changes in comparison with the tripartite traditional law, which had conferred sacred legitimacy on the ruler and his bureaucratic rule; it now recedes behind the political legislator and manages his programs. Now however all the state powers differentiated in themselves fall under the shadow of a noumenal res publica justified by reason, which should find as faithful a reflection as possible in the phenomenal res publica. The positivization of law itself still stands as the realization of the rational-legal principles under the imperatives of reason.

But if politics and law are pushed into the subordinate position of executive organs for the legislation of practical reason, politics loses its legislative competence and law its positivity. Therefore Kant must fall back on the metaphysical premises of his two-kingdom doctrine in order to distinguish legality and morality from one another in a highly contradictory way.[11]

2 THE SUBSTITUTION OF RATIONAL LAW WITH THE IDEA OF THE CONSTITUTIONAL STATE

(1) Rational law has not only proved vulnerable on philosophical grounds; the conditions which it was supposed to interpret have outgrown it. Soon it became clear that the dynamics of a society integrated across markets could no longer be contained by the normative notion of law and could certainly not be stopped in the framework of a legal system formulated *a priori*. Any attempt to theoretically derive the foundations of private and public law from supreme principles once and for all had to fail because of the complexity of society and history. Social contract theories—and by no means just the idealistic ones among them—were laid out too abstractly. They had not accounted for

11 Kersting 1984: 16 ff.

the social conditions of their possessive individualism. They had not acknowledged that the fundamentally private-law institutions of property and contract, as well as the subjective-public right of defence against the bureaucratic state could only promise justice through the accommodation of a fictive economy based on small goods. At the same time, contract theories—and by no means just the *a priori* procedural ones—were formulated too concretely. They had not accounted for the mobilization of living conditions and underestimated the pressure to adjust which emanated from the growth of capitalism, and from social modernization in the first place.

In Germany, the moral content of rational law was detached from legal theory and is at first continued on the parallel tracks of private-law doctrine and the idea of a constitutional state, but it had dried up in positivistic terms during the course of the nineteenth century. From the viewpoint of pandectistics, law became absorbed by the civil code administered by lawyers to a significant extent. Here, in the private legal system itself, and not on the part of a democratic legislator, the moral content of law was supposed to be secured.[12] F. C. von Savigny, who construed all private law as an edifice of subjective right, was following Kant's view that the form of subjective right was moral in and of itself. General here, subjective rights exclude private-autonomous realms of authority and guarantee individual freedom by means of subjective authorizations. The morality of law consists in the belief "that the individual will is assigned to a domain, in which it [the individual will] has to prevail independently from any external will."[13] But it soon became clear from actual legal developments that subjective rights are something secondary vis-à-vis objective law as well as being completely unable to offer a conceptual foundation for the private law system as a whole. The concept of subjective right was thereupon positivistically reinterpreted and purified of all normative associations. According to B. Windscheid's definition, subjective rights merely shift the commands of the objective legal order onto the authority of individual legal subjects.

A parallel development can be traced in the idea of the constitutional state which Kant had already introduced, albeit under hypothetical reservations. The German theorists of the nineteenth century are interested above all in constitutional taming of monarchical administrative power. Mohl and Welcker even posit in the Metternich era that universal and abstract laws turn out to be a suitable medium for an equal advancement of all citizens' "with an education that is as multifaceted as possible, consistent with reason and inclusive of all intellectual and physical powers."[14] After the foundation of the German Reich, Gerber and Laband are already developing the doctrine of law as the command of a

12 Coing 1970: 11 ff.

13 von Savigny 1840a: 333.

14 Maus 1978: 13 ff.

sovereign, substantively free, legislative body. It is this positivist concept of law which was eventually used by progressive constitutional lawyers of the Weimar period such as Heller for the parliamentary legislator: "In a constitutional state, laws mean only, but also all, legal norms posited by the people's legislature."[15]

I remind readers the doubtless atypical German development only because in it may be studied the gradual erosion of a rational-legal moralized concept of law from the twofold perspectives of legal dogmatists and judges on the one hand, and of parliamentary legislators on the other. In the Anglo-Saxon countries, where the idea of the constitutional state has been unfolded in terms of the "rule of law"[c] from the beginning in accordance with democratic developments, the idea of fair legal proceedings – fair trial and due process – offered itself as a uniform interpretative model that was concurrently applied to legislation and jurisdiction. In Germany, the positivistic destruction of rational law took place via other routes. Certainly, Kant's construction, according to which politics and law were subjected to the moral imperative of rational law, is refuted in private law dogmatics as well as the theory of the constitutional state – but sometimes from the perspective of justice, and other times from the perspective of political legislators. As a result, for those who were not convinced by sheer legal positivism as an alternative after the collapse of the protective canopy of rational law, *the same* problem always presents itself in another form on both sides.

One can generally articulate the problem as follows. On the one hand, one cannot explain the moral foundations of positive law in the form of a higher-order rational law. On the other hand, they also cannot be liquidated without replacement without taking away from law the essential moment of indisponibility. But then it must be shown how, within positive law itself, the moral viewpoint of an impartial judgment- and will-formation can be stabilized. This demand is not thereby already fulfilled simply because specific moral principles of rational law are positivised as the contents of constitutional law, because the point is the contingency of the contents of an arbitrarily changeable law. Rather, the morality that is built in to positive law has itself the transcendent power of a self-regulating procedure governing its own rationality.

(2) Under the pressure of this problem, those of Savigny's successors who did not want to be satisfied with a positivist reinterpretation of subjective law expanded scientific juridical law into a source of legitimacy. In his theory of legal sources, Savigny had even assigned the judiciary and legal dogmatics the modest and derivative function of "showing and bringing to consciousness in a scientific way" how positive law originated from custom and legislation.[16] On the contrary, at the end of the century, G. F. Puchta represents the view that the

15 Heller 1971: 226.

c *Translator's note:* "rule of law" in English in the original.

16 von Savigny 1840b (cited in Maihofer 1973: 44).

production of law must not be the sole object of the political legislator, otherwise the state could not be founded on "law," i.e., could not be a constitutional state. Rather, the judiciary would assume, going beyond the implementation of valid law, the productive function of continuation and expansion of valid law guided by constructive principles.[17] This judge-made law should obtain its independent authority from a scientific method of justification, that is from the arguments of a scientifically procedural jurisprudence. Puchta already provides the starting point for a theory which from the perspective of judicature traces the legitimating grounds of legality back to the procedural rationality constitutive of juridical discourse.

From the legislative perspective, an analogous interpretation suggests itself, even if parliamentary discussion is aimed directly at compromising and not, like juridical discourse, at the scientifically-disciplined justification of judgments. Also in this respect, for those who do not want to resign themselves to democratic legal positivism, the question arises as to the grounds on which laws enacted by parliamentary majorities may claim legitimacy. Kant had already taken the first step, following Rousseau's concept of autonomy, of working out the moral point of view of impartiality from the procedure of democratic legal positivism itself. As is well-known, he explains that the criterion for the touchstone of lawfulness of each public law was whether it "could have arisen from the general will of an entire people."[18] However, in proposing this criterion Kant himself contributed to the rapid confusion of two completely different meanings of "universality" of law: the semantic universality of abstract universal law superseded procedural generality, which treated law enacted democratically as an expression of "the unified will of the people."

In Germany, where the debate over democratic theory only revived in the 1920s, this confusion had two unfortunate consequences. For one thing, one could be mistaken about the cumbersome burdens of proof of a proceduralist democratic theory that must first be removed. First, argumentation theory would have to show how, in the will-formation of the parliamentary legislator, political goal-setting and moral-foundational discourses were mutually intertwined with legal judicial review. Second, it would have to be made clear how an argumentatively-achieved agreement differs from a negotiated compromise, and how the moral viewpoint itself in turn brings to the fore the conditions of fairness for compromise. Third, and above all, it would have to reconstruct how the impartiality of legislative will-formation ought to be institutionalized through legal procedure – starting from majority rule, through parliamentary rules of procedure, to suffrage and opinion formation in the political public sphere. This analysis would have to be guided by a model that presents the nec-

17 Puchta, *From Law* 1841 (cited in Maihofer 1973: 52 ff.).

18 Kant 1870.

essary conditions of communication for discursive will-formation and a fair balance of interests in their context. Only with such a foil can the normative sense and the actual practice of such procedures be critically analysed.[19]

But furthermore, this confusion of procedural generality with the semantic universality of parliamentary legislation had the consequence that one could be mistaken about the separate problem of the application of law. If the morally-substantial procedural rationality of legislation were sufficiently institutionally secured by itself, then the laws, whether or not the regulatory law of the social state is now concerned, would never have a semantic form and a resulting certainty that left to the judge only its algorithmic application. The construction achievements of legal development are always inextricably interwoven with the interpretative power of rule application, as philosophical hermeneutics demonstrates.[20] Therefore the problem of procedural rationality arises for judicial decision-making practice and legal dogmatics all over again and in a different way.

In legislative procedures, a morality integrated in positive law can come into play so that the political discourse of goal-setting is restricted by the principle of the more general ability to consent, hence that moral consideration, which we must respect in the *justification* of norms. With the context-sensitive *application* of norms, however, the impartiality of judgment does not thereby come into play in asking ourselves what everybody could want, but in asking whether we have adequately considered all relevant aspects of a given situation. Before we are able to decide which norms are applied in a case, inasmuch as these norms in some circumstances collide with one another and must then be prioritized in the light of principles, we must clarify whether the description of the situation is reasonable and complete with regard to all whose interests are affected. As Klaus Günther has shown,[21] practical reason rises to prominence through the examination of the *generalisability of* interests in the settings of the justification of norms, and in the settings of application of norms through the *reasonable* and *complete* acquisition of relevant contexts in light of competing rules. To this, the legal procedures must conform, concerning which the impartiality of jurisdiction is supposed to be institutionalized.

(3) With these considerations I aim at the idea of a constitutional state defined by the separation of powers, whose legitimacy draws on the impartiality of the guaranteed rationality of its legislative *and* judicial processes. Thereby nothing more is obtained than a critical benchmark for the analysis of constitutional reality. That idea, to be sure, does not merely confront abstractly a reality that corresponds so little to it – as an impotent obligation. On the contrary, the procedural rationality already partially integrated into positive law marks

19 Neumann 1986: 70 ff.

20 Esser 1972.

21 Günther 1986.

the sole remaining dimension (following the collapse of rational law) in which positive law can be guaranteed a moment of indisponibility and a structure free of contingent actions.

3 THE RATIONALITY OF LEGALLY INSTITUTIONALIZED PROCESS: PRELIMINARY QUESTIONS

(1) If legitimacy by dint of legality is supposed to be possible in societies of our kind, a belief in legality that has lost the collective certainties of religion and metaphysics must rest in some sense on the "rationality" of law. But Max Weber's assumption that an independent, morality-free rationality that is intrinsic to law itself, could supply the ground for the legitimating power of legality has not been substantiated. Legitimacy always owes its rule, exercised according to the forms of positive law subject to justification, to the implicitly moral content of formal qualities of law. Meanwhile, the formalism of law must not be too concretely solidified in specific semantic characteristics. Rather, those procedures, which institutionalize demands for justification and the route to their argumentative vindication have legitimizing power. The source of legitimacy, moreover, must not be unilateral; it is not supposed to be sought in one place, whether as a replacement for political legislation or jurisdiction. For under the conditions of welfare-state politics, even the most thoroughly democratic legislator can no longer bind justice and administration solely through the semantic form of law; he cannot manage without regulatory law. A rational core in the moral-practical sense only emerges from legal procedure if one analyses how, using the idea of impartiality of the justification of norms as well as the application of binding regulations, a constructive connection is established between valid law, legislative procedure, and the procedures for the application of law. This idea of impartiality forms the core of practical reason. If we put aside the problem of the impartial *application* of norms, the idea of impartiality is unfolded above all under the aspect of a *justification* of norms in those moral theories and theories of justice that propose a procedure for assessing practical questions from a moral viewpoint. The rationality of such a pure procedure, which precedes all institutionalization, is measured by whether the moral point of view[d] is explicated appropriately in it.

At present, I see *three serious candidates* for such a proceduralist theory of justice. All originate from the Kantian tradition, but they vary according to the models by means of which they explain the procedure of impartial will-formation.[22] John Rawls continues from the model of contractual agreement and

d *Translator's note:* "moral point of view" in English in the original.

22 Habermas 1986.

integrates morally substantial constraints into the characterization of the original position under which the rational egoism of the free and equal parties must lead to the choice of correct principles. The fairness of outcomes is guaranteed through the procedure by which they are realised.[23] Lawrence Kohlberg instead uses G. H. Mead's model of the general reciprocity of mutually entangled perspectives. An idealized original position is superseded by an ideal role-adoption, which demands of an author of moral judgments that he place himself in the situation of all those who would be affected by the implementation of a questionable norm.[24] Both models have in my view the drawback that they do not completely satisfy the cognitive demands of moral judgment. According to the model of contractual agreement, moral insights are *adapted* into rational elective decisions, using role play to simulate empathetic efforts at understanding. Karl-Otto Apel and I have therefore proposed to recognize moral argumentation itself as the appropriate procedure of rational will-formation. The assessment of hypothetical claims of validity constitutes such a procedure, because everyone who seriously wants to argue must engage with the idealizing assumptions of a demanding form of communication. That is to say, each participant in an argumentation practice must pragmatically stipulate that in principle, all potentially concerned parties could take part in a cooperative search for truth, in which solely the force of the better argument may be given a chance.[25]

I cannot engage in moral-theoretical discussion here; in our context the conclusion suffices that there are serious candidates for a proceduralist theory of justice. Only then is my thesis that proceduralized law and principled moral reasoning refer to each other not left hanging in the air. Legality can only create legitimacy to the extent to which the legal system reflexively responds to the justification requirements created by the positive development of law, specifically in a way that institutionalizes legal decision-making procedures which are permeable to moral discourse.

(2) However, the boundaries between law and morality must not be blurred. The procedures which theories of justice provide in order to explain how one can make judgements from a moral viewpoint only have in common with legally-institutionalized procedures that the rationality of the procedures should guarantee the "validity" of the procedurally obtained results. But legal procedures approach the demands of more comprehensive procedural rationality because they are interwoven with independent institutional criteria by means of which disinterested observers can determine from their perspective whether a decision is properly arrived at or not. The procedure of moral discourses not regulated by law does not fulfil this requirement. Here, procedural rationality is

23 Rawls 1975.

24 Kohlberg 1981.

25 Habermas 1983.

incomplete. Whether something has been judged from the moral viewpoint can only be decided from the perspective of the interested parties. For this purpose, there are no external or prior criteria. None of these procedures can manage without idealizations, even if these – such as the communication requirements of an argumentation praxis – could be proven as unavoidable or lacking in alternatives in the sense of a weak transcendental constraint.

On the other hand, these are just the weaknesses of a procedural rationality of this sort, which from functional viewpoints explain why certain matters require legal regulation and cannot be left to the moral rules of post-traditional style. Regardless of how the procedure looks, according to which we want to test whether a norm can find the unforced, i.e., rationally motivated agreement of all possible participants, it guarantees neither infallibility nor clarity nor a timely outcome of the result. An autonomous morality has at its disposal only a fallibilistic procedure of norm justification. This high degree of cognitive indeterminacy is furthermore reinforced by the fact that, with a context-sensitive *application* of highly abstract rules to complex situations – described as appropriately as possible and in their relevant aspects as completely as possible – an additional structural uncertainty is connected.[26] This cognitive weakness corresponds to a motivational weakness. Every post-traditional morality demands a distancing from the self-evident truths of unproblematically habituated forms of life. Moral insights decoupled from the concrete ethics of everyday life no longer immediately carry with them the motivational power which also allows judgments to be practically effective. The more morality itself internalizes and becomes autonomous, the more it retreats into private spheres.

In all areas of activity where conflicts, weighty problems, and social subject matters in general demand clear, timely and binding regulation, legal norms must therefore absorb the uncertainties which would arise were they left to a purely moral behavioural control. This enhancement of morality through obligatory law itself can even be justified morally. K. O. Apel speaks in this context of the problem of the reasonableness of a demanding universalistic morality.[27] Even morally well-justified norms are only reasonable to the extent that those who then adapt to their practice may expect that everyone else also acts in accordance with norms. For only under the condition of generally-practised compliance with norms can the reasons cited to justify them count. If an obligation that is effective in practice cannot be consistently expected from moral insights, then compliance in accordance with norms is only reasonable in responsible ethical terms when they obtain legal obligation.

Important characteristics of positive law become understandable when we comprehend law from this perspective of a compensation for the shortcom-

26 Günther 1986.

27 Apel 1986: 232 ff.

ings of autonomous morality. Legally-institutionalized behavioral expectations obtain *binding force* through a linkage with the sanctioning capacity of the state. They extend only to what Kant calls the *external aspect* of action, not to motives and sentiments, which cannot be enforced. The *professional administration* of fixed, written, publicly and systematically-developed law releases private legal persons from the burden of requiring individuals to resolve the moral conflicts of action by themselves. After all, positive law owes its conventional characteristics to the fact that it can be enforced through the decisions of a political legislator and can in principle be amended arbitrarily.

This dependence on politics also explains the instrumental character of law. Though moral norms are always ends in themselves, legal norms are *also means* to political ends. They do not serve, that is to say, as does morality, only impartial settlement of conflicts of action, but also the implementation of political programs. The collective goal-setting and the implementation measures of politics owe their binding power to a legal form. In this respect law stands between politics and morality; and, as Dworkin has shown, in legal discourse the arguments concerning the application of legal interpretations are accordingly conjoined with both political arguments about goal setting on the one hand, and with arguments of moral justification, on the other.

(3) The question of the legitimacy of legality has so far brought to the fore the theme of law and morality. We have made it clear to ourselves how conventional externalized law and internalized morality complement each other. Having said that, the simultaneous entanglement of law and morality interests us more than this complementary relationship. This entanglement takes place because in a constitutional order the resources of positive law are tasked with distributing the burden of argument and institutionalizing methods of justification that are open to moral argumentation. Morality no longer hovers over the law, as the construction of rational law as an extra-positive set of norms suggests; it migrates into positive law, without being absorbed in it. Morality, which not only confronts the law, but also establishes itself in law, is of course purely procedural in nature; it has dispensed with all determinate normative content and sublimates itself to a procedure of justification of possible moral content. In this way procedural law and proceduralized morality can *mutually* control each another. In legal discourse the argumentative treatment of morally practical questions by way of legal institutionalization is, as it were, tamed. Such treatment is limited methodologically through the binding of valid law; objectively with regard to subjects and burdens of proof; socially with regard to the conditions for participation, exemptions, and allocation of roles; and temporally with regard to decision deadlines. But conversely moral argumentation is also institutionalized as an open procedure that obeys its own logic and so controls its own reasonableness. The legal constitution does not interfere with the inner

working of argumentation to such an extent that this would have to come to a halt at the limits of positive law. Law itself licences and stimulates a justification dynamic that also transcends the wording of valid law in an unforeseeable way.

This conception must certainly be differentiated in light of the different contexts of jurisprudential, judicial, legalistic discourse or according to the different subject areas from morally-related to purely technical problems issues. Then the respective decision-making practice can also be critically reconstructed from the viewpoint of how far the legal procedures of logic give free play to argumentation, or systematically distort the play of language through implicitly entrained external restrictions. Such effects themselves naturally emerge not only in procedural arrangements, but also in the way these are practised. At times a special class of arguments offers itself for such a reconstruction; in judicial decision-making practices, for example, especially suitable are opinions of the court, which eliminate normative aspects in favor of purportedly functional requirements. Of course, such examples clearly show that justice and the legal system indeed respond to society, yet are not autonomous vis-à-vis society. Whether one must also then submit to systemic imperatives if they violate or adversely affect well justified principles, whether they originate in the economy or the state apparatus itself, is of course decided ultimately not in courts, nor by the legal public, but in political struggles over the demarcation of the border between system and lifeworld.

We have now seen that the legitimizing power, which has its seat in the rationality of legal procedure, communicates legal rule not only via procedural norms but even more so via democratic legislative procedures. That the workings of parliament could have a rational core in a moral-practical sense is admittedly not so plausible at first glance. Here it appears to be a matter of acquiring political power and of power-controlled competition among antagonistic interests, in such a way that parliamentary debates are if need be accessible to empirical analysis, but not to a critical reconstruction according to the model of fair negotiation of compromises or even of discursive will-formation. I cannot offer a satisfactory model here; but I would like to point to the long series of process-oriented constitutional doctrines which pursue a critical-reconstructive approach.[28] In this approach, majority rule, parliamentary procedural norms, electoral procedure etc. are analyzed from the viewpoint of how far they can safeguard equal consideration of all interests involved in each case and of all relevant aspects of the case respectively in parliamentary decision-making processes. I do not see the weakness of these theories as being in their process-oriented approach as such, but in the fact that they do not develop their normative viewpoint based on a logic of moral argumentation, and do not apply the communicative conditions for an unconditional justification dynamic. Furthermore,

28 Choper 1980; Ely 1980; Critical to this end: Parker 1981: 223 ff.

internal parliamentary will-formation only forms a narrow segment of public life. The rational quality of political legislation not only depends upon how elected majorities and protected minorities work within parliament. It also depends on the level of participation and education, on the degree of information, and on the sharpness of articulation of controversial questions in the wider public. The quality of public life is generally determined by the actual opportunities which the political public sphere opens up with its media and institutions.

4 CONCLUSION

That the idealised concept of the constitutional state that I have reformulated is not exaggerated but springs from the soil of legal reality itself can be ultimately seen in the fact that the autonomy of the legal system can be measured by this idea alone. If the dimension in which the legally-institutionalized methods of justification open toward moral argumentation were to close, we would no longer know in the least what the autonomy of law could mean other than the autonomy of the system. A legal system does not independently acquire autonomy for itself. It is only autonomous to the extent that the procedures institutionalized for legislation and jurisdiction guarantee impartial judgement and will-formation, and in doing so, provide access to an ethical form of procedural rationality in both law and policy-making to an equal extent. No autonomous law without realized democracy.

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Synopsis

Luka Burazin

Legal office

SLOV. | *Pravne funkcije.* To besedilo ima tri cilje. Prvi je pojasniti, kaj so pravne funkcije in v kakšnem smislu je mogoče govoriti o njihovem obstoju. Drugi cilj je razložiti, na podlagi česa lahko rečemo, da so te funkcije pravne narave. Tretji cilj pa je prikazati, kakšen pomen ima dejanska uporaba teh funkcij za njihov obstoj. Glavni argument je, da je ontološko gledano pravne funkcije najbolje razumeti kot nesnovne institucionalne artefakte. To je zato, ker jih je mogoče ustvariti le s kolektivnem prepoznavanjem ustreznih konstitutivnih norm, ki podeljujejo status pravne funkcije, in z ustreznimi deontičnimi opolnomočenji, obstajajo pa lahko le tako dolgo, dokler se to prepoznavanje ohranja. Poleg tega avtor trdi, da so tako imenovane izpeljane pravne funkcije (npr. zakonodajna in sodna oblast) pravne narave zaradi pravnih norm, ki jih konstituirajo, tako imenovana izvirna pravna funkcija (tj. ustavodajna oblast) pa je pravne narave zaradi pravila prepoznavanja, ki je v veljavi med državljani ((tj. ker jo zadevna skupnost kolektivno prepoznava kot pravno). Končno avtor trdi, da je za pravne funkcije kot institucionalne artefakte mogoče reči, da obstajajo, le pod pogojem, da jih vsaj na začetku zasedajo uradniki, ki dejansko uporabljajo spremljajoča deontična opolnomočenja, in vse dokler državljani ne ukinejo začetnega kolektivnega prepoznavanja prvotnih uradnikov.

Ključne besede: funkcija, uradniki, statusna funkcija, artefaktna teorija prava, učinkovitost

ENG. | This paper has three aims. The first is to explicate what kind of entity legal offices are and what their specific mode of existence amounts to. The second is to explain in virtue of what these offices can be said to be legal. Finally, third, to show the relevance of the actual use of legal offices for their existence. The main argument is that, ontologically, legal offices are best understood as immaterial institutional artifacts. This is because they can be created only if there is collective recognition of the relevant constitutive norms, which confer the status function of legal office, accompanied by the relevant deontic powers, and can continue to exist only for as long as this recognition is maintained. Furthermore, it is argued that so-called derived legal offices (e.g., the legislature and judiciary) are legal in virtue of the legal norms that constitute them, and the so-called original legal office (i.e., the constitution-maker) in virtue of the citizens'

norm of recognition (i.e., in virtue of its being collectively regarded as a legal office by the relevant community). Finally, the paper argues that as institutional artifacts, legal offices can be said to exist only on the condition that they are, at least initially, filled with officials actually carrying out the deontic powers accompanying the offices they hold and for as long as the initial citizens' collective recognition of the original officials is not withdrawn.

Keywords: office, officials, status function, artifact theory of law, efficacy

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Synopsis

Alejo Joaquín Giles

From "appropriate" means to desired ends
On instrumental justification in discrimination cases

SLOV. | *Od "primernih" sredstev do želenih ciljev. O instrumentalni utemeljitvi v primerih diskriminacije.* Pravna pravila, ki prepovedujejo diskriminacijo, pogosto pogojujejo ta napotek z odsotnostjo presoje, da bi bila različna obravnava upravičena. Običajno je različno obravnavo treba šteti za upravičeno, če med drugim zasleduje legitimen cilj in je "primerno" sredstvo za njegovo izpolnitev. A kaj v tem kontekstu pomeni "primerno"? V članku avtor podaja odgovor, ki ga je mogoče povzeti v treh korakih. Prvi korak je pojasnitev ohlapne zahteve po "primernosti" kot določenega vzročnega prispevka. Drugi korak je rekonstrukcija vsebine, ki jo pojmu vzročnega prispevka pripisujeta dve pojmovanji vzročnosti, in sicer regularistično in verjetnostno pojmovanje. Tretji korak je zagovor razumevanja zahteve po "primernosti" kot verjetnostnega vzročnega prispevka. Po teh treh korakih se avtor posveti regulativnim možnostim, ki jih njegov odgovor odpira v zvezi s strategijo, ki je v protidiskriminacijskem pravu pogosta, in sicer da se za nekatere vrste primerov zahteva trdnejša utemeljitev. Kot pokaže, stopnjevitost verjetnostnega pojmovanja vzročnega prispevka omogoča oblikovanje različnih ravni "primernosti" glede na izbrane utemeljitvene namene, višje ravni primernosti pa lahko porodijo tudi svojevrstno dilemo.

Ključne besede: primernost, diskriminacija, instrumentalna utemeljitev, vzročnost, zadostnost

ENG. | Legal rules prohibiting discrimination often make this mandate subject to the condition that the difference of treatment in question is not considered justified. Typically, a difference of treatment must be considered justified if, among other factors, it pursues a legitimate aim and is an "appropriate" means to achieve it. What does "appropriate" mean in such a context? In this article, I provide an answer that can be summarised in three steps. The first step is to elucidate the vague requirement of "appropriateness" as a given causal contribution. The second step is to reconstruct the content assigned to the notion of causal contribution by two conceptions of causality, the regularistic and the probabilistic. The third step is to argue for an understanding of the requirement of "appropriateness" as a probabilistic causal contribution. Having made progress on these fronts, I will turn to the regulatory opportunities that this latter

choice opens up with regard to the strategy, common in anti-discrimination law, of requiring a more robust justification for certain kinds of cases. As I will show, the gradual character of the notion of probabilistic causal contribution allows for the formulation of different levels of "appropriateness" that are sufficient for justificatory purposes. In relation to the non-basic levels, a dilemma may arise.

Keywords: appropriateness, discrimination, instrumental justification, causality, sufficiency

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Synopsis

Goran Dajović

Hart's judicial discretion revisited

SLOV. | *Ponovno o Hartovi sodniški diskreciji.* V *Harvard Law Review* je bil nedavno prvič objavljen Hartov esej z naslovom "Discretion". Gre za skrbno urejeno različico predavanja, ki ga je imel Hart na Harvardu leta 1956. Ta esej zapolnjuje pomembno vrzel v njegovem delu o sodnem utemeljevanju. V prispevku posvečam pozornost njegovemu pojmovanju sodniške diskrecije, njenima dvema glavnima vrstama (izrecni in tihi) ter njegovemu razumevanju razlage in racionalnosti v povezavi z diskrecijo. Po Hartu je diskrecija oblika odločanja v težkih primerih, ki je racionalna in do neke mere pravno zamejena. Ker pa ob pravilni razlagi nobena kombinacija pravnih pravil in načel ne podaja vedno enega samega pravno pravilnega odgovora, se mora sodnik v nekaterih primerih zateči k nepravnim razlogom, tj. uporabiti mora diskrecijo. Hartovo spoznanje, da pravo ni edini temelj (sodnih) odločitev, nakazuje, da obstaja "še nekaj" (v našem "praktičnem vesolju"), kar igra vlogo v pravnem "zemeljskem" svetu in posledično tudi v sodnem svetu.

Ključne besede: Hart (Herbert LA), diskrecija, razlaganje, praktična racionalnost

ENG. | The Harvard Law Review recently, for the first time, published Hart's essay titled "Discretion". It is a carefully arranged version of the lecture which he gave at Harvard in 1956. This essay fills significant gap in Hart's work concerning judicial reasoning. In my paper attention is devoted to his conception of judicial discretion, its two main types (express and tacit), and his understanding of interpretation and rationality related to Hartian discretion. According to Hart, discretion is a form of decision-making in hard cases, which is rational and to some extent constrained by law. However, because no combination of legal rules and principles, properly interpreted, will always give only one legally right answer, the judge in some cases must resort to non-legal reasons, i.e. exercise discretion. Hart's insight that the law is not the sole ground for (judicial) decisions suggests that there is something "out there" (in our "practical universe") that plays a role in the legal "earthly" world, and consequently, in the judicial world as well.

Keywords: Hart, discretion, interpretation, practical rationality

Summary: 1 Introductory remarks – 2 Hart on judicial discretion – what we already knew – 3 Hart on judicial discretion – what did we not know? – 4 (Re)construction of Hart's typology of judicial discretion – 4.1 Express (avowed) discretion – 4.2 Tacit discretion – 5 Two additional clarifications of Hart's concept of judicial discretion – 5.1 Discretion and interpretation – 5.2 Discretion and rationality – 6 Conclusion

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Synopsis

C Ignacio Giuffré

Pushing the boundaries of deliberative constitutionalism
From judicial dialogue to inclusive dialogue

SLOV. | *Premikanje meja deliberativnega ustavništva. Od sodnega dialoga do vključujočega dialoga.* Deliberativno ustavništvo je teorija, ki se je v zadnjih desetletjih znašla v središču učene razprave. Njena novost in zanimivost sta v tem, da se lahko izogne ugovorom zoper sodno presojo z zavezanostjo predpostavkam deliberativne demokracije. A tem ugovorom se lahko izognemo le s pojasnilom, kdo lahko v tem ustavnem dialogu legitimno sodeluje. Avtor tega članka trdi, da je deliberativno ustavništvo sicer obetavna alternativa, ki upošteva ugovore zoper sodno presojo in deliberativni obrat v demokratični teoriji, vendar obeh vidikov vse njegove različice ne jemljejo resno. Da bi pomirili ugovore zoper sodno presojo, potrebujemo različico deliberativnega ustavništva, ki je usmerjena v vključujoč dialog in ki obravnava celoten ustavni sistem, ne le znotrajsodni, medsodni in medinstitucionalni dialog.

Ključne besede: deliberativni konstitucionalizem, deliberativna demokracija, ustavnosodni nadzor, protivečinski problem

ENG. | Deliberative constitutionalism is a theory that has arrived at the centre of the academic debate in recent decades. Its novelty and interest lie in the fact that it offers a way to escape the objections to judicial review through a commitment to the premises of deliberative democracy. In this context, however, a question needs to be clarified: who can legitimately participate in this constitutional dialogue, in order for the objections to judicial review to be avoided? The argument of this article is that, while deliberative constitutionalism is a promising alternative that takes note of the objections to judicial review as well as the deliberative turn in democratic theory, not all of its variants take both of these aspects seriously. To assuage the objections to judicial review, we need a variant of deliberative constitutionalism that is oriented towards inclusive dialogue, and which addresses the whole constitutional system, rather than only intrajudicial, transjudicial and interinstitutional dialogue.

Keywords: deliberative constitutionalism, deliberative democracy, judicial review, countermajoritarian difficulty

Summary: 1 Introduction – 2 Intrajudicial dialogue – 3 Transjudicial dialogue – 4 Interinstitutional dialogue – 5 Inclusive dialogue – 6 Conclusion

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Synopsis

Jürgen Habermas

How is legitimacy made possible via legality?

SLOV. | *Kako legalnost omogoča legitimnost?* Avtor zagovarja tezo, da avtonomizacija pravnega sistema ne more popolnoma ločiti prava od morale na eni in politike na drugi strani. Tudi pravo, ki je postalo pozitivno, ni pretrgalo svojih notranjih vezi z moralo in politiko. V prvem delu članka je v grobem opisano, kako se je sodobno pravo s pomočjo racionalnega prava ločilo od tradicionalnega prepleta morale, prava in politike. Srednji del članka se ukvarja z vprašanjem, kako iz propada racionalnega prava nastane ideja ustavne države, ki ji ni treba zgolj nemočno stati v odnosu do močno zapletene družbe pospešenih sprememb. V zadnjem delu pa avtor preučuje, kako se danes pravo in morala hkrati dopolnjujeta in prepletata.

Ključne besede: pravo, morala, politika, sodobno naravno pravo, pravna država, legitimnost, legalnost, procesna racionalnost

ENG. | The author defends the thesis that the autonomization of the legal system cannot entail a complete dissociation of law from morality on the one hand, and politics on the other. Even law which has become positive does not sever its internal ties with morality and politics. The first section roughly outlines how modern law, with the help of rational law, has differentiated itself from the traditional complex of morality, law and politics. The middle section deals with the question of how an idea of the constitutional state emerges from the collapse of rational law, which does not have to merely stand impotent in relation to a society of high complexity and accelerated change. In the final section, the author examines how law and morality simultaneously complement and intertwine with each other today from an internal perspective.

Keywords: law and morality, law and politics, modern natural law, rule of law, legitimacy, legality, procedural rationality

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