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V tokratni številki so objavljeni prispevki v angleščini in španščini.
Za slovenske povzetke in ključne besede glej strani 203–220.

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Andrew Halpin*

On kno-rights and no-rights

This article joins a debate over no-right previously conducted with Matthew Kramer and more recently joined by Mark McBride, in defence of Kramer. My disagreement with Kramer centres on his assertion that the relationship between claim-right and no-right involves logical duals rather than contradictories, as Hohfeld proposed. That position is tied to Kramer's view that no-right and liberty must have the same content as correlatives. McBride has attacked my rejection of Kramer's use of duals as being erroneous and an impediment to understanding the Hohfeldian analytical framework, including the role of correlativity. I reject here McBride's efforts to technically rescue Kramer's use of duals and to vindicate that use as being essential for an intelligible explanation of the complete Hohfeldian framework. I argue that the representation of claim-right and no-right as duals remains erroneous, making the Hohfeldian framework unworkable. Within that argument, I draw attention to the distinct concepts of Hohfeldian no-right and Kramerian kno-right; question the complicated steps introduced by McBride to establish a test demonstrating the duality of kno-right; and, taking kno-right and two instances of no-rights as distinct positions on a deontic hexagon, demonstrate the inability of kno-right to operate within a framework of Hohfeldian correlatives.

Keywords: Hohfeld (Wesley Newcomb), no-right, logical duals, correlativity, deontic oppositional geometry, rightlessness

1 INTRODUCTION

In a previous article I explored the relationship of correlativity between the Hohfeldian no-right and liberty (privilege),[1] and in doing so challenged the understanding of no-right which Matthew Kramer had proposed as an improvement on what he sees as a defective notion of no-right in the Hohfeldian analytical framework.[2] A key reason for Kramer's dissatisfaction with Hohfeld is found in Kramer's view of correlativity, which requires that both correlative positions should share the same content. Contrary to Hohfeld's reading of the content of a liberty being the negation of the content of the relevant no-right (*Y*'s liberty to *enter* Whiteacre is the correlative of *X*'s no-right that *Y* do *not enter*),[3] Kramer insists that the same content should prevail for both positions.[4] The key move

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1 Halpin 2020. Throughout that and the current article I adopt the more widespread "liberty" which Hohfeld accepted as a synonym for his preferred "privilege" – Hohfeld 1919: 42, 47-49.

2 Kramer 2019.

3 Hohfeld 1919: 39.

4 Kramer 2019: 215.

employed by Kramer, in support of his take on the no-right/liberty relationship, is to represent the relationship between claim-right and no-right as that of logical duals. Since logical duals are characterized by a negation of content between the two duals, Kramer relies on this to switch the content between claim-right and no-right, so as to be able to align the content of the no-right with that of the liberty (which he keeps as being the opposite or negation of the content of the absent claim-right).[5]

More recently, Mark McBride has mounted a defence of Kramer's position,[6] concentrating on vindicating his use of duals, which I had suggested was erroneous and an unnecessary distraction to reaching a clear understanding of the Hohfeldian framework. McBride fundamentally disagrees, believing that establishing the duality of the claim-right/no-right relation is essential to securing the reality of the no-right position, the reality of Hohfeldian liberties, and, ultimately, the viability of the Hohfeldian framework itself.[7] McBride's defence is ingenious, and valuable in amplifying Kramer's understanding of no-right through providing more detail of the intricacies of its operation. However, where McBride sees his efforts as technically rescuing Kramer's use of duals and making an essential contribution to an intelligible explanation of the complete Hohfeldian framework, I shall argue here that the use of duals remains erroneous and that the suggested representation of the Hohfeldian framework is unworkable.

My argument proceeds in four stages. In section 2, I clarify the distinct concepts[8] referred to by Hohfeld and Kramer through the common label of "no-right". I adopt a suggestion briefly entertained in the earlier article that it would be helpful to provide a different label for Kramer's concept, a "kno-right", in order to keep this distinctiveness in mind.[9] Then in section 3, I note how McBride's attempt to rescue Kramer's depiction of kno-right and claim-right as logical duals includes a change from consideration of no-right to consideration of kno-right, when applying the commonly accepted template for testing the existence of logical duals. However, McBride does not follow through with a

5 Kramer 2019: 216. In the absence of *X*'s claim-right correlative to *Y*'s duty not to enter Whiteacre, *Y* enjoys a liberty to enter Whiteacre. Conventional Hohfeldian analysis adds *X*'s no-right that *Y* not enter. It is this latter negative content that is switched by Kramer in order to give the no-right the same content as the correlative liberty. Regarding the liberty as a dual of the claim-right is the basis for its having the negation of the content of the claim-right.

6 McBride 2021.

7 McBride 2021: 40-41. Although McBride's immediate target is my attack on Kramer's use of duals, he makes it clear that ultimately the objective is to strengthen Kramer's position in his disagreement with Heidi Hurd and Michael Moore, who challenge the Hohfeldian understanding of no-right, liberty, and hence the operation of the Hohfeldian framework. However, I have argued that Hurd and Moore's threats to Hohfeld can be combatted without any invocation of duals. See Halpin 2020: Part II.

8 Concepts *and* the practical normative positions to which those concepts refer.

9 Halpin 2020: 151, 154.

straightforward subjection of kno-right to the template test. I undertake such a test at this point, which leaves kno-right failing to satisfy the test. In section 4, I review the more complicated steps taken by McBride in his efforts to complete the testing of kno-right in a way that can satisfy the requirements made by the template. The complications introduced by McBride include a suggestion as to how duals are to be understood and approached, a transfer of external negation, a severance of the contradictory relationship from the dual relationship, further amplification of the appropriate grammar for the neologism no-right as first suggested by Kramer, and a curious switch between the asserting of a claim-right and the asserting of a remedial right. At this point, the detailed intricacies of the operation of kno-right provided by McBride are illuminating, but on closer inspection reveal that kno-right cannot meet the requirements of the template to secure its status as a dual, nor fit within the Hohfeldian framework. Finally in section 5, I move on from the negative conclusions of the previous part and reflect on the precise characteristics of Kramer's kno-right, as linked by him to a state of rightlessness. Drawing on the resources of deontic oppositional geometry, I demonstrate how the kno-right and two instances of no-rights can be represented as distinct positions on a deontic hexagon. For present purposes, this reinforces the conclusion that a Kramerian kno-right cannot operate within a framework of Hohfeldian correlatives, for which the two instances of Hohfeldian no-rights are essential. A final reflection considers wider implications of the present study for the relationship between deontic oppositional geometry and Hohfeldian legal relations.

2 THE DISTINCTIVENESS OF KNO-RIGHT AND NO-RIGHT

It is easy to become confused over the nature of Kramer's disagreement with Hohfeld regarding no-right. From the intensity of some of Kramer's remarks,[10] it appears that the charge against Hohfeld[11] amounts to the failure to provide a coherent concept of no-right within his analytical framework, or to have made an elementary blunder by incorrectly describing one of the normative positions within that analytical framework. More specifically, Hohfeld's treatment of a no-right as having the same content as the absent claim-right is incoherent because this then gives it a different content to its correlative liberty, whereas correlatives must have the same content. Or, the normative position within the

10 "Hohfeld himself and many eminent exponents of the Hohfeldian analysis have failed to use the term 'no-right' correctly" – Kramer 2019: 215; "Many other philosophers of rights have followed Hohfeld in conflating 'no-right' and 'no right'." – Kramer 2019: 217.

11 And a large number of others – Kramer 2019: 217-18.

framework that is taken to be both the negation of a claim-right and the correlative of a liberty has mistakenly been given the wrong role by Hohfeld.

Understood in either (or both) of these ways, the disagreement is about who has correctly identified a no-right, Hohfeld or Kramer. This is misleading, and a basic mischaracterization of where the disagreement actually lies. It can be shown that Hohfeld's no-right is a coherent concept, of a practical normative position that can be intelligibly understood as the negation of a claim-right and the correlative of a liberty. Hohfeld attaches the label "no-right" to the concept of this normative position that makes sense on its own terms. Kramer's concept (and the related normative position) obviously differs from Hohfeld's, at the very least, from bearing a content which is the precise negation of the content of Hohfeld's concept; and consequently, standing in a different relationship to the absent claim-right.[12] In order to avoid confusion, we should accordingly adopt a different term for Kramer's concept and the normative position to which it refers.[13] Hence, the suggested "kno-right".

So understood, the dispute between kno-right and no-right places a burden on Kramer to show the coherence and utility of his concept, as much as it places pressure on Hohfeld's concept to meet these criteria. I have already asserted the coherence of Hohfeld's concept in the previous paragraph. The confidence of this assertion is based on work undertaken in the earlier article. I shall briefly rehearse the salient points in the remainder of section 2. Consideration of Kramer's concept (as defended by McBride) will occupy sections 3 and 4, spilling into the concluding section 5, where it will be evaluated alongside its Hohfeldian rival.

The simplest way to appreciate the coherence of the Hohfeldian no-right is to take Hohfeld at his word when he explains its correlative as being nothing

12 Whereas the Hohfeldian no-right bears a relationship of negation to claim-right (they are contradictories), the relationship of Kramer's kno-right to claim-right is not clearly explained by Kramer (Kramer 2019: 221 n22). He explicitly denies that they are contradictories (214, 217, 223) and also indicates the relationship does not involve negation by rejecting a paraphrase of "no right" as applicable to no-right (215, 216, 217, 219, 222). Yet nowhere does Kramer fully explain what the relationship does consist of, beyond his assertion that they are duals, which appears to be pressed more to assure the relationship Kramer thinks he needs between the correlative kno-right and liberty than to secure an understanding of the kno-right/claim-right relationship. The practical question of what happened to the claim-right, once the kno-right has been recognized, is not addressed by Kramer. And the conceptual question, if the claim-right is now absent, of how the presence of the kno-right can be related to that absence, remains unexplored by Kramer beyond his remarks of what the relationship does not involve. As we shall see below, part of the burden picked up by McBride is to attempt to fill in this gap.

13 In contrast to Kramer, McBride does provide some recognition of the two distinct Hohfeldian and Kramerian concepts (McBride 2021: 40 n3), though maintains the Kramerian option is required in order to salvage the Hohfeldian scheme and admits to paying less attention to the Hohfeldian alternative.

more than the absence of a duty. Despite labelling this correlative position as a "liberty not",[14] Hohfeld insists it is constituted by the absent duty alone,[15] and even at one point considers "no-duty" as an alternative label for it.[16]

Overlooking Hohfeld's preferred label for the moment, we can readily grasp an intelligible concept of no-right as the negation of a claim-right and the correlative of a no-duty, where all these related elements possess a common content. Adding for the sake of completeness the negated duty, we obtain a full set of the four normative positions found in the opposing correlative relations that express a dispute between two parties.[17] We can capture this in what we can refer to as a dispute box, as found in Figure 1.

Figure 1

X's **claim-right** that *Y* pay $100 correlative to *Y*'s **duty** to pay $100

denied by

X's **no-right** that *Y* pay $100 correlative to *Y*'s **no-duty** to pay $100

Note that the intelligibility of these interrelated concepts coheres around a common instance of conduct, the payment of $100 by *Y* to *X*. This is claimed as due in the first correlative relation, and denied as due in the second.

Incidentally, note also, that with the current terminology there is no problem in meeting Kramer's insistence that two correlative positions must have the same content. This is satisfied in both correlative relations in Figure 1.[18]

Things are not so straightforward when the label is changed from "no-duty" to "liberty not". *Y*'s no-duty to pay $100 becomes *Y*'s liberty *not* to pay $100, and the common content of paying $100 is now jarred by the appearance of not paying as the content of the liberty correlative to the no-right. Yet if we do ac-

14 Hohfeld 1919: 39 ("privilege not" in the original, but see note 1 above for the use of liberty here). The confusion regarding Hohfeld's choice of label is compounded by his initially displaying liberty as the correlative of no-right and negation of claim-right in his table of concepts (Hohfeld 1919: 36) and then only subsequently (39) adding the negation of its content, almost as an afterthought. It took Glanville Williams (1956) to insist that the negative suffix should have appeared in the standard table of concepts.

15 Hohfeld 1919: 39. In a stimulating study of the Hohfeldian scheme, Arriagada (2018) interrogates the Hohfeldian relation of negation between liberty (not) and duty. In reaching the conclusion that liberty is "derived" where duty is "primitive", she stresses the importance of acknowledging the practical utility of Hohfeld's scheme alongside its logical structure. That emphasis is endorsed here in taking the practical context of a legal dispute as providing intelligibility to Hohfeld's relation of negation.

16 Hohfeld 1919: 48 n59.

17 For the significance of a legal dispute to Hohfeld's analytical scheme, see Halpin 2020: 149 n13. My position is not that Hohfeld's scheme can only be applied to contexts involving an actual or potential legal dispute, but that his concepts and the relations between them have that as their primary setting, and so must be capable of being applied to a dispute.

18 A fuller response to Kramer's position on correlativity can be found in Halpin 2019: 230-31.

cept that for Hohfeld "a liberty not to pay $100" is to be understood precisely as "no duty to pay $100", then whatever fallout there might be from Hohfeld's preferred terminology, that should find expression as criticism of his choice of label for the correlative of no-right,[19] not as an accusation of incoherence against his concept of no-right.

There is another aspect of the coherence of Hohfeld's overall scheme incorporating his concept of no-right that needs to be stressed, whose importance will become fully evident later. Within his scheme disputes concerning specific conduct and that conduct's negation are treated as discrete disputes, each with a separate set of interrelated concepts. We can illustrate this in the dispute boxes found in figures 2 and 3, retaining the label of no-duty.

Figure 2

X's **claim-right** that *Y* enter his property correlative to *Y*'s **duty** to enter

denied by

X's **no-right** that *Y* enter his property correlative to *Y*'s **no-duty** to enter

Figure 3

X's **claim-right** that *Y* not enter his property correlative to *Y*'s **duty** not to enter

denied by

X's **no-right** that *Y* not enter his property correlative to *Y*'s **no-duty** not to enter

This much should be self-evident. A dispute over whether you are required to enter my property to paint it under a contract between us (Figure 2) is totally different from a dispute over whether you are required not to enter my property as a trespasser (Figure 3). However, once "no-duty" is replaced with the terminology of "liberty" a potential source of confusion is introduced, since to talk of having a liberty can be suggestive of having a choice: enjoying a liberty to do something or not.

The examples provided above indicate that this cannot be inferred within the Hohfeldian scheme. A liberty not to enter (now replacing the no-duty to enter in Figure 2) is discrete from the liberty to enter (now replacing the no-duty not to enter in Figure 3), and it is a contingent matter whether either is accompanied by a liberty with the opposite content so as to provide the holder with a full liberty to do something or not. In the case of the painter who successfully argues he is under no duty to enter the property because there was no valid contract, his liberty not to enter is not going to be accompanied with a complementary liberty to enter. In the case of the alleged trespasser who successfully argues he is under no duty not to enter because he is exercising a right of way, his lib-

19 Criticism of Hohfeld's choice of label is found in Halpin 2020: 163.

erty to enter will in those circumstances be accompanied by a complementary liberty not to enter, though that is hardly likely to form the subject matter of a legal dispute. The dispute in question, captured within the Hohfeldian scheme, is wholly over a liberty to enter.

Accordingly, even when we revert to Hohfeld's terminology of *liberty* (privilege) in place of "no-duty", it should be clear that this is not a licence to introduce a *full liberty*. The fact that Hohfeld stresses that the liberty has a content which is the precise negation of the content of the absent duty should be enough to warn against falling into this error.[20] For if the liberty in question were a full liberty, possessing the expanded content of engaging in the conduct or not, it would be impossible to regard it as the precise negation of either a duty to engage in that conduct or a duty not to engage in that conduct. It would amount to the negation of both. What might be referred to as a state of "dutilessness" in the holder of the full liberty – accompanied by a state of "rightlessness" in the other party. The possible significance of that state of affairs will be examined below. For now it suffices to establish that it has no relevance to expounding a coherent concept of Hohfeld's no-right.

3 TESTING CLAIM-RIGHT/KNO-RIGHT AS LOGICAL DUALS

In the earlier article I introduced a template based on the uncontroversial case of duals found among normative or deontic[21] positions, the case of duty and liberty. The template conveys the dual relationship between duty and liberty, involving an equivalence based on both internal and external negation, and also the contradictory relationship which can be produced by removing the external negation. I then employed this template to test whether claim-right and no-right could fit into a dual relationship. McBride accepts the general validity of the template, and, indeed, seeks to demonstrate that claim-right and kno-right can satisfy it within an appendix found at the end of his article. He

20 Hohfeld 1919: 39. The error has nevertheless been made – examples are provided by Hurd and Moore (2018: 332 n96). Confusion persists if the availability of "liberty" as a synonym for "privilege" in Hohfeld (see note 1 above) is ignored and then "liberty" is taken from usage elsewhere to be restricted to the case of full liberty, and as such to be alien to Hohfeld's scheme of analysis. This strategy has been adopted in de Oliveira Lima, et al 2021. Outside of Hohfeld, this strategy may be problematic in failing to account for the distinct usages of "liberty to" and "liberty not to", as opposed to "liberty to or not to" (on the distinction between "half-liberties" and "full liberties", see Feinberg 1980: 157). Within an understanding of Hohfeld, it may be problematic in obscuring the Hohfeldian analysis of a full liberty as an aggregate legal position (picked up in section 5 below).

21 The alternative descriptions are taken as synonymous here, though see Halpin 2020: 162, for a potential distinction; McBride prefers deontic.

also accepts that the template is not satisfied by the Hohfeldian claim-right and no-right, as I pointed out in the earlier article.[22]

DUALS:	Joe has a claim-right to be paid $10 by Sally
	Joe has *no* no-right *not* to be paid $10 by Sally

CONTRADICTORIES:	Joe has a claim-right to be paid $10 by Sally
	Joe has a no-right *not* to be paid $10 by Sally

The second line of the duals pair clearly does not express the equivalent of the first, and the second line of the contradictories pair clearly does not express the contradictory of the first. Hence the test is failed.

When it comes to testing the Kramerian claim-right and kno-right, McBride's reaction is to point out that the negative result to testing the Hohfeldian no-right cannot hold for the Kramerian kno-right since the external negation of the latter differs in impact from the external negation of the former. The "*no* no-right" can sensibly be understood, once the double negation is eliminated, as the presence of a claim-right *not to be paid*, which proves calamitous for establishing its equivalence to a claim-right *to be paid*, as required for duals. This result does not follow for "no kno-right". Since a kno-right is not itself to be understood as the negation of a claim-right, it follows that the negation of a kno-right will not yield a claim-right. Accordingly, McBride infers, this obstacle to establishing a relationship of duals no longer applies to claim-right and kno-right.[23]

However, this tactic of removing an obstacle in the test for claim-right and no-right is not in itself adequate to ensure a positive result for the test of claim-right and kno-right, for which an independent test would have to be run. I suggested in the earlier article that submitting claim-right and kno-right to the test would not vindicate Kramer's assertion of their duality.[24] I did not provide the details there, thinking that the task of filling them in could easily be left to the reader. That, in hindsight, was a mistake. The task uncompleted there remains to be done. Here I shall provide a straightforward application of the test to claim-right/kno-right, before considering in section 4 the more complex attempt to meet the test mounted by McBride.

Recall that for Kramer the key assumption is that liberty and kno-right as correlatives must have the same content. We can start by representing this in a dispute box, abiding by Kramer's stricture, as follows in figure 4.

22 McBride 2021: 44. Halpin 2020: 154.

23 McBride 2021: 44-45.

24 Halpin 2020: 154.

Figure 4

Joe's **claim-right** that Sally pay $10 correlative to Sally's **duty** to pay $10

denied by

Joe's **kno-right** that Sally *not* pay $100 correlative to Sally's **liberty** *not* to pay $100

This flags up an immediate problem for Kramer in that the claim-right that Sally pay $10 is not obviously negated by a kno-right that Sally not pay $100. In fact, it is difficult to make any sense of Kramer's relationship between claim-right and kno-right in the practical context of a legal dispute (which is the primary context for the application of Hohfeld's framework).[25]

Kramer himself does not provide much assistance with this conundrum, concentrating more on the abstract conceptual relationship between claim-right and kno-right rather than providing details of its practical application. At the abstract level, he informs us that kno-right is not the contradictory of claim-right but instead its dual;[26] and, that kno-right cannot be paraphrased as "no right", which would express the negation of the claim-right.[27] From these observations, we can conclude that Kramer's kno-right is not itself to be understood as the negation of a claim-right. The question remains whether the kno-right is capable of playing its part in the representation of a dispute, as in figure 4. And if so, how exactly we should understand "kno-right *not*" as the negation of a claim-right. That "liberty *not*" is the negation of duty is readily intelligible from the accepted interconnected semantics of duty and liberty, accommodated in the relationship of duals between them.[28] Is it simply a matter of recognizing claim-right and kno-right as duals?

25 Kramer 2019: 221 n22: "Between a claim-right and the no-right that is its dual, there is only one thing in common (apart from the fact that each of them is a deontic position): the person who holds the claim-right is the person who bears the no-right, and the person who bears the duty correlative to the claim-right is the person who holds the liberty correlative to the no-right."

26 Kramer 2019: 214, 216, 217, 221, 223.

27 Recall Kramer asserts that kno-right is not equivalent to "no right", the phrase amounting to a negation of the (claim-)right – note 12 above. Yet if it is still to perform the role of negating a claim-right, what sense can it be given to achieve this? Intriguingly, before Kramer's outright rejection of an equivalence between "no-right' and "no right" in his 2019 article, he had in his 1998 essay appeared to equate the presence of "a *no-right* concerning the activity" with having no right: "no *right* to the halting of the activity" – Kramer 1998: 10. The earlier part of this passage is cited in Kramer 2019: 219.

28 Lorenz Demey and Hans Smessaert (3) point to the well known example of the duality between conjunction and disjunction in classical propositional logic and point out that it is "[b]ecause of their semantics, i.e. the way they are standardly interpreted in CPL, [that] these connectives can be defined in terms of each other". Also, at 4, regarding another well known case of duals: "All these equivalences are manifestations of the underlying semantics of the universal and existential quantifiers". Similarly, the accepted semantics of duty and liberty

In order to put that to the test, we can run claim-right and kno-right through the template.

DUALS:	Joe has a claim-right to be paid $10 by Sally
	Joe has *no* kno-right *not* to be paid $10 by Sally[29]

CONTRADICTORIES:	Joe has a claim-right to be paid $10 by Sally
	Joe has a kno-right *not* to be paid $10 by Sally

Bear in mind that the second line of the duals pair needs to express the equivalent of the first, and the second line of the contradictories pair the contradictory of the first.

Commencing with the purported equivalence, this boils down to a claim-right with a particular content being equivalent to the negation of a kno-right with that content negated: CR*c* = ¬KR¬*c*. It is axiomatic for Kramer (and McBride) that CR ≠ ¬KR, so, as we noted, we do not arrive at the absurdity of CR*c* = CR¬*c*. However, that still leaves the issue of how to makes sense of what a kno-right is, such that it is capable of having this equivalence through double negation with claim-right. One cannot simply stipulate that something that is intelligible (a claim-right) possesses a dual (a kno-right), and then rely on that duality to make the stipulated item intelligible. Not everything possesses a dual. Neither Kramer nor McBride offers an explanation of the meaning of kno-right which might be capable of rendering it an intelligible dual of claim-right. No interconnected semantics for the two terms is ever proposed.

If we turn to the purported contradictory, this boils down to accepting that CR*c* and KR¬*c* are contradictories, but since KR is not itself the contradictory of CR, how can negating the content of KR turn it into a contradictory? The intelligibility of kno-right becomes even more vexed when we take into account that Kramer does accept the simple formulation of "there is no right" to signify the contradictory of claim-right, and if we drop the silent k and revert to Kramer's chosen term for his kno-right. We then get from Kramer as equivalent expressions for the contradictory of "a claim-right that *c*": (i) "there is no right that *c*"; and, (ii) "there is a no-right that not-*c*". The equivalence of (i) and (ii) is difficult to fathom. If the "no" in the "no-right" compound does not signify the negation of a right, as Kramer insists for his kno-right, then how exactly is this

allow them to be defined in terms of each other (duty to = no liberty not to) as duals, which also produces duty and "liberty not" as contradictories.

29 Kramer 2019: 216, misses the external negation from his illustration ("Y's no-right concerning X' (...)

compound noun to be understood – particularly if the negation of its content then does somehow turn it into the negation of a right? Again, no explanation of the meaning of "no-right" is provided in order to make kno-right intelligible for this aspect of its purported relationship with claim-right.

We may conclude from this initial subjection of the professed duality of claim-right and kno-right to the template test that the second line of the duals pair does not intelligibly express the equivalent of the first, and the second line of the contradictories pair does not intelligibly express the contradictory of the first. Hence the test is failed: claim-right and kno-right cannot be duals.

4 COMPLICATING THE TEST

The puzzle of Kramer's lack of concern to provide a meaning for "no-right", as applied to his own concept of kno-right, may partly be explained by his concentrating instead on proclaiming its dual relationship with claim-right, which he saw as the basis for finding a common content between no-right and its correlative liberty. In part, Kramer's disinterest in its meaning might also be explained by his assumption that he was simply rescuing Hohfeld's understanding of no-right from error, while abiding by the basic meaning of no-right derived from its position in the Hohfeldian framework. This suggestion is supported by the use Kramer himself makes of the conventional table of Hohfeldian concepts.[30] However, we can see from section 2 that such a borrowing of the basic meaning of no-right from Hohfeld overlooks, first, the intelligibility of the Hohfeldian no-right, and, secondly, its distinctiveness from the proposed Kramerian kno-right.

In any event, despite his unequivocal assertion that the term "no-right" needs to be understood differently from the phrase "no right", Kramer does make an effort to show that his kno-right can obliquely provide a negation of claim-right, as well as being a proper correlative to liberty – so making it a candidate for performing the twin roles of correlativity with liberty and negation of claim-right, attributed to no-right in Hohfeld's analytical scheme and displayed in his table of concepts, which Kramer reproduces. Kramer's process of oblique negation is not derived from a meaning given to kno-right but from the novel locution of its content, which Kramer insists is required by its peculiar formation as a neologism. Kramer moves from a content of "kno-right *not*" (as found in figure 4 above and the subsequent application of the template test) to a content of "kno-right concerning".[31] This novel locution of content is embellished by McBride,

30 Kramer 2019: 214 – repeated in McBride 2021: 40.

31 The concerning locution is found in Kramer's 1998 essay, but seems to be compatible with a negation of claim-right there – see note 27 above. More recently, we find in Kramer 2019: 216, a statement seemingly acknowledging kno-right as the negation of claim-right: "the claim-

who also employs it to allow kno-right to be used as a negation of claim-right. McBride also fortifies his defence of Kramer's kno-right with some additional complications. We shall consider all of these complications in turn here.

4.1 The approach to duals

In an intriguing discussion of how duals should be approached, McBride seeks not only to clarify the relationship between the statements of equivalents and the statements of contradictories in the template test; but also, more fundamentally, to establish an analytical priority for the *relation* of duality over *propositions* (statements) expressing duality, from which he in turn treats some quality of duality itself as the source for the equality from double negation found in statements expressing duals. It is worth quoting these claims in McBride's own words. His discussion starts from the template originally devised from the uncontroversial case of the duality of duty and liberty, with added numbering (I add letters to McBride's key steps):[32]

DUALS:	[1] Sally has a duty to pay $10 to Joe [2] Sally has no liberty not to pay $10 to Joe[33]

CONTRADICTORIES:	[3] Sally has a duty to pay $10 to Joe [4] Sally has a liberty not to pay $10 to Joe

(a) … we are bound to ask: Why? In virtue of what are [3] and [4] contradictory? … the answer lies in seeing the equivalence – not duality – of [1] and [2].

(b) … again we are bound to ask: Why? In virtue of what are [1] and [2] equivalent? … the answer lies, of course, in the duality of the duty/liberty relation …

(c) To sum up, we have [3] and [4] as contradictory propositions. And that is so in virtue of [1] and [2] being equivalent propositions. And that in turn is so in virtue of the duality of the duty/liberty relation. This is how things are, and must be. … when we seek specifically to expound the nature of the duty/liberty relation, we are, and must be, in the realm only of duality. The duality of the dual/liberty relation is the bedrock: it is explanatorily basic, or fundamental.

For McBride the "realm only of duality" in (c), from which alone understanding of the dual relation between duty and liberty can be gleaned, has some-

right which Y would possess if he did not bear the no-right which he bears." At 220, more explicitly: "Any deontic position designated by "no-right" is constituted by the absence of a claim-right as a position of rightlessness".

32 McBride 2021: 41-42 (internal footnotes omitted).

33 Kramer 2019: 216, misses the external negation from his illustration ("Y's no-right concerning X' (...)

how become detached from the equivalence and contradictoriness expressed in the statements (propositions) [1]&[2] and [3]&[4] respectively. This outcome is first assisted by his finding, in (a), an expression of "*equivalence* – not *duality*" in [1]&[2]. It is further stressed in a footnote attached to the final words of (c): "Contradictory and equivalent *propositions* are *explained by* the dual *relation* (and not conversely)."[34]

Let me first agree with McBride that equivalent statements employed to express duals, such as [1]&[2], have a prority over contradictory statements, such as [3]&[4], which can also be found where duals exist. Put simply, if Q and R are duals, then we can express their duality by the equivalence, $Qc = \neg R\neg c$. From which it follows that Q and R can also be found as contradictories, Qc and $R\neg c$.[35] If there is a dual relation between two things then there must also be a contradictory relation between them. Obviously, not everything that can be found in a contradictory relationship can also be found in a dual relationship. So it is fair to point out the priority of equivalence over contradictoriness in a case where Q and R are duals. However, that is not to say one can then sever the contradictory relationship from the dual relationship – this I shall consider more fully in section 4.3.

In this part, the brunt of my disagreement with McBride covers his efforts to separate the quality of duality found in a case of duals, or, as he puts it, in the "relation of duality" they possess, from statements (propositions) expressing their equivalence through double negation. We have seen above that he reiterates this position in a number of ways – first denying that [1]&[2] express duality and restricting them to expressing equivalence; then creating a realm of duality in which dual relations enjoy an existence discrete from statements (propositions) expressing their equivalence through double negation; and culminating in attributing explanatory power to the dual relation over statements (propositions) expressing the equivalence of duals through double negation.

All this suggests there is some essence of duality locked away in a secret kingdom accessible only to dual relations who alone can dwell there. Once the dual relations emerge, they are capable of providing an explanation of statements (propositions) of the equivalence (through double negation) of duals. Unfortunately, we are not ourselves allowed access to this secret essence. In the absence of McBride revealing it to us, we should stick with the conventional understanding of the duality of Q and R, which is expressed in the statement of their equivalence through double negation. This expression may take the form

34 McBride 2021: 42 n11 – despite continuing in that footnote to acknowledge: "duality's *nature*, in abstracto, rests on negation and equivalence."

35 This generalizes the standard case of duality through double negation, under which duty/liberty duality falls – see further, Halpin 2020: 153.

of a single statement, as in Q*c* = ¬R¬*c*, above; or, the form of a pair of statements, as [1]&[2] illustrate.

If the equivalence of [1]&[2] *expresses* duality, then we do not need to look to duality to *explain* [1]&[2]. Moreover, there is no further essence of duality to be found. If Q and R are duals then their duality is fully captured by their equivalence through double negation. This equivalence through double negation is just what duality is.

4.2 The transfer of external negation

There is another aspect of McBride's exposition of duality which complicates matters, when it comes to testing the duality of claim-right and kno-right. In addition to his efforts to separate statements expressing duality from duality itself, McBride attempts to clean up these statements (propositions) by transferring the external negation of the dual element to govern the statement or proposition. This is a more understandable move if he does not see the statements as expressing the duality of the two elements but only an equivalence between propositions. If the statements themselves are equivalents, then why not explicitly relate the external negation which contributes to that equivalence to the statement itself? So McBride offers as an equivalent but rephrased form of [2] the improved [2']:

> [2] Sally has *no* liberty *not* to pay $10 to Joe
>
> [2'] It's *not* the case that Sally has a liberty *not* to pay $10 to Joe

Despite McBride's insistence that [2] and [2'] are equivalent,[36] there is a significant presentational difference between them, when it comes to their expressing the duality of liberty and duty; or later with [6] and [6'], when this technique is applied to the testing of claim-right and kno-right as duals.[37] The external negation of liberty, one of the duals, in [2] is transferred to being an external negation of the statement or proposition in [2'].[38] But assessing the proposition [2] or [2'] as a dual is not the issue.[39] Combined with McBride's insistence in (a) that we look only for equivalence and not duality in the propositions [1] and [2'], this transfer of the external negation from *liberty* (and later kno-right) to the proposition distracts us completely from any consideration of *its* duality with duty (claim-right). Nevertheless, McBride deploys his revised

36 McBride 2021: 42.

37 McBride 2021: 44.

38 McBride 2021: 42: "to make fully explicit the first external negation of the *proposition*".

39 Kramer 2019: 214, displays a similar preoccupation with propositions, rather than focusing on the entities that are regarded as duals – possibly contributing to his error of missing off the external negation mentioned in note 29 above.

[2'] and subsequent [6'] with the transferred external negation, to the testing of a dual whose own defining external negation is no longer evident.[40]

McBride's justification for making this transfer when it comes to kno-right is particularly revealing. The move is heralded by McBride as "vitally important"[41] and explained as being so because it forestalls the mistake of performing double negation elimination with "*no* no-right" when we are applying this phrase to the Kramerian kno-right.[42] However, we saw in section 3 that the double negation elimination applicable to the Hohfeldian no-right can be avoided for kno-right by asserting that kno-right does not bear the same meaning as no-right in that it does not amount to "no right". However, as was also pointed out in section 3, this leaves open the glaring issue of what exactly a kno-right is (the meaning of "no-right" when applied to Kramer's concept).[43]

4.3 Severing the contradictory relationship from the dual relationship

We saw in section 4.1 how McBride's efforts to separate the dual relation from propositions expressing the equivalence of the two duals, and propositions expressing the contradictory relationship between the two duals, led to an unwarranted claim. This being that the statements expressing equivalence through double negation had to be explained by the dual relation, as though there were something within that relation other than the very quality of enjoying equivalence through double negation, which was expressed in those statements. Having discredited that claim in 4.1, there remains an issue over the additional contradictory relationship between duals.

The contradictory relationship, as acknowledged above, is in a sense secondary to the relationship of equivalence through double negation possessed by duals, in that the former can be derived from the latter but not the latter from the former. McBride seeks to go further, assisted by his initial separation of the dual relation from statements expressing the equivalence of duals, he then finds the statements (propositions) expressing contradictories existing "in virtue of" the statements (propositions) expressing equivalence[44] – so setting the contradictories two steps removed from the actual dual relation. This renders "duals

40 It is noteworthy that McBride deploys this technique of transferring the external negation at the point where kno-right is put to the test in his Appendix, but reverts to the "no no-right" formulation elsewhere when discussing "concerning" (2021: 46, 47).

41 McBride 2021: 42.

42 McBride 2021: 44.

43 If, indeed, the transfer only produces an "equivalent" statement to the one employing "*no* no-right", as McBride (2021: 42, 44) insists, then the improved statement would always be open to being switched back to the statement with the awkward "*no* no-right". The problem would not go away.

44 McBride 2021: 42.

and contradictories" as "compatible", but not co-existing in the "realm only of duality". Rather, they are only found in the same "ballpark".[45]

In this way, McBride seeks to defend Kramer's omission to mention the contradictory relationship between duals.[46] Yet this contradictory relationship cannot be glossed over so easily, even if it were only found within some outer ballpark rather than an inner realm. It goes to the very heart of the relationship between claim-right and kno-right, as found in figure 4 and the following template test in section 3. If claim-right and kno right are duals, as Kramer and McBride contend, then if follows that they also enjoy a relationship as contradictories. So when it comes to depicting the denial of claim-right in the dispute box in terms of a kno-right, why would one reach for the relationship of equivalence through double negation as duals (which, in any case, cannot be made intelligible here) rather than the contradictory relationship which would more naturally fit into the context of denial?

This question is even more pressing when a correction is made to the outer ballpark imagery, based on McBride's flawed separation between a dual relation and statements expressing that relationship. Admittedly, the vocabulary of duals is not the easiest to grasp intuitively, but here is an attempt to offer the basics, with paraphrases and illustrations in parentheses.

(I) Q and R are duals (the duality of Q and R) (a dual/duality relation exists between Q and R) (Q is the dual of R) (liberty and duty are duals)

(II) as its dual, Q is the equivalent of the double negation of R (Qc = ¬R¬c) (a liberty to enter is the dual of no duty not to enter) ("Y has a liberty to enter" is equivalent to "Y has no duty not to enter")

(III) as duals, Q and R can be found in a relationship of contradictories (Qc and R¬c are contradictories) (a liberty to enter is the contradictory of a duty not to enter) ("Y has a liberty to enter" is the contradictory of "Y has a duty not to enter")

One source of confusion is that we can refer to the two entities as duals, (I), or to statements of their equivalence through double negation as duals, (II). Although (II) definitively expresses (I), as I have already stressed, it is not the case that the relationship of equivalence in (II) exhausts the possible relationships between the two entities found as duals in (I). It is clearly *inherent* in (II) that Q and R can be found in a relationship of contradictories in addition to their relationship of equivalence through double negation – simply by removing the external negation of R. And if it is inherent in (II), which is the definitive

45 McBride 2021: 42.

46 McBride 2021: 42 n10.

expression of (I), it follows that a potential relationship of contradictories is inherent in the duality noted at (I).

Again we have to ask, why it is that we should select the equivalence relationship when seeking to deny a claim-right by a kno-right, rather than looking to the contradictory relationship that claim-right and kno-right must possess (if, indeed, they are duals). Moreover, the presence in the template of statements expressing the two relationships of equivalence through double negation as duals, and of contradictories, can be regarded as a wholly appropriate way to test for the presence of duals.

4.4 An appropriate grammar for no-right

One possible motivation for ignoring (Kramer) or sidelining (McBride) the contradictory relationship between claim-right and kno-right is the belief that the purported equivalence relationship as duals between them can be made to work indirectly to convey the negation of claim-right that a contradictory relationship might more obviously be expected to do. Such oblique negation through duality is advanced through invoking a peculiar grammar for "no-right", initially by Kramer[47] and then repeated with embellishment by McBride.[48] The reasons given for this grammar are twofold: first, no-right is a neologism; secondly, it is constructed in a distinctive way so as to distinguish it from the phrase "no right", which cannot, accordingly be regarded as conveying the same meaning.[49]

The first reason lacks deference to the creator of the neologism, Hohfeld. As creator, he would normally be accorded the privilege of stipulating what meaning the neologism was designed to bear. On this, Hohfeld was clear. Having found the need for a neologism in the absence of a "single term available to express" the conception which he had indicated to be both the negation of a claim-right and the correlative of a liberty, Hohfeld immediately pointed out that "no-right" bore the same content as the absent claim-right ("shall not enter") in contrast to the content of its correlative liberty ("of entering"). Hohfeld was clear that *X*'s "no-right that *Y* shall not enter" conveys precisely the same meaning as *X*'s having "no right that *Y* shall not enter". And as such, no-right is intelligible as both the negation of a claim-right and the correlative of a liberty.[50]

Or so it seemed, to Hohfeld and a number of reasonably well-educated people after him. Kramer disagrees. Due to its "hyphenatedness" and "status as a single term", "no-right" according to Kramer cannot be employed "as if it

47 Kramer 2019: 217-18.

48 McBride 2021: 44-46.

49 Kramer 2019: 216.

50 Hohfeld 1919: 39.

were the phrase 'no right'" – as Hohfeld mistakenly did.[51] Although there can be found concerns about stylistic infelicity in Kramer's reprimand of Hohfeld, it is clear that the crux of Kramer's charge is substantive: Hohfeld (and others after him) incorrectly used no-right to convey the same meaning as "no right", namely, as bearing a content identical to the absent claim-right, rather than the negation of that content in common with the correlative liberty.[52] For Kramer, "the inapposite grammatical form is accompanied by an inaccurate substantive specification of the content."[53]

Yet even if Kramer were correct about holding Hohfeld to more exacting stylistic, or even grammatical, standards than he respected, the accusation that any such failings are accompanied by a substantive error of content would not follow. First establish the content the neologism is intended to convey, and then look to the appropriate stylistic or grammatical form to fit it. If necessary, correct or improve upon the stylistic and grammatical points, but stick with the intended content. The real gripe Kramer has with Hohfeld is that he has chosen the wrong content for his neologism, and this revolves around one thing alone: Kramer's persistent assertion that no-right and liberty as correlatives must have a common content.[54]

As it is, Kramer's stylistic and grammatical criticisms are not well made. The term "no-right" is a compound noun, a "single term", employing a hyphen to connect its constituent elements. Other compound nouns constructed in this way can be found. Notably, claim-right. That a compound noun of this type can be followed by a subordinate clause introduced by "that" is well documented ("John has a claim-right that Mary pay him $10."[55]). No grammatical bar then to no-right similarly governing this type of subordinate clause. Although unusual, the formation of a hyphenated compound noun with "no" as its prefix is not unknown. There is no grammatical rule specifying that if I wish to coin the term "no-Z" then it must convey something different to an alternative construction that does not employ a hyphenated term. Consider the equivalence between: "John was a no-show for the 3.15 flight." and "John did not show up for the 3.15 flight."[56] More pointedly, consider Hohfeld's other unused neologism, "no-duty", as employed in section 2. "*Y* has a no-duty to pay $100." is an intelligible equivalent to "There is no duty on *Y* to pay $100." The grammar police

51 Kramer 2019: 216.

52 Kramer 2019: 216-18.

53 Kramer 2019: 218.

54 This is evident in the second paragraph of Kramer 2019: 216, where the accusation that "Hohfeld specified the content incorrectly" is backed up solely by an invocation of duality, connected to establishing the same content for no-right and liberty as correlatives.

55 Kramer 2019: 216.

56 Those who understand cricket will appreciate the equivalence between "That delivery was a no-ball" and "There was no (valid) ball from that delivery."

cannot intervene and insist that if we employ no-duty it must be "no-duty *not* to pay $100". The same point applies if the more common "non-" is used in place of "no-" as the prefix for the compound noun. Bentham's neologism a "non-command" intelligibly, and correctly, bears the same content as the command it negates.[57]

One searches in vain for the enunciation by Kramer of a rule of grammar which specifies that two different grammatical constructions must possess different meanings, because one employs a term and the other a phrase; because one involves a hyphenated compound noun; because one involves a "no-" (or "non-") prefix … . Kramer's recourse to grammar provides inadequate support for his basic assertion that no-right and liberty have a common content as correlatives, related to the professed duality of claim-right and no-right.

Apart from grammar, Kramer is conscious of stylistic elegance. He first states what he takes to be the dual relationship between claim-right and no-right:58

(A) Y's no-right concerning X's entering the land is the dual of Y's claim-right to X's not entering the land.

He then acknowledges the more ponderous formulation of the content of the no-right:

(B) As is evident from [this] sentence … , the term "no-right" does not connect very elegantly to a specification of the content of the position which that term designates.

He then attributes the lack of elegance to the use of the hyphenated term:

(C) For the hyphenated term, the link to the content of its designated position has to be formulated slightly more ponderously…

Since this is regarded as a necessary consequence of employing "no-right" by Kramer, Hohfeld's substantive failing rather than the lapse in elegance can become the focus – a failing which prevents an accurate representation of the content of a no-right:

(D) …instead of writing … Y's no-right that X shall not enter, Hohfeld should have written that the correlate is Y's no-right concerning X's entering the land … . When the link to the content is formulated suitably, the content itself can then be specified straightforwardly and accurately.

This line of reasoning from Kramer displays a number of flaws. To begin, at (A) Kramer omits the external negation from the dual relationship.[59] It should be, "Y's *no* no-right concerning X's entering" as the dual of "Y's claim-right to

57 See Bentham 2010: 139-40.

58 Kramer 2019: 216-17.

59 See the earlier discussion in note 29 above.

X's not entering".[60] By omitting the external negation, (on the assumption that claim-right and no-right are duals) Kramer would have provided a relationship of contradictories between "Y's no-right concerning X's entering" and "Y's claim-right to X's not entering".[61] If this represents Kramer's depiction of the corrected normative positions as they are meant to appear in Hohfeld's table, then this is irreconcilable with Kramer's assertion that these positions have a relationship of duals within the table, rather than contradictories.[62]

More importantly, all this depends on reading "concerning entering" as "entering" – the internal negation of "not entering" found as the content of the claim-right. But that then brings us back to the unintelligibility of the purported contradictories found in applying the template test in section 3. The unintelligibility of treating CR*c* and KR¬*c* as contradictories is equally problematic for a case with the negation the other way round, CR¬*c* and KR*c* as contradictories – as we have here: "a claim-right that *X* not enter" being regarded as the contradictory of "a kno-right that *X* enter". The unintelligibility now revealed goes beyond Kramer's concerns with lack of elegance in (B), or ponderous style of expression in (C). It also gives the lie to his claim to have provided an accurate specification of the content of no-right in (D).

However, there is another aspect to Kramer's choice of locution for the content of his kno-right. Although this takes us from the strict pattern of duality Kramer asserts for claim-right and no-right, it provides an air of credibility when it comes to fitting the two normative positions within a relationship of negation, as required by Hohfeld's table. As I pointed out in the previous article,[63] the phrase "no-right concerning *X*'s entering" is capable of covering both the potential rights *Y* might possess with regard to *X*'s entering: the right that *X* enter *and* the right that *X* not enter. That this broad understanding of "no-right concerning" might have been what Kramer intended, is reinforced by a paraphrase he introduces in his recent article: "a state of rightlessness".[64]

Heidi Hurd and Michael Moore have suggested (prior to Kramer's recent article) that Kramer treats liberty as a full liberty, and the rightlessness of a no-right as the combination of no-rights respectively correlative to the two liberties (to do or not to do).[65] Kramer himself had not provided sufficiently detailed application of his analysis to be fully confident of how he intended "covering"

60 Alternatively, "Y's no-right concerning X's entering" as the dual of "Y's *no* claim-right to X's not entering" – taking "concerning entering" being the negation of "not entering", and so providing the internal negation (more on that shortly).

61 Recall from section 3 that removing the external negation from entities in a dual relationship creates a contradictory relationship between them.

62 Kramer 2019: 214.

63 Halpin 2020: 154-55.

64 Kramer 2019: 220.

65 Hurd and Moore 2018: 307 n29.

to be taken, but the expansive reading is certainly possible, and if it is adopted it has a clear advantage for his fundamental ambition to treat claim-right and no-right as duals with mutually negated contents, while still fitting them into the Hohfeldian table where they appear as negations of each other.

Here is how it would work. The expansive reading of no-right concerning entry is cashed out as a no-right that *X* enter to provide it with the negated content of the absent claim right that *X* not enter – so satisfying Kramer's invocation of duality. Then it is cashed out as a no-right that *X* not enter, so making it appear intelligible as the negation of the claim right that *X* not enter – so fitting into Hohfeld's table. Of course, the success of the strategy comes from not paying close attention to the unpacking, relying instead on some broad generality conveyed by "concerning", and then following the appropriate connotation as and when required.[66]

Unfortunately, this expansive reading is incompatible both with Hohfeldian correlativity (see section 2 above) and with duality, which requires the negation of a specific internal content in order for the dual relation to be established (see section 4.1 above). An undifferentiated state of rightlessness can satisfy neither.

4.5 Switching to remedial rights

In general, McBride endorses Kramer's approaches to duality, grammar, and the locution employing "concerning", but in one important respect he seeks to improve upon Kramer's position by providing us with a basis for differentiating "concerning". McBride is willing to explicitly specify whether the ambivalent "no-right concerning *X*'s entry" should be understood narrowly as a "no-right concerning *X*'s entry", or as a "no-right concerning *X*'s non-entry", by making the negated content explicit when appropriate. In this way, McBride indicates which of the two potential rights is present and which missing when a state of rightlessness is introduced by a kno-right.[67]

Now this amendment is in itself a helpful clarification, but it loses the potential advantage of the expansive reading of "concerning" I mentioned at the end of section 4.4. More than that, it brings to the surface other complications when the attempt is made to test Kramer's kno-right with the template test. This is hardly surprising, since if "concerning *c*" and "concerning *not c*" are simply meant to be synonymous respectively with "that *c*" and "that *not c*", or other conventional Hohfeldian phrases employed in stating the content of a no-right,

66 Evidence to support this strategy is found in Kramer's persistence in treating no-right as the negation of claim-right despite distinguishing it from the negation when asserting duality – see note 31 above.

67 This is clearest at McBride 2021: 47, where the two no-rights "concerning your entry" and "concerning your non-entry" are distinguished.

then we are back to the unintelligibility of Kramer's kno-right, as discovered in section 3.[68]

However, McBride seeks to overcome this problem in the following ingenious way. He commences with what is extremely close to what was found in the template test for considering a Hohfeldian no-right as the dual of claim-right in section 3. Let us remind ourselves of that:

(1) DUALS:	Joe has a claim-right to be paid $10 by Sally
	Joe has *no* no-right *not* to be paid $10 by Sally

This is accepted as failing the test. I also offered a straightforward test of the Kramerian kno-right in section 3 which I demonstrated was also a failure:

(2) DUALS:	Joe has a claim-right to be paid $10 by Sally
	Joe has *no* kno-right *not* to be paid $10 by Sally

Here then we have McBride's effort employing the "concerning" locution, displayed in the same format:[69]

(3) DUALS:	I have a claim-right that you enter
	I have *no* no-right concerning your non-entry

Remember that to satisfy the test, the second of the paired statements has to be intelligibly rendered as the equivalent of the first.

Before scrutinizing McBride's attempt to satisfy the test, we can note that he has built in a no-right with a content that is the negation of the content of the claim-right, so respecting Kramer's insistence that this is required so as to provide a common content with its correlative liberty. However, that is secondary to the issue to be addressed. As already pointed out, if we took McBride's differentiated concerning locution to be merely synonymous with conventional Hohfeldian terminology, then (3) could be restated with "*no* no-right that you *not* enter" and would be no different from (1) – or (2) if we are following a Kramerian kno-right. As such, it could be summarily dismissed as failing the test, as already undertaken in section 3. But McBride has more work for his concerning locution to do. Here is his exposition of the second statement in (3):[70]

68 Text following note 28 above. McBride does retain the Kramerian negation of content for the differentiated no-rights, in a way to be discussed in the main text following here.

69 McBride 2021: 46.

70 McBride 2021: 46.

> Which is to say, to adopt Kramer's terminology, if you fail to enter I'm not in a position of *rightlessness* (correlative to a liberty of yours not to enter). If you *fail* to enter, I can *make a claim*.

This has the appearance of tying in Kramer's "rightlessness" to the "no-right concerning" locution, as Kramer himself did, and then linking the negation of that rightlessness to the presence of a claim, so as to demonstrate equivalence with the claim-right present in the first statement in (3). So it seems that the test for duality has been satisfied and also the fruit of that desired duality has been harvested, in a common content for the correlatives liberty and no-right.

On closer inspection, things are not so simple. Where we initially praised McBride for introducing differentiation into a postulated expansiveness in Kramer's use of concerning and rightlessness, we now have to find fault with McBride's extension of rightlessness (and, by association, concerning) beyond anything attributable to Kramer. Where we wondered if Kramer might be taking rightlessness (no-right concerning entry) to cover an absence of both the right that you enter and the right that you not enter, it is clear that McBride has extended it in a far more ambitious manner, to cover the absence of a remedial right. So when that no-right is negated in an attempt to illustrate a case of the equivalence of duals, the remedial right is now present. If you fail to enter, I can make a claim.

However, this "claim" now appearing in McBride's exposition is not the original "claim-right that you enter" in the first of the statements he is discussing, found in (3) above. It is a claim to a remedy for being in breach of the duty that is the correlative of that claim-right. As such this "claim" is not technically a Hohfeldian claim-right at all.[71] It is certainly not the correlative of the duty to enter;[72] it cannot be accommodated in the dispute box found in figure 2;[73] and, if this claim features in the understanding of a no-right, that conception of no-right cannot be fitted into Hohfeld's table of conceptions, contrary to McBride's expectation. Furthermore, McBride's no-right constructed with this elaboration of rightlessness (and concerning) cannot fit in the purported relation of duality with claim-right, irrespective of what negation its content bears. For the substantial element of its content (*my* entitlement to a remedy)[74] is wholly different

71 It primarily involves a power (or powers) on the part of the claim-right holder to pursue proceedings for breach of duty, and some time thereafter (possibly) a power of an official to grant a remedy, before any talk of a claim-right to a specific remedy might become appropriate. For important recent work on this topic, see Liau 2020: ch 2.

72 Nor is the negation of that claim, i.e., my state of "rightlessness" with regard to a remedy, the correlative of your liberty not to enter, as professed by McBride (2021: 46).

73 It is a basic precept of Hohfeld's analytical scheme that the analysis of a primary claim-right/duty relation is undertaken separately from the anlalysis of any remedial consequences that might ensue as a result of a breach of the primary duty – Hohfeld 1919: 41 n39; Finnis 1972: 380; Halpin 1997: 31.

74 McBride does not specify what the remedy in question might be, but inasmuch as he treats the negation of a no-right as amounting to the entitlement to make a remedial claim, the presence

from the content of the claim-right (that *you* enter). There is no prospect of achieving equivalence between these disparate contents.

The same critique can be made of McBride's effort to satisfy the template test in his Appendix, where the following appears.

(4) DUALS:	[5] Joe has a claim-right to be paid $10 by Sally
	[6''] It's not the case that Joe has a no-right concerning not being paid $10 by Sally

Taking into account that for McBride "It's *not* the case that Joe has a no-right"in [6''] can be expressed by the equivalent "Joe has *no* no-right"[75] (the formulation found in (3) above), we can adopt this alternative in order to avoid the distraction of a transferred external negation. Also, now we have the benefit of McBride's exposition of his use of the concerning locution, we can replace the "a no-right concerning *not* being paid $10 by Sally" by the clarification he has provided: "a no-right to a remedy in the event of not being paid $10 by Sally". Combined together these two points then provide us with a clearer representation of [6'']:

[6''*] Joe has *no* no-right to a remedy in the event of *not* being paid $10 by Sally

Place this now alongside [5] in the professed dual in (4) above:

(4*) DUALS:	[5] Joe has a claim-right to be paid $10 by Sally
	[6''*] Joe has *no* no-right to a remedy in the event of *not* being paid $10 by Sally

Still, there is no prospect of achieving equivalence between [5] and [6''*] with their disparate contents, so as to express a relation of duality between claim-right and no-right. That is not to say there is no relationship evident within [5] and [6''*].

Picking up on McBride's adoption of rightlessness as a synonym for no-right, and his understanding that "*no* no-right" amounts to "not a position of rightlessness", if we take one step further we reach "a position of having a right". This then provides us with a more accessible version of [6''*]: Joe has a right[76] to a remedy in the event of *not* being paid $10 by Sally. We have now discredited any attempt to establish duals here, or to find in McBride's rescue of Kramer's kno-

of the no-right must be understood as covering not having the entitlement to make a remedial claim. However the negation is configured, the content involves entitlement to a remedy.

75 See note 42 above.

76 A non-Hohfeldian right, in the same way that the "claim" was non-Hohfeldian – text at note 70 above.

right a credible conception that might fit in Hohfeld's analytical framework. However, the more accessible version of [6"*] matched to [5] does produce an intelligible relationship – a relationship of implication between the existence of a claim-right and the provision of a remedy to the holder of the claim-right, in the event of the breach of the correlative duty:

(5) BREACH:	(i) Joe has a claim-right to be paid $10 by Sally (ii) Joe has a right to a remedy in the event of not being paid $10 by Sally

Seeing an implication between (i) and (ii) may be taken as providing a semblance of equivalence between them, but that would be to unduly stretch the notion of equivalence, to overlook any controversy over the *ubi ius ibi remedium* maxim, to ignore the discretionary aspects of civil law remedies,[77] and to neglect the contingency of (ii) – some duties will be performed. It does turn out that Sally's behaviour in (ii) is the negation of Sally's behaviour in (i) – simply because the conduct which triggers a remedial claim has to be the negation of the conduct required under a claim-right.[78] Here too maybe the semblance of the internal negation of content required for duals. But on both points, at best, all we have here is a façade. Upon closer inspection, we have seen that McBride's defence of Kramer's kno-right cannot meet the test for duality, nor provide it with credibility as a conception within Hohfeld's framework.

5 KNO-RIGHT, RIGHTLESSNESS AND NO-RIGHTS

5.1 Exploring rightlessness

To state that a party is found in a condition of rightlessness could amount to a number of things. In the extreme case, having no legal personality at all and so being unable to enjoy any rights whatsoever. That sense is clearly not relevant here. The Hohfeldian framework is used to analyse the positions of parties who are capable of possessing rights, and to specify in particular circumstances what type of right (claim-right, liberty, power or immunity) is held, or not, depending on the outcome of a (potential) legal dispute – together with the correlative

77 This point reinforces the relevance of official (judicial) power in the securing of a remedy, picked up in note 70.

78 The claim-right claim is to the performance of a duty, the remedial claim is conditional upon the *non*-performance of the duty. Once this is appreciated, the negation of content appearing in McBride's "no-right concerning" being related to the remedial claim is wholly compatible with the Hohfeldian no-right related to the claim-right claim. Accordingly, contrary to his protestation (2021: 45 n19), he has (in some respects) "collapsed into being a strict Hohfeldian".

position of the other party to that dispute.[79] So, "rightlessness" as invoked by Kramer (and McBride) must relate to some condition of a party who is capable of holding rights, who potentially might enjoy a right, subject to the outcome of the dispute in question going their way.

Given the particularity of a Hohfeldian *position* within a correlative legal relation, that can be found one side or the other of a specific legal dispute between two parties, it might be thought that any discussion of a more expansive *condition* of rightlessness is simply irrelevant to Hohfeldian concerns. As indicated in section 2, even where a party possesses a full liberty, to do or not do something, any dispute relating to that condition of full liberty will focus on challenging one limb of that condition (you think you have a full liberty to use a right of way over my land or not, I challenge you, arguing that you have a duty to stay off on the grounds that the right of way does not exist, then it is solely your liberty to enter that is pertinent – I have no reason to argue that you do not possess the liberty to stay off).

That is not to say that the Hohfeldian analytical scheme is incapable of being used to connect the analysis of specific legal positions held by parties within bipartite legal relations to the analysis of broader aggregate legal positions enjoyed by those parties – the aggregate being composed of a purposeful holding of different legal relations together. Notably, this occurs with the aggregate of a property interest; also, with an aggregate of a contractual interest – among many other commonplace legal interests that can be broken down into their constituent legal relations.[80]

The state of a full liberty mentioned towards the end of section 2, possessing the expanded content of engaging in the conduct or not, can be simply understood as a Hohfeldian aggregate composed of the two discrete liberties under the Hohfeldian scheme: a liberty to engage in the conduct, and a liberty not to engage in the conduct. It was also mentioned there that (given Hohfeld's narrow understanding of liberty as the negation of a duty),[81] this state would amount to a condition of dutilessness with respect to that conduct for the party enjoying the aggregate position; accompanied by a state of rightlessness with respect to that conduct in the other party, holding the two no-rights correlative to the discrete liberties.

The qualifying phrase "with respect to that conduct" could be replaced by similar expressions such as, "in regard to that conduct", or "concerning that conduct". These and other similar phrases are used by Kramer to indicate the scope of a no-right (kno-right).[82] Kramer also suggests in his recent arti-

79 See note 17 above and accompanying text.

80 For further discussion, see Sichelman 2022; Halpin 2017; Halpin 2022.

81 For discussion of a normatively rich notion of liberty, see Halpin 2020: 163-66.

82 Kramer 2019: 217; Kramer 1998: 10, 13.

cle that, "A no-right is a position of rightlessness, and a liberty is a position of dutilessness."[83] There is, accordingly, further evidence to back the postulated reading from Hurd and Moore that Kramer treats liberty as a full liberty and the rightlessness of a no-right as the combination of the two no-rights respectively correlative to the two liberties (to do or not to do).[84]

Yet if that is the case, then the expanded normative position of rightlessness or dutilessness, combining the two individual Hohfeldian positions found in discrete legal relations cannot itself represent the correlative of either of those individual Hohfeldian positions. My rightlessness concerning entry cannot be treated just as the correlative of your liberty to enter (or your liberty not to enter). Similarly, it cannot be treated just as the negation of my claim-right that you do not enter (or my claim-right that you do enter). In both cases, the aggregate contains more than is needed for dealing with either individual legal relation.

Using rightlessness as a convenient resource to store both no-rights, to then be individually picked out as and when the circumstances require is clearly not a legitimate tactic. Certainly not, if our enterprise is to provide a coherent account of Hohfeld's table of fundamental conceptions, which seeks to specify precisely which normative positions are present or absent for any legal relation. Rightlessness and dutilessness have no part to play in that table.

I have not, however, been completely dismissive of the notions of rightlessness and dutilessness, having acknowledged their role in portraying the Hohfeldian aggregate position of a full liberty. Still, to suggest that an aggregate position can infiltrate the table of Hohfeld's fundamental conceptions should be regarded as anathema. Yet so much controversy persists over the Hohfeldian analytical framework that to invoke orthodoxy is no guarantee of securing agreement.[85] Instead, I conclude with an attempt to present the distinct concept of the Kramerian kno-right as expressed in terms of rightlessness, as opposed to the two distinct Hohfeldian no-rights (respectively correlative to a liberty to do and a liberty not to do) by drawing on the resources of deontic oppositional geometry.

5.2 The deontic hexagon

The Aristotelian square of opposition has been used to portray the logical relations between deontic operators, providing us with a deontic square of opposition; and it is widely acknowledged that this square can be employed to represent both Bentham's and Hohfeld's basic normative concepts.[86] Arriving later on the scene, the less well-known oppositional hexagon provides an extra two points, which can be used to represent additional deontic states and their

83 Kramer 2019: 222.

84 Text following note 63 above.

85 McBride 2021: 39 n1.

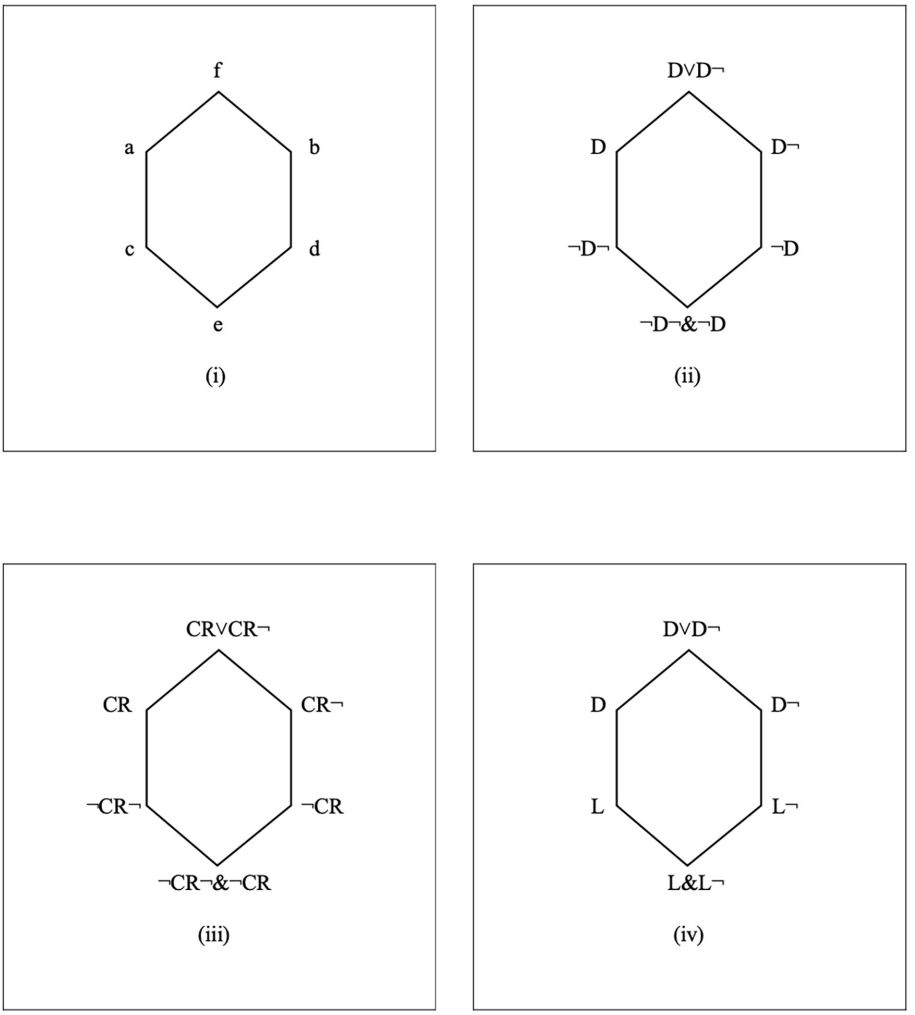
86 Halpin 2020: 153 n27.

relations to the basic deontic operators of obligation (duty) and permission (liberty).[87] One of the extra points can be taken to represent a state of dutilessness or, correlatively, rightlessness; and within the hexagon the relationships can be displayed between this state and the separate positions of holding a liberty not to (no duty to) and a liberty to (no duty not to) – or, correlatively, the separate positions of holding no claim-right that and no claim-right that not. Note for this part I initially avoid use of "no-right" as the label for the negation of a claim-right with a view to benefiting from the insights available from the deontic hexagon while keeping the discussion on neutral territory where the specific content of a no-right does not enter the discussion. Even without the terminology of no-rights, it is evident that the (liberty not/no claim-right that) and (liberty/no claim-right that not) correlatives amount to the two distinct correlatives, which are derivable from the Hohfeldian framework. And since Kramer is happy for the "no right" designation to accurately portray the negation of a claim-right, we remain on neutral ground by employing the "no claim-right" phrase at this point.

Four deontic hexagons are reproduced in Figure 5.

87 I add the Hohfeldian concepts in parentheses here. Subsequently, I shall exclusively refer to the Hohfeldian concepts. For discussion of the relationship between deontic operators and Hohfeldian normative positions, see Halpin 2019: 251-52. An illuminating history of the oppositional hexagon can be found within Demey 2020.

Figure 5: *Deontic hexagons*



Hexagon (i) provides the basic formal structure, with its points lettered for ease of reference when discussing the specific content attached to the other hexagons. In (i), the square of opposition is found at abcd. The horizontals and diagonals of the full square are omitted for current purposes. We retain the vertical sides ac and bd representing the relationships of implication (downwards but not upwards).[88] To reach a hexagon we then add on the lower point e which represents the conjunction of c and d, and the upper point f which represents the disjunction of a and b.

88 The completed diagram with accompanying explanation can be found in Demey 2020.

Turning to hexagon (ii), here we have the deontic relationships represented wholly in terms of duty, signified by D, with a preceding negation sign indicating the negation of duty and a succeeding negation sign indicating the negation of its content. At this stage, we do not translate the absence of a duty into the presence of a liberty. The disjunction of duties at point f here amounts to what can be referred to as a state of obligatoriness – whether the duty is to perform some specific conduct or to not perfom that conduct, the party is under an obligation and not free to choose what to do. This can be contrasted with the conjunction of the negations of duties at point e. This amounts to a state of *dutilessness*. As such, the party is free from any obligation and is free to choose what to do (a state of optionality).[89] We shall see shortly that this can equally be expressed in terms of the enjoyment of liberty.

First, however, in hexagon (iii) we find the correlative positions of the other party. Since the correlative positions of the two parties in a Hohfeldian legal relation mutually imply each other, we can always infer the presence of the one from the existence of the other. So, we could have simply added the correlative claim-right positions alongside the duty positions found in hexagon (ii). For ease of comprehension it is convenient to represent them in their own distinct hexagon, found at (iii). But it is important to keep in mind that each of hexagons (ii) to (iv) can be merged together. They are all representing different facets (or designations) of common normative relationships. So, hexagon (iii) provides us with the various conditions that the right-holder might be in, relative to the different positions of the correlative duty-holder, with respect to a claim-right, signified by CR. We now find at point e of (iii) a state of *rightlessness*, correlative to the state of dutilessness at point e of (ii).[90]

Finally, in hexagon (iv) I introduce the terminology of liberty (L) to replace negated duties, providing us with a state of full liberty at point e (to do or not to do), distinct from the discrete liberties to do and to not do at points c and d respectively.

Several pertinent observations can be made from this brief digression into deontic oppositional geometry, which helpfully displays the distinct normative positions found in Hohfeldian legal relations at points a, b, c and d, while sepa-

89 Optionality and obligatoriness are contradictories, but as the following footnote indicates the e and f points cannot be treated in the same way as the a, b, c and d points to represent the interconnections of correlatives and negations found across Hohfeld's fundamental conceptions and legal relations.

90 The state of right-holding at point f of (iii) and the corresponding state of obligatoriness at point f of (ii) are of less interest. This is due to the disjunctive state at f, from which it is impossible to infer correlativity between the two f states (obligatoriness in (ii) might amount to a duty not to while right-holding at (iii) might amount to a claim-right that, which would obviously not be the correlative of that duty). In general, the greater explanatory value of the e point over the f point can be supported by the historical recognition of a pentagon of opposition (abcde) having significance independently from the hexagon – Demey 2020: 40-44.

rately representing the conditions of dutilessness and rightlessness at point e. We can note the importance of recognizing the two discrete Hohfeldian relations cohering at points c and d. As discrete liberties in (iv) they cannot be submerged in a condition of full liberty at point e.[91] Technically, implication flows upwards from e to c and d, but not downwards from c or d to e.

Similarly, the two absent duties at c and d in (ii) cannot be submerged in a condition of dutilessness at e. Also, the two absent claim-rights at c and d in (iii) cannot be submerged in a condition of rightlessness at e. The differentiation of absent rights and duties is required. Kramer's kno-right has not shown itself to be capable of effectively conveying the differentiation of absent rights, from behind the cover of rightlessness. Hohfeld's no-right has never had any problem with fulfilling this role.

Futhermore, when we move from the role no-right possesses in Hohfeld's table of concepts as the negation of claim-right to the role it possesses as the correlative of liberty, it is clear that the condition of rightlessness, chosen by Kramer as the specification of his kno-right, being found at point e, cannot be treated as the correlative of either of the liberties at points c and d in (iv). As mentioned, it does make sense to regard the condition of rightlessness at point e of (iii) as the correlative of the condition of dutilessness at point e of (ii). However, this is based on a clear understanding of the meaning and significance of these two terms. Employing a specific term of "no-right" to cover the absence of claim-right at points c and d in (iii) has to be both content specific and capable of intelligibly conveying that there is no (claim-)right of the appropriate content. At the same time, if the term "no-right" is employed to cover the correlative of the liberties at points c and d in (iv), it again has to be both content specific and capable of intelligibly conveying that correlativity. The term as applied to Hohfeld's concept of no-right, with the simple meaning of there being no claim-right (equivalent to "no right"), can be understood in a way that meets these requirements.

When it comes to Kramer's kno-right, no intelligible meaning for kno-right has been provided, let alone one capable of meeting these demands. Despite the strenuous efforts of Kramer and McBride to defend the duality of no-right, seen as a bulwark for the common content they take it as sharing with its correlative liberty, no meaning for kno-right has been offered that carries with it an interconnected semantics with claim-right capable of establishing a relation of duality between them. If kno-right is taken to be a state of rightlessness, as found at point e of the deontic hexagon, it is incapable of playing any part as the specific negation or correlative of the Hohfeldian conceptions found at points a, b, c and d. It does not fit within Hohfeld's table of concepts. Nor then can we expect it to secure the reality of the no-right position, the reality of Hohfeldian liber-

91 As discussed in section 2 above.

ties, and the viability of the Hohfeldian framework itself. These being the stated aims of Kramer and McBride. This outcome of our assessment of the Kramerian kno-right might be regarded as reason for relinquishing the axiomatic attachment to a common content between liberty and no-right,[92] and for ceasing to push duality onto a relationship where it has never been shown to fit.

As a final reflection, it can be pointed out that this brief excursus into the deontic hexagon in order to assist with realizing an outcome for a local contest between Hohfeldian no-right and Kramerian kno-right is capable of bearing other implications, when it comes to considering the general relevance of deontic oppositional geometry to the illumination of legal relations – or, to put it the other way round, the illustrative value of practical legal relations in exploring the theoretical standing of deontic oppositional geometry. At the local level, we discovered a crucial status for the inner square, abcd, which expansion to further points on the hexagon, e and f, could neither infiltrate nor disturb. Recently, it has been suggested that increasing the complexity of deontic geometric models is necessary to "complement" the analysis found in Hohfeld's analytical framework.[93] The suggestion to be carried from here into that debate is that any complementary features may also have to fit with more basic or elementary features contained within Hohfeld's framework (as depicted in the square of opposition alone). That is undoubtedly a debate which will deservedly attract more attention than can be paid to it here. My concluding aspiration for the present article is limited to the hope that it renders further debate over kno-right and no-right unnecessary.

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92 For other reasons, see the discussion cited in note 18 above.

93 See de Oliveira Lima, et al 2021.

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Constitutive rules of precedent

A non-prescriptivist account of *stare decisis*

The purpose of this paper is to reject the thesis that a system of precedent is established with a prescriptive norm. This claim is supported by two lines of reasoning. First, it is claimed that systems of precedent necessarily require constitutive norms and not prescriptive norms. Second, any system of precedent comprises at least two, if not three, constitutive rules of precedent. While one confers the power to set a precedent, another conditions the validity of a judicial decision to the fact that it follows the precedent. Finally, there may also be a third rule that confers the power to ensure that precedent is followed and to annul divergent decisions.

Keywords: rule of precedent, prescriptive norm, constitutive norm, competence, applicability

1 INTRODUCTION

Literature on the theory and dogmatics of judicial precedent is undergoing a renaissance, as the publication of numerous articles, compilations, and volumes on the subject proves. There is, however, still work to be done in this field, at least in terms of the analytical theory of law. It is important to note that certain common statements in the framework of theories on judicial precedents have not yet been sufficiently filtered through the analytical theory of law. Indeed, while existing contributions have undoubtedly been valuable, many are based on questionable assumptions.

I address one such assumption in this paper, namely, that when a system of precedent is in place, following precedent is either mandatory, although to varying degrees, or at the least, permitted.[1] In particular, I argue against the common assumption that the use of precedents in any system of precedent is governed by a prescriptive norm of obligation or – when there is no such obligation – by a prescriptive norm of permission.[2] To this end, I proceed as fol-

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1 See Horty's excellent work on precedent-setting as obligations with exceptions (Horty 2011). See also Pulido Ortiz 2018.

2 Given this limited aim, I will neither provide a comprehensive review of the literature nor refer to it exhaustively. A more comprehensive analysis should undoubtedly include many

lows: First, I start by rejecting the thesis that the rules establishing the alleged "obligation" or the alleged "permission" to follow precedents are prescriptive (or regulative) norms.[3] Second, I argue that systems of precedent are necessarily established by constitutive norms, and I demonstrate that the practice of precedent is normally based on three constitutive rules of precedent: one that necessarily confers the power to set a precedent; another that necessarily conditions the validity of judicial decisions to their following of the precedent; and in some systems, one that that confers the power to ensure that precedents are followed and to annul divergent decisions.

Three clarifications are, however, important before we turn to the heart of the argument.

2 THREE PRELIMINARY CLARIFICATIONS

The first clarification concerns the difference between prescriptive norms and constitutive norms (2.1). The second traces a distinction between the concept of precedent and the rule of precedent (2.2). The third regards the positive nature of the rule of precedent (2.3).

(2.1) Two distinctions that show the contrast between constitutive norms and prescriptive norms are important for the argument in this paper.[4] First, constitutive norms do not provide deontic characterisations of behaviours or states of affairs as mandatory, prohibited, or permitted under certain circumstances of application (as prescriptive norms do). Instead, constitutive norms correlate certain circumstances of application with the attribution of an institutional property. Second, unlike prescriptive norms, constitutive norms are not associated with sanctions for the addressees who are responsible for deviating from the norm. Instead, the legal consequence of non-compliance with a constitutive norm is that the institutional property correlated with the circumstances of application of the norm does not occur.

To be able to adequately describe how precedents operate in a legal system, the distinction between prescriptive norms and constitutive norms must be maintained consistently. Indeed, it enables us to flag an improper use of the language when the possibility of choosing to apply a precedent or not is explained by saying

other important contributions, among which those by non-Anglo-American authors are too often neglected in English language works. See at least Aarnio 1996, Barberis 2015, Chiassoni 2012, Gascón 1993, Bustamante 2016, Peczenik 1997, Taruffo 2014, Garay 2013, Gómora 2018, Guastini 2014 and 2018, Siltala 2000, Wróblewski 2008, Magaloni Kerpel 2001, Ferreres 2010, Zanetti Jr. 2015 and Pulido Ortiz 2018.

3 I will use these two expressions interchangeably.

4 See, e.g., Moreso and Vilajosana (2004: 73) or von Wright (1970: 26) for distinctions between prescriptive and constitutive norms.

that there is a prescriptive norm of permission that allows the judge to choose between both options. As I will show, the norm "allowing" the judge to choose between both options does not have the form of a permission but of a constitutive norm that considers either decision valid. The same can be said about the "obligation" to apply a precedent: It is not that the judge has an obligation established by a prescriptive norm of obligation. Rather, the judge's decision is invalid if the judge does not apply said precedent. For reasons of clarity, it is therefore important to avoid using the terms 'mandatory' and 'permitted' in these contexts.

(2.2) The second clarification concerns the distinction between the rule of precedent and precedents themselves. Of course, the concept of precedent cannot be taken for granted; numerous concepts of precedent are available (Chiassoni 2012; Horty 2011; Iturralde 2014). For the purposes of this work, however, "precedent" means a court decision that contains a (general) rule relevant to the justification of other court decisions.[5] It is clear, however, that not every court decision constitutes precedent (except in the sense of a contingent auto-precedent) for the court issuing the ruling. What differentiates any old jurisdictional decision from a ruling setting precedent is a norm identifying it as such. Such a norm must be in place (is necessary) for precedent to be established. In this regard, a distinction must be drawn between court decisions containing a rule relevant to future judgements and a norm establishing that certain decisions count as precedents. Put simply, while precedents are a set of judicial decisions, the rule of precedent, or the rule of *stare decisis*, is the rule determining that certain court decisions count as precedent.[6] However, and as this paper shall demonstrate, the rule of precedent is not a single rule. It is instead a set of rules on (at least) the competence to set precedents and on their relevance.

(2.3) The third clarification concerns the (potentially) positive nature of the rule of precedent. Clarification is needed because a conceptual link has too often been established, either expressly or supposedly, between the positivization from the legislator (or the courts) and the mandatory nature of precedents. Indeed, while a distinction between legally binding and *de facto* binding precedents is highly recommended, this distinction has often been associated with that made between binding precedents and merely persuasive precedents. Beyond the fact that the opposition between binding and persuasive precedents

5 In this sense, my work develops the theory of precedent in terms of norms rather than reasons for action. Of course, a development of precedent theory based on reasons for action is as perfectly possible and plausible as Lamond (2005) and Horty (2011) have shown. But my work is conceptually prior to theirs's insofar as they presuppose that the rules model – as reconstructed by Alexander and Sherwin (2004) – is a prescriptive rules model. In this sense, when Horty and Lamond attack the rules model, they do so on the grounds that the rules would be prescriptive norms.

6 Pulido Ortiz 2018: 24 ff.

deserves a separate discussion,[7] it is frankly disorienting to argue that precedents are more or less binding depending on whether the legislator (or the court) has positively enforced them. This is disorienting for two reasons.

First, nothing prevents the legislator from positivizing the "obligation" to only consider previous decisions, or to only mention them.[8] This means that there is a positive rule but that it establishes a different framework to the mandatory nature of following precedents (for instance, merely considering them may be enough). However, it is also possible that the judges deem following precedent "mandatory" even when there is no legislative provision to support this.[9] This becomes apparent, for instance, when without making a general statement, judges annul court decisions merely because they do not follow previous rulings.

Second, however, the legislator's positivization of a normative statement is neither a necessary nor a sufficient condition for adding a rule to the system. Beyond the very real issue of the separation of powers, the fact is that every experienced lawyer is aware of the presence of legislative statements that are systematically ignored by the courts of justice. But the opposite is also true, namely, that every experienced lawyer knows that some norms considered "mandatory", or even of valid, cannot in any way be traced back to legislative or constitutional texts.

The three clarifications offered above are relevant precisely because the practice of following precedents is governed, particularly in civil law, through implicit rather than explicit rules. As detailed below, this poses a certain difficulty for determining the nature and the content of the rule of precedent. This is because if we cannot count on legislative positivization to determine the presence and content of the rules governing the practice of precedent, we must empirically analyse which rules govern the use of precedent and the legal consequence of not following them. This is not easy, however, at least if we admit the possibility that some legal rules are associated with no legal consequence. It is possible that in an specific legal system, only the following of precedent is associated with legal consequences or that, on the contrary, only not following precedent

7 The term 'persuasiveness' does not properly express the degree of bindingness of court decisions for two reasons. First, in deontic logic, the term 'mandatory' does not admit degrees. Second, persuasiveness refers why, based on its content and not just its origin, a norm enters reasoning – but it tells us nothing about its bindingness.

8 It is true that in some jurisdictions the legislature (or some legislatures) cannot establish what the force of precedent should be. However, my statement does not refer to any specific statutory law, but to the logical possibility of it being so regulated.

9 In fact, without expressly mentioning it, courts have frequently first considered the 'mandatory' nature of following case law. Later, the courts themselves expressly declare it, particularly courts of final appeal. Only in a final stage, if at all, does the legislator positivize this. This appears to have been the case in Colombia. See Bernal Pulido 2008.

has such consequences.[10] The latter seems to be the case with following at least some precedents: decisions where following precedent determines the validity of the subsequent ruling, but not following precedent is not a condition for invaliding the judicial decision.[11] From this standpoint, thinking that because the rule holding precedent to be mandatory has not been positivized, or because there is no legal consequence for not following precedent, these decisions become irrelevant, seems to be a somewhat hasty conclusion. It could certainly be the case that following precedent is not regulated in any way, thus making the following of precedent legally irrelevant. However, the opposite seems to be the case: although there may be no clear consequences for not following precedents, courts often use them to justify their decisions and trial lawyers constantly cite them. In some legal frameworks, identifying the legal consequences of failing to follow precedent is impossible, but this does not render the precedents themselves irrelevant. Consequently, it is logically possible, and is in fact the case in many legal systems (e.g., in Chile, Spain, and Italy) that failure to follow precedent does not entail any legal consequences but following precedent does. Now, on most occasions, not following precedent does entail legal consequences in terms of the annulment of the judgement or the possibility of appealing it, but these are not the only ways precedent can be relevant.

Further, this is not the only evidence to suggest that precedents are legally relevant even when there are no expected implications for not following them. We invest heavily in bibliographic databases, while the judiciaries in several countries are launching free, large-scale digital publications of their rulings; we dedicate whole sections of legal journals to the analysis of judgements; we teach entire university courses on jurisprudential analysis. Therefore, we must analyse how precedents are relevant (if this is the case), even while not following them carries no legal consequences at all.

This paper does not seek to describe how precedent works in any specific legal system of common law or civil law. What it aims at is recreating the way

10 From this standpoint, it is possible that not following precedents has no associated consequence for any subject, but following them is a condition to consider the decision valid. This is possible only if we think that it establishes conditions other than those necessary. In such a case, if following precedent were a necessary condition, it would be impossible for the rule of precedent to regulate following precedent, but not regulate the not following of precedent.

11 The work of Richard Re (2020) is particularly valuable. He tries to reconstruct a part of the rule of precedent as a permission. He believes that if we consider the rule of precedent as a rule of permission, it is possible to account for the role that precedents play when they are not binding. The only problem with this thesis is that whether permissive rules can fulfil this function is highly debatable. Indeed, a permissive rule shows a certain action as possible, but as seen below, it is not possible to account for what a behaviour that is merely permitted contributes to justifying the decision. If the rule of precedent is something that affects the validity of legal decisions, then it is not possible to reconstruct it as a permissive rule because these do not affect the validity of any legal act.

both types of systems work. Despite the possibility that specific legal systems include prescriptive norms regulating the following (or non-following) of precedent, these have a contingent character. What is fundamental in precedent systems is that they are based on constitutive norms.

3 PROBLEMS OF PRESCRIPTIVIST ANALYSES

Generally speaking, the reconstruction of the practice of precedent in the common and civil law systems is often introduced as constituting a major division. While in the former, precedent is said to be mandatory, in the latter, it is said to be merely persuasive, with no associated legal consequences.[12] While it is true that in some Latin American civil law systems, there have been legislative and judicial positivization processes for the practice of precedent, many contain no express consequence for not following precedents, meaning they are not, therefore, mandatory.

I believe that theories like the above are based on a conceptual error: thinking that the *stare decisis* norm (or rule of precedent) is prescriptive. This section will analyse the theory that following precedent is a prescriptive rule of obligation or a prescriptive rule of permission. As legal systems do not generally prohibit the practice of using past court decisions to justify future court decisions, I shall not focus on this logical possibility.[13]

3.1 Mandatory rule of precedent

To analyse the theory that the rule of precedent is a prescriptive norm that renders following precedent mandatory, strictly speaking, based on the *ratio decidendi* or the holding contained in the precedent, I shall assume the maximum degree of bindingness. Consequently, following precedent in this regulatory scenario would be an imperative duty. This section will show that even in such cases, the rule of precedent cannot be configured as a prescriptive norm that qualifies following precedent as mandatory.

Despite the fact that in regular juristic parlance, following precedent is often presented as mandatory, it is extremely unwise to reconstruct the rule of precedent as a prescriptive rule of obligation. Indeed, if it were mandatory to apply the same *ratio decidendi* to similar cases as those already decided in a previous decision, then the consequence for a judge not following this mandate would typically be a sanction.

12 This is not the only fundamental difference. See, Núñez Vaquero 2021; Bustamante 2016: ch. 1; Gascón Abellán and Núñez Vaquero 2020; Zanetti 2015: ch. 1.

13 Furthermore, due to the interdefinability between "prohibited" and "mandatory", analysing the second option helps us respond to the theory that using precedent is prohibited.

To be clear, I am not arguing that there are no prescriptive norms without sanctions. I am only putting forward the idea that if not following a prescriptive norm has any consequences, these must logically be a sanction. Since Hart's critique of Kelsen, it has become widely accepted that there can be prescriptive norms without sanctions associated to their violation. Nonetheless, also according to Hart, it is agreed that the normal consequence of a violation of a prescriptive norm is a sanction, whereas the consequence of a constitutive norm is its non-validity. As I aim to show in what follows, the idea that the rule of precedent is a prescriptive norm is not only in contrast with the practice of our legal systems (3.1.1), but that the implications of considering it as such would also be rather strange (3.1.2).

(3.1.1) First, it is extremely rare for judges to be sanctioned for not following precedent. Indeed, very few legal systems set forth sanctions for judges if they do not apply the *ratio decidendi* from the previous case.[14] One exception is the Colombian legal system where its Supreme Court considers the failure to follow precedents as a type of prevarication.[15]

Two points must be made in this respect. The first concerns the type of prevarication, which always requires at least an inexcusable error if not wilful intent (this is more common). In other words, for prevarication to take place one must not only make the decision in question, but also wilfully (or due to a serious lack of knowledge of the law) infringe the law with it. However, it is also important to stress that when considering failure to follow precedents as prevarication, precedents are comparable to any other legal rule. It is not a question of not following precedent, but of not following any legal rule.

The second point concerns the possible indirect sanctions that judges may receive. Indeed, several advocates for judicial independence (Bordalí 2003; Andrés Ibáñez 2019; Taruffo 2014; Núñez Vaquero 2020) have sounded the alarm because following precedent is being associated, albeit not directly with sanctions, with withholding awards, incentives, or some other form of pressure that decreases judicial independence from their (supposed) hierarchical superiors. To assess the thesis that the rule of precedent is not a prescriptive norm of obligation, we shall therefore adopt a broad concept of 'sanction' that covers any negative consequence for the incumbent(s) of the judicial body failing to follow precedent. Consequently, we can argue that the rule of precedent is a prescriptive norm because the failure to follow precedent entails some such sanction in the broad sense.

14 The possible sanction associated with international liability that a state may incur for not following the jurisprudence of an international tribunal deserves separate mention. For example, no one doubts that the Inter-American Court of Human Rights lacks the jurisdiction to overturn decisions, but that failure to follow the Court's precedents could result in international liability.

15 Colombian Supreme Court ruling C-539/11.

However, despite the expansive nature of such a concept of sanction, which includes not only direct punishments but also indirect sanctions such as losing awards, it is still extremely uncommon for incumbent judges to be sanctioned. Judges are not normally sanctioned for not following a specific precedent but for systematically disregarding them. Still, this remains exceptionally rare.[16]

Note that the above definition of sanction excludes the legal consequences that the decisions such courts hand down may be subject to instead of their authors, i.e., the nullity or revocability of the decision. This point is important because if there is one consequence most provided for in the case of not following precedents (strictly speaking: their *rationes decidendi*), it is the nullity or at least the revocability of the decision in question.

(3.1.2) Second, it seems somewhat strange that judges would be sanctioned while their judgements would remain valid or at least non annullable. I am not only saying that the sanctioning of judges for not following a precedent in a system where precedents are binding is far from the most frequent consequence of the violation of the rule of precedent. I am saying that the nullity of the decision in question is more consistent with what constitutes a system of precedents.

A legal system aiming at having future decisions determined by past rulings could deploy a set of sanctions to make the courts decide in the same fashion as in the past. However, a system of sanctions does not guarantee institutional results, but leads to their achievement only indirectly through the suppression of deviant behaviour. Indeed, it would be possible for judges to accept sanctions and yet systematically ignore precedent. Consequently, it can hardly be argued that a legal framework that punishes judges who do not follow precedent, but does not annul their decisions, is really a system of precedent.

This perspective highlights that the most common consequence linked to a system of precedent is not sanctioning incumbent judges but annulling the judicial decisions that go against past rulings. While it is true that sanctions may function as a negative incentive for judges to not deviate from past decisions, a system of precedent based exclusively on sanctions for judges deviating from past decisions is strange in this sense.[17] To understand this point, simply imagine a system of precedent where failure to follow the precedent results only

16 While I do not have empirical data demonstrating how many times judges depart from precedent, I do have some data regarding how many times judges are sanctioned for departing from precedent. Between 2015 and 2019, only two judges have been sanctioned in Spain, for example. See Consejo General del Poder Judicial (2016-2020). However, it is also a commonly shared assertion in several civil law jurisdictions that judges often fail to follow precedent without justification, and that there is no legal consequence for such behaviour.

17 According to Pulido Ortiz, prescriptive norms would have the capacity to guide the behaviour of judges indirectly by generating pressure on practical decision making (Pulido Ortiz 2018: 330 and 335). However, while what such pressure from prescriptive norms consists of in relation to judicial decisions is unclear, above all, it cannot explain the role it would have concerning the validity of the decisions. Of course, it would be absurd not to recognise that

in sanctioning the incumbent judge, and another system where the anticipated consequence is only the nullity (or the revocability) of the ruling. In the first case, it would be perfectly possible for a judge to decide to deviate from the precedent, accepting the sanction as a reasonable price to pay. However, this appears to frustrate the goals sought through the establishment of a system of precedent. In the second case, on the contrary, if the consequence of not following precedent is the nullity of the decision, whether the incumbent judges are willing to accept the sanction becomes irrelevant because the institutional consequence remains the same.

Therefore, while a system of precedent based exclusively on prescriptive norms associated with sanctions for incumbent judges is inconsistent with such goals, it is possible and most common to have a system of precedent that sets forth the nullity (or the revocability) of the decision deviating from precedent as the sole consequence of not following it. As will be developed below (sec. 4), this is an initial argument for considering that the rule of precedent, although possibly accompanied by prescriptive norms regarding the following of precedents, is above all a jurisdiction rule.

In short, it is possible for a legal framework to include a prescriptive norm of obligation to follow the precedent. However, the system of precedent must be based on constitutive rules since a system of precedent based exclusively on prescriptive rules isn't possible.

3.2 Permissive rule of precedent

It could be claimed that in the majority of civil law systems, the rule of precedent is a prescriptive norm of permission. However, the idea that the rule of precedent can be reconstructed as permission, wherein following precedent is not mandatory, must also be rejected. In a nutshell, the main reason is that if precedent is something that affects the validity of a judicial decision, and validity depends on constitutive norms, then the rule of precedent cannot be a permissive rule because permissive rules are prescriptive norms.[18]

To explain why the analysis of the rule of precedent in terms of a permissive norm should be rejected, it is useful to recall that "permission" constitutes the only deontic operator that qualifies either the commission or the omission of a certain behaviour, but not both.[19] Therefore, if following precedent is merely

prescriptive norms can play some role related to following precedent. While a system of precedent is possible without sanctions, it is not possible without a system of annulments.

18 A reviewer suggested that there might be permissive constitutive rules, which do not affect the validity of any legal act. I do not know if such rules exist, but I cannot identify any examples, let alone identify the rule of precedent with such a rule.

19 In this sense, permission is called the minimal regulatory solution (Alchourrón & Bulygin 2012: 63). In contrast with permissions, obligations and prohibitions constitute deontic operators that qualify both the commission and the omission of the regulated behaviour. In short,

permitted (as opposed to optional, mandatory, or prohibited), then not following a precedent may be prohibited, mandatory, or permitted. But this seems implausible for the following reasons:

(i) First, if not following a precedent were prohibited, this would mean that following a precedent would be not only permitted (as by hypothesis of this subsection 3.2), but also mandatory per definition (in deontic logic, "prohibited to ϕ" is defined as synonymous with "mandatory not to ϕ" and "not permitted to ϕ"). In other words, following a precedent would be qualified as both permitted and mandatory. The problem, however, is that this specifically brings us back to what was said in section 3.1 about the rule of precedent as a norm that makes following precedent mandatory.

(ii) Second, if not following a precedent were mandatory, this would mean, again per definition, that following a precedent would be prohibited. We would thus have an antinomy: two incompatible regulatory qualifications for the same action. Indeed, following precedent would be both permitted (as by hypothesis of this subsection) and prohibited. Besides the fact that this brings us back to the problem of qualifying the (non-) following of precedent as mandatory, it does not seem sensible to think that the rule of precedent is a set of antinomic rules.

(iii) Third, it is possible that both following and not following a precedent are permitted. Therefore, the rule of precedent would be a norm that would qualify following precedent as permitted, but not following it would also be permitted. It would thus be optional. However, this makes the following of a precedent somewhat irrelevant (but in any case, see Bulygin 2020 and Poggi 2004). To understand the reason, we must examine the functions performed by the permissions, and therefore the optional behaviours, in the legal systems.

Permissions are typically assigned three functions: (a) the first is to clarify the regulatory status of a conduct; (b) the second is to protect conduct from future amendments in lower ranking provisions; and (c) the third is to repeal prohibitive rules.[20] Of these three functions, only the third advocates for the rule of precedent.[21] Therefore, we can reject the notion that the function this rule performs in the legal system is to clarify the status of the behaviour of "following the precedent", or to derogate prohibitive rules.

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if a certain behaviour is mandatory, its omission is prohibited and vice versa; and if a certain behaviour is prohibited, then its omission is mandatory and vice versa.

20 Guastini 2017: 67-68; Poggi 2004: 22.

21 However, the last function, to repeal past prohibitions, could be relevant when use of precedent was previously prohibited. However, as demonstrated below, this reconstructs the following of precedent as a legally irrelevant action, which is strange, as we will see.

The relevant point is the function of permissions to shield certain behaviour so that lower ranking provisions[22] cannot amend the deontic characterisation of the behaviour in question. There would be two rules that could not be issued precisely because the rule of precedent is a norm that qualifies following precedent as optional: (*i*) the rule sanctioning the incumbent judge for not following a precedent; (*ii*) the decision annulling a judicial decision for not following a precedent.

(*i*) The first option, where the judge is not sanctioned, must be ruled out for the reasons detailed above. Namely, it is extremely uncommon and strange for judges to be sanctioned for not following a precedent, and when they are, this occurs under the broader term of prevarication, which requires a subjective element (i.e., the will to break the law by making the decision in question or to break the law due to a serious lack of knowledge of the law).

(*ii*) The second option is that a rule of precedent making following precedents optional, prohibits a higher body (or the individual rule this body issued) from annulling a decision for (not) using a precedent in its reasoning. From this standpoint, if the rule of precedent qualified the use of precedent as optional, it would be preventing a higher court from annulling the decision for (not) following a precedent, by issuing an individual rule, merely because the decision uses (or does not use) a past court ruling in its reasoning (whether other reasons are used or not).

This second option must also be ruled out for two reasons. First, because, as seen above, the consequence that may arise from failure to comply with a prescriptive norm, such as a permissive rule, is a sanction for a certain individual. Although there are sanctions affecting the legal acts an individual may perform through the penalty of disqualification, this applies to future actions on a personal basis. A judicial decision being annulled because precedent was not followed does not seem to comply with these characteristics. In other words, if the rule of precedent prevents a legal decision from being annulled because it has followed precedent or not, then it affects the validity of such a decision. Prescriptive norms do not affect the validity of legal actions (constitutive norms do). Therefore, when we speak about the rule of precedent, we are not speaking about a permissive norm (or at least not only a permissive norm).

Second, this configuration of the rule of precedent as optional does not reveal a key aspect of how precedents function in our legal systems: it does not allow a distinction to be made between institutionally relevant and irrelevant behaviour. For example, imagine a system with a rule qualifying signing decisions with a green pencil as permitted. Signing (or not) a legal decision with a green pencil does not add or remove anything for the validity of judicial decisions. It

22 When speaking of lower ranking provisions, I understand hierarchy materially. For the different meanings of hierarchy, see Guastini 2017: 207.

is therefore irrelevant for the purposes of justifying the judgement, although it protects such behaviour from any other norms issued.

I do not think we can say the same about the use of legal precedent in the justification of judicial decisions. Instead, even in legal systems with consensus that a failure to follow the *stare decisis* rule does not constitute grounds to annul the decision, this does not mean it is irrelevant for justifying the judicial decision. In such systems, the use of precedent constitutes at least a contributing condition for the validity of the judicial decision. This means that if we classify following precedent as merely permitted in these legal systems, we do not account for how following precedent conditions the validity of the judgement because permissive norms do not condition (and cannot condition) the validity of legal decisions. To use an extreme example, citing a precedent where not mandatory is not like looking into a crystal ball. Setting the rule of precedent as a permissive rule does not allow this key aspect to be accounted for.

Of course, nothing would prevent that apart from there being a rule that makes the use of past legal decisions relevant, it is permitted (or optional) to cite precedents. Furthermore, if such a permission is found in a higher-ranking provision, this would prevent a lower ranking provision from being able to qualify such behaviour as prohibited. Nevertheless, it still does not account for the role that the rule of precedent plays in our legal systems.

4 A NON-PRESCRIPTIVIST ACCOUNT

After ruling out the rule of precedent as a prescriptive norm, we must establish what kind of rule it would be. In this section I argue, first, that not being a prescriptive norm, the rule of precedent must be reconstructed as a constitutive norm (4.1). I then introduce three constitutive norms typical of systems of precedent (4.2):[23] a norm for setting precedents, another on the applicability of the individual rules contained in the ruling *decisum*, and a third (contingent) rule on the competence to control the following of precedent.

4.1 *Stare decisis* as a constitutive rule

In this section, I argue that if the rule of precedent is not a prescriptive norm, the only option is to reconstruct it as a constitutive norm. Two reasons justify such a necessity.

(i) First, as mentioned above, it is generally accepted that the consequence associated with constitutive norms, from Hart onwards (1998: chs II and III),

23 These are not the only standards. On the contrary, it is possible that there are other constitutive rules that are not rules of competence, such as those that establish - as a reviewer rightly mentions - the difference between *ratio decidendi* and *obiter dicta*.

is not a sanction, but the validity (or invalidity) of the act. In fact, Hart's criticism of Kelsen's reconstruction of primary and secondary norms, which states that primary norms (the only existing rules) are instructions for judges, while secondary norms merely reflect primary norms, hits the mark here: there are norms that are difficult to reconstruct as prescriptive norms. As is also well known, Hart distinguished between three types of secondary rules: change, adjudication (or judgement), and recognition.

As detailed below *(infra* 4.2), the rule of precedent is not a single rule, but a set of rules that to a certain extent contains rules of all three types. The important point here is that according to Hart (1998: 35), secondary rules are characterized by the consequence associated with the failure to follow them:[24] the act being invalidated. If, as argued above, the most frequent and normal consequence associated with the failure to follow the rule of precedent is the nullity of the decision,[25] there appears to be good reason to define it as a constitutive rule, not a prescription.

(ii) The second reason is that it is possible to reconstruct, based on von Wright, the distinction between prescriptive and constitutive norms as an exhaustive and exclusive division. As is well known, in *Norm and Action*, von Wright distinguishes between six types of norms, differentiating these into two groups: primary and secondary.[26] The first group features prescriptive norms, the defining rules (herein referred to as constitutive norms), and the technical norms. The second group contains moral, ideal, and customary laws.

The second group of norms can be directly ruled out as part of an exhaustive and exclusive distinction of types of rules because such rules are characterized either by their origin (customary) or their content (ideals and morals), whereas the first group is characterized by their structure. Therefore, it would not be difficult to imagine, for example, prescriptive norms that are simultaneously prescriptive, moral, and customary. Consequently, the second group should be

24 Hart's distinction is by no means unambiguous, as he sets forth three different criteria to differentiate between them. First, the distinction is comparable to the difference between norms and meta-norms; second, according to the addressee, the former would be addressed to citizens whereas the latter would target bodies creating and applying the law; third, based on the consequences associated with not following them. See Guastini 2014: 103-104.

25 However, invalidity is only one of the possible consequences associated with a failure to follow precedent. Not following precedent may only mean, for instance, authorisation for the parties to the process where precedent was not followed to file an appeal, or simply annul the decision. That said, the above are consequences associated with the constitutive rules, not prescriptive norms.

26 Von Wright 1970: 26 ff. Truth be told, it is unclear whether von Wright put forward these types of norms as a classification, and not simply as a set of examples of norm meanings. This is a significant difference because in this sense, distinguishing between the norms would be impossible. Therefore, my argument seeks to go even further.

ruled out, as I say, as an exhaustive and exclusive division in relation to the first group.

The first group includes the prescriptive, constitutive, and technical norms. According to von Wright's definition, technical norms do not exactly guide behaviour in the same way as prescriptive and constitutive norms, as they are instructions intended for those seeking to achieve a certain predetermined goal.[27] A simple example serves to demonstrate this: to cook a paella, a recipe must be followed, otherwise the goal will not be achieved, but such norm (the recipe) does not mean that paella must be cooked.

In this sense, technical norms presuppose anankastic statements – statements describing causal relationships between events in the empirical world. However, it could be argued that instead of a statement defining the world as it is, a technical norm presupposes a statement of what ought-to-be: an anankastic-constitutive statement (Azzoni 1986). Again, a couple of simple examples help demonstrate this: if you want to comply with traffic rules, do not break the speed limit; or, have witnesses if you want your marriage to be valid.

This possibility could imply that the distinction between constitutive and prescriptive norms is not exhaustive, although it may be exclusive. However, the problem is that this type of technical norm of the world of what ought-to-be presupposes precisely the norms of the other two types. Whereas the first technical norm presupposes the existence of a prescriptive rule (e.g., it is forbidden to drive over 120 km/h), the second assumes the constitutive rule under which for a marriage to be valid, there must be (a necessary condition of a sufficient condition) (Alarcón Cabrera 1991: 284) witnesses when the marriage takes place. It would therefore seem that technical norms that do not presuppose anankastic statements, but norms cannot themselves be considered norms in the same sense as prescriptive or constitutive norms, given that these underpin technical norms.[28]

Based on the above, it can be concluded that prescriptive and constitutive norms, being the only types that do not presuppose other sets of norms,[29] form an exhaustive and exclusive set of the types of norms. It can therefore be concluded that if the rule of precedent really is or presupposes a norm (or a set thereof), and if this norm or a set of norms is not prescriptive, then it/they must be constitutive.

27 This is because certain purposes are assumed, which would be normative in the traditional sense of the term. See von Wright 1970: 34 ff.

28 The discussion about the ontological independence between the different types of constitutive norms is complex and superfluous to the purposes of this paper. For further insight, see Roversi 2011.

29 There would, of course, be a discussion about the autonomy of prescriptive norms from constitutive ones, and vice versa. I argue here, however, that at least from a structural perspective, these are independent.

Although a criterion has already been put forward to distinguish between the two types of norms (the legal consequences associated with not following precedent), this may be insufficient for determining which type the rule of precedent corresponds to if there are no legal consequences laid down in the law,[30] making it impossible to differentiate between them in an extensional sense. Therefore, it might not be clear that, in the absence of legal consequences, the rule of precedent is a constitutive norm.

There is, however, another criterion – structural in nature – to distinguish between the two types of norms. Whereas prescriptive rules correlate to a factual situation (regulated behaviour) with a deontic operator (prohibited, permitted, mandatory, or optional), constitutive rules correlate a factual situation (regulated behaviour) with another factual situation (Moreso and Vilajosana 2004: 74). For instance, whereas the prescriptive norm correlates a prohibition with exceeding 120 km/h, constitutive norms correlate the validity of marriage with the presence of witnesses, even if only as a necessary condition (or as a necessary condition for a sufficient condition).

The structural difference seems to shape the difference between prescriptive and constitutive norms as a major distinction. Therefore, if following precedent is associated with the validity (applicability, regularity, or any other property that is not a deontic operator) of the decision – even if, as will be shown below, the condition is not always necessary or sufficient – it can be concluded that the rule of precedent is a rule of a constitutive nature.

4.2 A set of constitutive rules of precedent

After establishing that the rule of precedent is a constitutive norm, the next step is to define the type of constitutive norm it would be. There are a wide variety of constitutive norms: competence norms, applicability norms, interpretative norms, validity norms, renvoi norms, etc. (Guastini 2017: 58). I will not explore the specific content of constitutive norms here because they depend on the content of each legal system and are therefore contingent. However, I shall demonstrate the typical content of the rule of precedent, showing how a precedent system can (or cannot) function without them.[31]

30 It is often believed that a failure to follow constitutive norms, if 'follow' is the correct term for complying with such rules, means the act is invalid. However, this implies that all constitutive rules are necessary conditions for the validity of the act. Nevertheless, it is possible and common for constitutive norms to be sufficient or contributing conditions (see Alarcón Cabrera 1991; Azzoni 1986; Roversi 2011). Whether such norms are in fact fragments of rules, is another matter I shall not delve into here.

31 As one of the reviewers rightly points out, it is possible that the rule of precedent contemplates as regulated behaviour something different from following the *ratio decidendi*. Indeed, this is possible as in the case where, for example, past decisions are simply cited. However, this is not the most common scenario.

Having clarified the above, the rule of precedent (or *stare decisis* rule) can be reconstructed as a set of at least three norms. The first is the norm establishing which decisions are precedents (4.2.1). The second is a rule that makes the validity of legal decisions conditional on following precedent, thus limiting their competence (4.2.2). The third gives certain bodies the power to overturn decisions from other judges where precedent has not been followed (4.2.3).

4.2.1 A rule of competence (to set precedent)

The first norm involved in the rule of precedent (or *stare decisis* rule) grants competence to the courts (or at least some of them) to set precedent. For example, Article VII of the Peruvian Code of Constitutional Procedure recognises the competence of the Constitutional Court of the Andean nation to set precedent.[32]

However, although it is increasingly more frequent for a body to be expressly granted competence to set precedent, this trend is not yet very widespread. It is far more common for the rule to be implicit. Still, stating that the courts have competence to issue general rules, valid or applicable for resolving future cases, while intuitive, is not entirely correct (Magaloni Kerpel 2001: 31 and 38). This is because courts sometimes have no pretence that their *rationes decidendi* be valid, applicable, or binding for subsequent cases. This may occur in two different ways. The first is because the court setting the precedent intended the rule (or linguistic fragment) considered *ratio decidendi* to be different from the norm subsequently considered as such. The second is because the court's decision did not seek to set precedent. Indeed, it is perfectly possible for a court to issue a judicial decision without claiming it contains a norm (*ratio decidendi*) with binding effect for subsequent cases, even if legal practice considers it as such.

This possibility is more relevant than it might seem. While we can clearly talk about exercising a competence when the court intends to exercise it, things change when no such intention exists.[33] Of course, it makes perfect sense to state that certain bodies have the competence to set precedent. However, saying that the rule of precedent always constitutes a norm granting judges competence to set precedent may be limiting, as courts could issue a judicial decision with no intention of setting a precedent and yet have the decision considered

32 Article VII of the Code of Constitutional Procedure: "Decisions of the Constitutional Court that acquire the authority of res judicata constitute binding precedents when the ruling so states, specifying the scope of their regulatory effect."

33 I am assuming here, following Raz or MacCormick, that the notion of competence is linked to the idea of intention. The thesis is debatable in theoretical terms, as we can reconstruct the notion of competence irrespective of any type of intention. I must thank María Beatriz Arriagada for her comments on this point. However, it seems clear to me that jurisdiction rules emerge, in historical terms, to give institutional relevance to intentional acts. See the work of Arriagada Cáceres 2021 and Mañalich 2021a and Mañalich 2021b. In any case, settling this matter would require further analysis beyond the scope of this paper.

as such. In other words, for a judgement to count as precedent, it is not always necessary for the issuing body to intentionally set a precedent.[34]

In light of the foregoing, rather than asserting that this initial aspect of the rule of precedent grants judges' the competence to set precedent (source act), it would be more accurate to state that, while in some legal systems there is a specific rule conferring jurisdiction, in many others, certain jurisdictional decisions are simply recognized as precedent (source fact), and in others, both occur. To paraphrase Hart: instead of a rule of change, which enables norms to be added to the legal system, in some jurisdictions, the rule of precedent would resemble the rule of recognition but be limited to the scope of judicial decisions. Therefore, the rule of precedent, which may be an (express or implied) norm that grants certain bodies the competence to issue rules within the framework of a legal procedure, may also simply recognise certain decisions as precedent irrespective of whether the issuing body intended the judicial decision to set a precedent or not.

If this is the case, this first rule (whether it provides for jurisdiction or only recognises past decisions as precedents) implied in the rule of precedent, is a minimum or necessary rule in any precedent system. Without a rule identifying which court decisions count as precedent (either by identifying such decisions or by giving jurisdiction to bodies to issue them), a system of precedents is impossible. However, this does not mean there are no gaps in the criteria enabling identification of which past decisions count as precedent (Kelsen 2017; Núñez Vaquero & Arriagada Cáceres 2020). That said, a system silent on which decisions count as precedent would be a system without precedent. The rule identifying certain rulings as precedent setting constitutes the practice of precedent to the extent of identifying the applicable precedents.

4.2.2 A rule of validity (to limit the competence)

As seen above when we rejected the notion that the rule of precedent is a prescriptive rule that classifies the following of precedent as mandatory or permitted, the most common and normal consequence of not following precedent is the nullity or revocability of the legal decision. In this sense, it seems plausible to state that the rule of precedent limits the competence of judges to issue valid judicial decisions, while it also conditions the validity of such decision to the fact that precedent has been followed.

It is worth clarifying what we mean by the validity of the court decision being conditional on following precedent. First, because the term "validity" is sufficiently ambiguous to require clarification about its intended meaning. Second,

34 Furthermore, the case may arise whereby, when the judicial decision is issued, there is no rule on precedent and subsequently such a rule is created, and the judicial decision becomes a precedent. These would be the unintended consequences (creation of precedent) of intentional acts (sentencing) (Barberis 2015: 71).

because the fact that the rule of precedent conditions the judicial decision's validity does not mean it must condition it.

(i) Initially, the term "validity" may refer to multiple properties advocated for different objects. On the one hand, validity is included both in normative texts – legislative and, of interest here, judicial – and in the norms set forth therein. On the other hand, validity may at least mean regularity (issued pursuant to the rules) and applicability, belonging, existence, and mandatory.

Analysing the combinations of the different objects with the different meanings of validity would be too lengthy a discussion, so I will specifically explore the concept of validity in only two of its different meanings, each concerning a different purpose.

First, it could be said that the rule of precedent conditions the validity, understood as regularity, i.e., production under the norms, of the legal decision following precedent or not. Second, the rule of precedent conditions the validity of the individual norm constituting the *decisum* of the judicial decision applying precedent (or not). In this case, validity is understood not merely as regularity but also as applicability. In the latter sense, the rule of precedent would establish conditions whereby the individual rule contained in the operative part of the judicial decision following precedent (or not) is applicable in subsequent proceedings.[35] This means the individual rule that the judge issues may be used in a subsequent proceeding or applied coercively by the competent bodies.

Second, stating that following precedent conditions the validity of subsequent judicial decisions – as described above as applicability of the individual rule – does not mean that it is a necessary condition for the subsequent decision to be valid. There are logically at least five types of conditions: a necessary condition, a sufficient condition, a necessary and sufficient condition, a necessary condition of a sufficient condition, and a sufficient condition of a necessary condition.

The way that following precedent may condition the validity of subsequent judicial decisions is relevant, as it demonstrates the different manners the rule of precedent may operate in, and how failure to follow precedent might not entail any consequences. Indeed, it is logically possible that following precedent is a necessary condition for the judicial decision to be valid. However, few legal systems provide for such a requirement, only providing for downstream vertical precedents.

35 Applicability is often understood as the obligation or permission for judges to use a norm to justify a decision. As can be easily observed, such a definition is structured based on prescriptive norms. See Moreso & Navarro 1996. However, applicability should be redefined in constitutive terms, as it is not a case of whether judges can or should use such norms, but instead that the use of such rules is a condition for the regularity of their decisions. Another issue concerns which consequences (if any) this has on the regularity or irregularity of the decision.

Far more frequently, following precedent is a contributing condition, i.e., a necessary condition of a sufficient condition, or a sufficient condition to the subsequent decision's validity. In other words, it is either a necessary element for one way for the condition (sufficient condition) to be considered valid, or merely citing a precedent is itself a condition sufficient to consider the decision justified.

However, if the rule of precedent can establish that following precedents is a sufficient condition[36] (or a necessary condition of a sufficient condition) for judicial decisions to be valid, then failure to follow precedents alone would not entail any legal consequences, or at least not in this type of precedent system. This means that whether following precedent (or not) is a necessary condition is just one possibility from several (and not the most common). Therefore, systems of relevant precedent are required, where failure to follow precedent entails no consequences, but following precedent renders a judicial decision valid.

Again, this is a necessary rule irrespective of its specific content (necessary, sufficient condition, etc.) for a system of precedents. This is because a system of precedent without any relevance is impossible, precisely because of how precedent has been defined above – as a past decision containing a general rule relevant to similar subsequent cases. If using a past decision for a similar case to justify the subsequent court's decision does not in any way condition the validity thereof, it could be said that there is no system of precedent in such a legal system.

4.2.3 A rule of competence (to control the following of precedent)

The third norm often added to the set of rules of precedent, confers competence to certain bodies to overturn a decision precisely because it does not follow precedent. However, before attempting to clarify the status of this third rule of precedent, it is important to highlight, as detailed above, that a rule of precedent can establish the following of past *rationes decidendi* not only as a necessary condition, but also as a sufficient (or contributing) condition for the validity of the subsequent decision. The norm conferring certain courts the power to annul judicial decisions on the basis that they do not follow precedent is therefore contingent.

This is obviously relevant if we are to establish whether a system of precedent requires that a body has the competence to verify the following of precedent. While there may well be a body responsible for controlling the validity of judicial decisions in general, in a system in which the following of precedent constitutes a sufficient condition of validity of a judicial decision (or a necessary

36 According to Azzoni (1986: 173-174), these would be metathetic constitutive rules, i.e., adding a sufficient condition of validity.

condition of a sufficient condition) there is no specific control of the following of precedent, but only of the justification of the judicial decision.[37]

This leads to the conclusion that there is room for a system of relevant precedents without any specific body having the jurisdiction to annul decisions on the grounds that they do not follow precedents. This, in turn, enables the self-precedent of courts of final appeal at each legal level to be shown in a different light. Indeed, nothing prevents a legal system from laying down, for instance, that following its own decisions is a sufficient condition to render decisions passed down by its own constitutional court valid. For example, this would be the case for the norm enabling, particularly courts of final appeal, to reject certain appeals on the grounds they have already ruled on the matter, exclusively basing their decision on past judicial decisions.

A system of precedents therefore seems possible without requiring a body to control their being followed. This is because the rule on following precedent and the jurisdiction to control such following are not mutually involved. In particular, although the norm conferring a body competence to control the following of precedent does require (to ensure the legal system does not contain a technical loophole) a rule determining that the following of precedent is a condition for the validity of the subsequent legal sentence, the norm establishing such a condition does not necessarily confer controlling powers to a body.

However, neither does the fact that this is a court of final appeal mean that a precedent following control system cannot be established. First, there is nothing to stop such body from controlling the validity of its own decisions.[38] Second, however, there is nothing to prevent another body from being granted limited competence to determine the validity of the court of final appeal's judicial decision based exclusively on following its own precedents.

5 CONCLUSIONS

It can be concluded that establishing the rule of precedent as a prescriptive norm is not a plausible way of reconstructing the rule of precedent. Indeed, it is rare for following precedent to be qualified in a deontic sense, and for the consequence (if any) of not following precedent to be a sanction. Moreover, a prescriptive reconstruction of the rule of precedent either turns out to be inconsistent with the goals pursued by a precedent system (that is, if the rule is taken to make the following of precedent mandatory) or makes following precedent

37 The same can be said regarding a specific system of procedural resources for not following precedent: a system of precedents without specific procedural remedies for failing to follow precedent is perfectly possible. See, in this regard, Gonçalves 2020.

38 For example, see the work compiled in Castillo Cordova 2015 on the reviewability of the Constitutional Court of Peru's rulings.

irrelevant (if the rule is taken to be one of permission). As we have seen, there may be a prescriptive norm of mandatory compliance stating that precedent must be followed, but such a norm does not explain a system of precedent.

It has also been demonstrated that, if the rule of precedent cannot be defined as a prescriptive norm, the only option is to establish it as a constitutive norm. However, it would be somewhat reductive to think of the rule of precedent as a single constitutive norm. Instead, I have argued, any system of precedent is established by a set of rules of precedent, which necessarily includes (a) one constitutive rule identifying a set of jurisdictional decisions as precedents and/or grants certain bodies the power to set precedent, and (b) another constitutive rule conditioning the validity of the subsequent decision applying (or not) the past *ratio*.

Finally, a set of rules of precedent can establish different types of conditions for the validity of the subsequent decision: from necessary to merely contributory. This, in turn, means, as I have tried to show, that the rule conferring powers to a body to control the following of precedent is contingent rather than necessary for the existence of a system of precedents.

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Claudina Orunesu*

Control de convencionalidad y supremacía de los tribunales internacionales

Algunas reflexiones sobre el control de convencionalidad en el Sistema Interamericano de Derechos Humanos

Según la Convención Americana sobre Derechos Humanos, la Corte Interamericana es el órgano competente para "conocer de todos los casos relativos a la interpretación y aplicación de las disposiciones de [la] Convención que le sean sometidos". En este marco normativo, la Corte Interamericana introdujo en 2006 la llamada doctrina del control de convencionalidad. Al hacerlo, no se limitó a sostener que los jueces nacionales deben controlar la compatibilidad de las leyes con el texto de la Convención Americana, sino que sostuvo que también deben tener en cuenta "la interpretación que de ella haga la Corte Interamericana, que es el intérprete último de la Convención Americana". Esta visión del control de convencionalidad, que implica también una noción particularmente fuerte de la supremacía judicial internacional, constituye una doctrina consolidada del tribunal internacional. Sin embargo, parecen surgir ciertas objeciones en torno a la doctrina y al estilo particular con que la Corte Interamericana la ejerce. Este trabajo pretende mostrar que el fundamento de la doctrina del control de convencionalidad en su configuración actual, es decir, la supremacía tanto del derecho convencional como de los criterios interpretativos fijados por la Corte Interamericana, puede conducir a consecuencias paradójicas y plantea dudas sobre el papel que la Corte Interamericana desempeña hoy en el proceso de adjudicación de la Convención. Por último, teniendo en cuenta una reciente y desafiante decisión de la Corte Suprema de Argentina, se explorarán algunas reformulaciones de la doctrina del control de convencionalidad.

Parablas clave: Corte Interamericana de Derechos Humanos, control de convencionalidad, supremacía judicial, interpretación jurídica, diálogo judicial

1 EL CONTROL DE CONVENCIONALIDAD

El proceso de internacionalización de los mecanismos de tutela de los derechos humanos ha constituido sin lugar a dudas una muy significativa conquista de la humanidad. En particular, el sistema interamericano de protección de los derechos humanos introdujo un procedimiento mediante el cual se trata de garantizar un equilibrio entre los Estados parte para la tutela del goce de los derechos humanos, comprometiéndose cada uno de ellos a respetar un plexo de derechos plasmado en la Convención Americana de Derechos Humanos, y

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reconociendo los Estados parte la competencia de ciertos órganos supranacionales (la Comisión y la Corte interamericanas) encargados de revisar la efectiva vigencia de tales derechos en la jurisdicción local.[1]

En ese esquema, la doctrina del denominado *control de convencionalidad* ha sido ideada como una herramienta para asegurar la aplicación armónica del derecho vigente y preservar la primacía del orden jurídico internacional de los derechos humanos en sede interna.[2]

La Convención Americana de Derechos Humanos establece que la Corte Interamericana es el órgano competente para *"conocer de cualquier caso relativo a la interpretación y aplicación"* de las normas de la Convención que le sea sometido a juzgamiento.[3] La Corte Interamericana está habilitada para declarar si ha existido una violación de alguna de las cláusulas de la Convención y, para el caso de que ello sucediera, puede ordenar que se garantice al afectado el goce de los derechos conculcados, se reparen las consecuencias de la medida o situación que vulneraron los derechos de que se trate y, si correspondiere, que se proceda a pagar una justa indemnización.[4]

En ese contexto normativo, en el año 2006 la Corte Interamericana en pleno hizo referencia por primera vez al denominado *control de convencionalidad*. En el caso "Almonacid Arellano y otros vs. Chile" el tribunal sostuvo:

> La Corte es consciente que los jueces y tribunales internos están sujetos al imperio de la ley y, por ello, están obligados a aplicar las disposiciones vigentes en el ordenamiento jurídico. Pero cuando un Estado ha ratificado un tratado internacional como la Convención Americana, sus jueces, como parte del aparato del Estado, también están sometidos a ella, lo que obliga a velar porque los efectos de las disposiciones de la Convención no se vean mermadas por la aplicación de leyes contrarias a su objeto y fin, y que desde un inicio carecen de efectos jurídicos. En otras palabras, el Poder Judicial debe ejercer una especie de "control de convencionalidad" entre las normas jurídicas internas que aplican en los casos concretos y la Convención Americana sobre Derechos Humanos. En esa tarea, el Poder Judicial debe tener en cuenta no solamente el tratado, sino también la interpretación que del mismo ha hecho la Corte Interamericana, intérprete última de la Convención Americana.[5]

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1 Cf. Albanese 2008: 17; Gozaíni 2008: 81.

2 Cf. Mac Gregor 2015; Sagüés 2010b: 134.

3 CADH: artículo 62.

4 CADH: artículo 63.

5 Caso "Almonacid Arellano y otros vs. Gobierno de Chile", sentencia del 26 de septiembre de 2006, serie C, número 154, considerando 124. Dicho criterio fue ratificado por la Corte Interamericana en los casos "Trabajadores Cesados del Congreso (Aguado Alfaro y otros) vs. Perú", sentencia del 24 de noviembre de 2006, serie C, número 158, párrafo 128; "La Cantuta vs. Perú", sentencia del 29 de noviembre de 2006, serie C, número 162, párrafo 173; "Boyce y otros vs. Barbados", sentencia del 20 de noviembre de 2007, serie C, número 169, párrafo 78; caso "Heliodoro Portugal vs. Panamá", sentencia del 12 de agosto de 2008, serie C, número 186, párrafo 180. Con anterioridad se había utilizado esta expresión de forma aislada. Véase caso

En síntesis, según el tribunal, para garantizar la supremacía de la Convención Americana los jueces nacionales, como integrantes del Estado, deben efectuar un control de adecuación de las normas del derecho interno a fin de verificar que ellas no contraríen a las normas convencionales. Y la razón por la que se les asigna tal deber consiste en sostener que si deben aplicar cierto conjunto de normas y entre ellas se cuenta la Convención, deben resolver los posibles conflictos que se detecten dentro de dicho conjunto, preservando la supremacía de la Convención.[6]

Pero obsérvese que la Corte Interamericana no se ha limitado a sostener que los jueces deben controlar la compatibilidad de las leyes internas con el texto del Pacto de San José de Costa Rica, sino que además deben tener en cuenta a tal fin "la interpretación que del mismo ha hecho la Corte Interamericana, intérprete última de la Convención Americana".

Esta visión del control de convencionalidad, que involucra además una noción particularmente fuerte de supremacía judicial internacional, fue consolidándose con el correr de los años y podría decirse que constituye en la actualidad una doctrina consolidada del tribunal internacional. Sin embargo en los últimos tiempos ciertas objeciones parecen estar surgiendo en torno al control de convencionalidad y al particular estilo con que la Corte Interamericana lo ejerce.[7] Por ello a continuación analizaré los fundamentos que sustentan la doctrina del control de convencionalidad en su configuración actual, esto es la supremacía del derecho convencional y la obligatoriedad de los criterios interpretativos impuestos por la Corte interamericana. La exploración mostrará que algunas versiones de esta doctrina pueden conducir a consecuencias paradójicas y sembrar algunos interrogantes concernientes al papel que la Corte Interamericana de Derechos Humanos desempeña en el proceso de adjudica-

"Myrna Mack Chang vs. Guatemala", sentencia del 25 de noviembre de 2003, serie C, número 101 y caso "Tibi vs. Ecuador", sentencia del 7 de septiembre de 2004, serie C, número 114.

6 Este razonamiento es muy semejante al que dos siglos antes utilizó la Corte Suprema de los Estados Unidos en el caso "Marbury vs. Madison" para la justificación del control de constitucionalidad por parte de los jueces, potestad que no figuraba expresamente en el texto constitucional de 1787, como tampoco figura en el texto de la Convención el control de convencionalidad. La Corte Interamericana fue precisando en sucesivos fallos quienes eran los órganos encargados de ejercer el control de convencionalidad, indicando que los "órganos del Poder Judicial deben ejercer no sólo un control de constitucionalidad, sino también "de convencionalidad" ex officio entre las normas internas y la Convención Americana, evidentemente en el marco de sus respectivas competencias y de las regulaciones procesales correspondientes", Caso "Trabajadores Cesados del Congreso (Aguado Alfaro y otros) vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas". Sentencia de 24 de noviembre de 2006, Caso "Cabrera García y Montiel Flores vs. México. Excepción Preliminar, Fondo, Reparaciones y Costas". Sentencia de 26 de noviembre de 2010. En Caso "Gelman vs. Uruguay. Fondo y Reparaciones". Sentencia de 24 de febrero de 2011, agregó que "es función y tarea de cualquier autoridad pública y no sólo del Poder Judicial".

7 Veasé, por ejemplo, Dulitzky 2015, Gargarella 2015, Contesse 2018.

ción de la Convención.[8] Luego evaluaré la posibilidad de su reformulación atendiendo el desafío impuesto el pasado año en una decisión de la Corte Suprema Argentina.

2 LA SUPREMACÍA DEL DERECHO CONVENCIONAL

Como se señaló, el control de convencionalidad proclamado por la Corte Interamericana tiene por objeto garantizar la supremacía de las convenciones de tutela de los derechos humanos sobre el derecho interno. El argumento consiste en sostener que, como los jueces tienen el deber de aplicar su derecho, y dado que eso supone interpretarlo, si un Estado ha ratificado la Convención Americana, entonces sus jueces están también obligados a garantizar que sus disposiciones prevalezcan sobre las normas internas que se encuentren en conflicto con ella.

Esto importa una toma de posición de la Corte Interamericana respecto del nivel jerárquico que debe asignársele a las normas convencionales en sede interna, una tesis que es susceptible de una lectura débil y no problemática y de otra fuerte y, cuanto menos, polémica. De acuerdo con la primera, el deber de llevar a cabo el control de convencionalidad por parte de los órganos jurisdiccionales de los Estados parte implica que las normas convencionales deben prevalecer en sede interna sobre las leyes ordinarias, de manera que debe acordárseles jerarquía supralegal y, quizás, incluso jerarquía constitucional. De acuerdo con la segunda, la doctrina del control de convencionalidad, ateniéndose a la letra de su formulación, se referiría a la supremacía de las normas convencionales sobre "las normas jurídicas internas", sin establecer ninguna salvedad, en particular respecto de sus normas constitucionales. Sobre tales bases se ha sostenido que "la tesis del control de convencionalidad quiere que siempre prevalezca el Pacto […] respecto de […] la Constitución y que ésta sea interpretada 'conforme' y no contra el Pacto. Ello importa la domesticación de la Constitución por el Pacto".[9]

El fundamento para esta segunda lectura –las normas convencionales tienen supremacía sobre cualquier disposición de derecho interno, incluso constitucional– ha pretendido encontrarse en normas de la Convención de Viena sobre derecho de los Tratados como el artículo 26 que establece el principio "*pacta sunt servanda*" y el 27 de acuerdo con el cual un Estado no podría oponer como excusa para incumplir sus obligaciones derivadas de un tratado internacional el cumplimiento de una disposición de derecho interno.[10] Sin embargo, la cláusu-

8 Véase respecto de las tensiones que han surgido últimamente respecto del papel que asume y debe asumir de la Corte Interamericana véase Contesse 2016 y Contesse 2018.

9 Sagüés 2010a; véase asimismo Hitters 2009, Mac Gregor 2015, Nash Rojas 2013.

10 Este fue el argumento utilizado en el caso Almonacid Arellano por la Corte Interamericana. Para una reconstrucción de los alcances que los redactores de la Convención de Viena asigna-

la en cuestión resulta igualmente aplicable a tratados bilaterales, de modo que su alcance se circunscribe al ámbito internacional y no tiene en sí misma ninguna implicancia respecto de la jerarquía normativa de la Convención en sede interna, pues de lo contrario debería aceptarse igualmente que cualquier tratado bilateral también posee un alcance supraconstitucional, lo cual es absurdo. Y eso sin mencionar que la Convención de Viena es ella misma una convención internacional, de modo que cualquier pretensión de justificar en una de sus disposiciones la jerarquía que debe asignarse en sede interna a las convenciones internacionales está irremediablemente condenada al fracaso por constituir una petición de principio.

Si distinguimos en principio dos niveles jerárquicos dentro de un sistema jurídico nacional, el constitucional y el legal, la recepción del derecho convencional en sede interna podría tener a) nivel infralegal; b) nivel legal; c) nivel supralegal pero infraconstitucional; d) nivel constitucional o e) nivel supraconstitucional.

De estas alternativas, el reconocimiento del control de convencionalidad solo resulta en sentido estricto incompatible con las dos primeras, pero perfectamente congeniable con cualquiera de las restantes. Sin embargo, la falta de toda distinción en la argumentación de la Corte Interamericana, y el contenido de algunos de sus pronunciamientos –como en el fallo "La última tentación de Cristo"–,[11] parecen dar apoyo a la interpretación fuerte según la cual la Corte Interamericana exigiría que se asigne a las disposiciones convencionales la máxima jerarquía normativa, incluso por sobre las normas constitucionales.

Si se tratara de normas internacionales de otra fuente quizás esta idea no resultaría tan problemática. Pero en el caso del derecho convencional, es muy difícil aceptar que pueda asignársele en el orden interno una jerarquía superior incluso a la de aquellas normas que acuerdan a los órganos internos la potestad de celebrar, en representación del Estado, tratados internacionales, puesto que en tal caso las relaciones de validez –entendida como la creación normativa regular– entre la Convención y el derecho interno se tornarían circulares. En efecto: la validez de la Convención, como la de cualquier convención internacional, depende por su carácter de la voluntad concurrente de los Estados nacionales que la suscriban, pero ahora el control de convencionalidad vendría a consagrar

ron a esos artículos, que se alejan bastante del sentido que le ha atribuido la Corte Interamericana, véase Contesse 2018: 1175-1176.

11 Caso "La última tentación de Cristo (Olmedo Bustos y otros) vs. Chile", sentencia del 5 de febrero de 2001. En el mismo sentido véase Caso "Almonacid Arellano y otros vs. Chile. Excepciones Preliminares, Fondo, Reparaciones y Costas", sentencia de 26 de septiembre de 2006, Caso "Mendoza y otros vs. Argentina. Excepciones Preliminares, Fondo y Reparaciones", sentencia de 14 de mayo de 2013.

que la validez de todo el derecho interno de cada Estado parte depende, a su vez, de su conformidad con las disposiciones de la Convención.[12]

El carácter paradójico de esta conclusión se pone de manifiesto cuando se examinan las disposiciones internas que receptan las normas convencionales. Por supuesto, puede ocurrir que la propia constitución de un Estado confiera supremacía a todas o algunas normas convencionales de tutela de los derechos humanos sobre la totalidad del derecho interno, tal como ocurre en Colombia y Guatemala.[13] Pero también puede acontecer que ello no sea así. Para citar un único ejemplo, en Argentina con la reforma constitucional de 1994 se le ha reconocido a las disposiciones de la Convención *"jerarquía constitucional"*, si bien con ciertas restricciones (*"en las condiciones de su vigencia /.../ no derogan artículo alguno de la primera parte de esta Constitución y deben entenderse complementarios de los derechos y garantías por ella reconocidos"*).[14] Pero ahora, si se acepta la lectura fuerte de la construcción de la Corte Interamericana sobre el control de convencionalidad, esa cláusula de la constitución se vería fulminada como anticonvencional y, por ello, debería considerarse que "desde un inicio carece de efectos jurídicos".[15]

El presupuesto implícito que parece asumirse cuando se sostiene una tesis tan fuerte es que la Convención tutela de manera más amplia y favorable los derechos humanos que los ordenamientos nacionales. Esto puede ser *usualmente* verdadero, pero no es *necesariamente* verdadero. Es más: ese presupuesto resulta expresamente contradicho por los propios términos de la Convención, cuando en el inciso b del artículo 29 se establece que

> Ninguna disposición de la presente Convención puede ser interpretada en el sentido de […] b) limitar el goce y ejercicio de cualquier derecho o libertad que pueda estar reconocido de acuerdo con las leyes de cualquiera de los Estados Partes[.]

En conclusión, parece enteramente inviable interpretar que el control de convencionalidad implica reconocer la supremacía de la Convención por sobre

12 Sobre las diferentes lecturas de las que resultan susceptibles las tesis monistas y dualistas respecto de las relaciones entre el derecho internacional y los derechos nacionales, véase Rodríguez & Vicente 2009.

13 Véase el artículo 93 de la constitución colombiana y el artículo 46 de la constitución guatemalteca. Las cortes constitucionales de ambos países, en un intento por armonzar las normas internacionales con las constitucionales, han elaborado la doctrna del bloque de constitucionalidad. Para un panorama acerca de esta cuestión veáse Chehtman 2022, Urueña 2019, Ochoa Escriba 2018.

14 Sobre el alcance de tales restricciones véanse, por todos, Vanossi & Dalla Vía 2000: 322 ss; Rosatti 2012. La Corte Suprema Argentina reinterpretaría estas normas a partir del caso Giroldi Horacio y otro s/recurso de casación" (1995, CSJN Fallos 318:514) asumiendo aún antes del caso Almonacid Arellano la obligatoriedad de los criterios interpretativos de los órganos internacionales.

15 Caso "Almonacid Arellano y otros vs. Gobierno de Chile", sentencia del 26 de septiembre de 2006, serie C, número 154.

las disposiciones constitucionales de los Estados parte. No existe ningún artículo de la Convención que le asigne semejante jerarquía, y una mera construcción de la Corte Interamericana no puede tener tal efecto, ya que la Corte no posee competencia alguna para modificar el derecho interno de los Estados parte, menos si se trata de sus preceptos constitucionales.

3 EL CARÁCTER VINCULANTE DE LOS CRITERIOS INTERPRETATIVOS DE LA CORTE IDH

El segundo problema que suscita la consideración del control de convencionalidad es que la Corte Interamericana no se ha limitado a sostener que los jueces deben controlar la compatibilidad de las leyes internas con el texto del Pacto de San José de Costa Rica, sino que además deben tener en cuenta a tal fin "la interpretación que del mismo ha hecho la Corte Interamericana, intérprete última de la Convención Americana".[16]

Nuevamente, tenemos aquí al menos dos posibles lecturas de esta directiva impartida por la Corte Interamericana, una débil y perfectamente sensata, y otra fuerte y problemática. De conformidad con la primera de ellas, los jueces al controlar la compatibilidad del derecho interno con la Convención, han de *"tener en cuenta"* las interpretaciones de la Corte Interamericana, en el sentido de que no pueden ignorarlas, de modo que, si existe jurisprudencia relevante de la Corte Interamericana sobre el punto a resolver en el caso, los jueces internos tienen que hacer mérito de ella, y si deciden apartarse de la lectura ofrecida por la Corte Interamericana de las cláusulas de la Convención, deben ofrecer argumentos para justificar tal actitud. Más detalladamente, el razonamiento que los jueces deben efectuar en situaciones semejantes podría sintetizarse del siguiente modo: a) deben verificar si existe jurisprudencia de la Corte Interamericana sobre el punto a resolver; b) deben determinar cuál es la doctrina o razón subyacente que se desprende de sus decisiones; c) deben examinar la aplicabilidad de esa doctrina al caso concreto; d) deben determinar si existen razones jurídicas internas que se opongan a la aplicabilidad de la doctrina derivada de la jurisprudencia de la Corte Interamericana, en cuyo caso e) deberán decidir si en el caso concreto corresponde seguirla o no, proporcionando en cualquier caso una debida fundamentación de su decisión.[17]

En este sentido, la interpretación de la Corte Interamericana debe "servir de guía" o pauta para nuestros tribunales en lo que hace a la interpretación de los

16 Caso "Almonacid Arellano y otros vs. Gobierno de Chile", sentencia del 26 de septiembre de 2006, serie C, número 154.

17 Este fue el criterio de la Procuración General de la Nación en el caso "Jorge E. Acosta", del 10 de marzo de 2010, expediente 93/2009, letra A.

preceptos de la Convención[18] o en otras palabras que su jurisprudencia cuando resuelve un caso concreto es *vinculante pero no obligatoria* para situaciones similares: vinculante porque, en la medida en que un Estado parte haya aceptado la competencia de la Corte debe tenerla en cuenta, pero no obligatoria en tanto no se trate de un caso en el cual el Estado se encuentre directamente involucrado como denunciado.[19]

La lectura fuerte de esta tesis entiende que sus interpretaciones deben ser seguidas por los Estados parte no solo en aquellas causas en las que han sido denunciados,[20] sino también en cualquier otra, y no solo cuando ellas son vertidas en sentencias sino también en opiniones consultivas. En consecuencia, lo que sostiene esta lectura fuerte de la tesis del carácter vinculante de las interpretaciones de la Corte Interamericana es que ella le atribuye a sus propios pronunciamientos el valor de precedentes con efecto *erga omnes*, al modo del alcance de *stare decisis* que la Corte Suprema estadounidense atribuye a los suyos.[21]

Para decirlo con la terminología de Joseph Raz, la diferencia entre las dos variantes de la tesis bajo análisis consistiría en que, mientras de acuerdo con la versión débil los precedentes de la Corte Interamericana serían vinculantes en el sentido de ofrecer una *razón de primer orden* para la acción, esto es, un factor que contaría a favor de –en nuestro caso– seguir la interpretación de la Convención ofrecida por el tribunal, de acuerdo con la versión fuerte ellos serían vinculantes en el sentido de ofrecer una *razón protegida* para la acción, esto es, una combinación de una razón de primer orden para seguir la inter-

18 Tal como lo señalara la Corte Suprema de Justicia Argentina respecto de la Comisión Interamericana en su considerando 15 *in re* "Bramajo, Hernán Javier s/ incidente de excarcelación - causa n° 44.891" (1996, CSJN, *Fallos* 319: 1840).

19 Cf. Gozaíni 2008: 104. En el caso "Gelman vs. Uruguay", la Corte Interamericana sostuvo que sus interpretaciones generaban diferente vinculación dependiendo de si el Estado había sido parte material o no en el proceso internacional. En el primer caso el Estado estaría obligado a cumplir y aplicar la sentencia; en el segundo, en cambio, la Corte se limitó a decir que todas las autoridades del Estado "(…) están obligadas por el Tratado debiéndoselo acatar y considerar los precedentes y lineamientos judiciales del Tribunal Interamericano". (Caso "Gelman vs. Uruguay. Supervisión de cumplimiento de sentencia", resolución del 20 de marzo de 2013). Como puede apreciarse, la expresión "considerar los precedentes del Tribunal" es perfectamente compatible con la lectura débil antes considerada.

20 Se sigue con claridad a partir del artículo 68 de la Convención.

21 La Corte Interamericana ha sostenido que "el Poder Judicial debe tener en cuenta no solamente el tratado, sino también la interpretación que del mismo ha hecho la Corte Interamericana, intérprete última de la Convención Americana…De tal manera, es necesario que las interpretaciones constitucionales y legislativas referidas a los criterios de competencia material y personal de la jurisdicción militar en México, se adecuen a los principios establecidos en la jurisprudencia de este Tribunal", Caso Radilla Pacheco vs. México. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 23 de noviembre de 2009. Ver también Caso Atala Riffo y Niñas vs. Chile. Fondo, Reparaciones y Costas. Sentencia del 24 de febrero de 2012, Caso Norín Catrimán y otros (Dirigentes, miembros y activista del Pueblo Indígena Mapuche) vs. Chile. Fondo, Reparaciones y Costas. Sentencia de 29 de mayo de 2014.

pretación de la Corte Interamericana y una razón de segundo orden de carácter excluyente que exigiría dejar de lado otras interpretaciones que pudieran entrar en conflicto con la primera.[22]

La dificultad fundamental que plantea la lectura fuerte de la tesis del carácter vinculante de las interpretaciones de la Corte Interamericana es que ella conlleva una correlativa y severa limitación de las facultades de interpretación de los jueces nacionales,[23] puesto que según este punto de vista, al ejercer el control de convencionalidad los jueces no podrían asignarle a las disposiciones de la Convención otra interpretación que aquella que les haya atribuido la Corte Interamericana. Sin embargo, recuérdese que el argumento justificatorio del control de convencionalidad consistía en que los jueces deben controlar la supremacía de la Convención porque ellos tienen el deber de aplicar, entre otras, sus disposiciones y en caso de conflicto deben privilegiar las de mayor jerarquía, para lo cual las deben *interpretar*. Es más: tal como lúcidamente se ha sostenido, no es posible controlar sin interpretar, razón por la cual el derecho constitucional ha elaborado el contenido y alcance del control de constitucionalidad a través de la interpretación de la Constitución.[24]

La Corte Interamericana puede, por cierto, justificar su propio ejercicio del control de convencionalidad en los casos que se le someten a decisión con argumentos como el comentado y, paralelamente, pretender que su jurisprudencia sea obligatoria en el sentido fuerte que estamos analizando. También puede extender el argumento para justificar el control de convencionalidad por parte de los jueces internos, pero sosteniendo la versión débil del carácter vinculante de sus decisiones. No obstante, fundar el deber de cualquier juez de controlar la convencionalidad de las normas internas en sus potestades de interpretación y aplicación del derecho y, paralelamente, limitar sus competencias para interpretar las normas convencionales es, cuanto menos, una inconsistencia pragmática.

El presupuesto que se encuentra implícito en esta lectura fuerte de la tesis bajo consideración es que la Corte Interamericana está, por alguna razón o plexo de razones, en mejor posición para determinar el contenido y alcance de los derechos humanos que los órganos jurisdiccionales internos, lo que se asocia con la idea de que la Corte es el "*intérprete final*" de la Convención, con apoyo en el artículo 62 inciso 1 de esta última. Sin embargo, es importante en este punto no confundir el carácter definitivo con el carácter infalible de una decisión judicial, tal como certeramente lo advirtiera Herbert Hart.[25] Una cosa

22 Cf. Raz 1990: 35-48 y 73-84. Para una presentación breve de las muchas dificultades que ofrece la idea raziana de razón excluyente, véase Rodríguez 2012: 127-145.

23 Cf. Sagüés 2010b.

24 Cf. Albanese 2008b: 14, citando a Bidart Campos 1996: 333 ss.

25 Cf. Hart 1961: 176-183.

es sostener que los pronunciamientos de la Corte Interamericana son finales o últimos en el sentido de definitivos, esto es, que no pueden ser cuestionados ante ningún otro órgano, tal como resulta de lo preceptuado por el artículo 67 de la Convención (*"El fallo de la Corte será definitivo e inapelable"*); una cosa diferente es sostener que ellos son infalibles. El carácter definitivo de un cierto pronunciamiento no le acuerda necesariamente corrección, ya que las pautas de corrección de una decisión judicial son independientes del carácter final o definitivo que ella pueda poseer.

Sin embargo, por muy absurdo que pueda parecer, eso fue exactamente lo que hizo la propia Corte Suprema Argentina en el caso "Espósito",[26] en el cual consideró que no correspondía aplicar las disposiciones comunes en materia de prescripción en la causa por entender que ello resultaría lesivo de la interpretación que hiciera la Corte Interamericana del derecho a la protección judicial de las víctimas en el caso "Bulacio vs. Argentina",[27] lo que podría dar lugar a responsabilidad internacional de nuestro país. Lo sorprendente de este caso es que la Corte Suprema aclaró que no compartía el criterio restrictivo del derecho de defensa que se desprendía de la resolución de la Corte Interamericana, no obstante lo cual, en lugar de resolver en consecuencia, lo hizo siguiendo el criterio de este último tribunal, sosteniendo:

> [S]e plantea la paradoja de que sólo es posible cumplir con los deberes impuestos al Estado argentino por la jurisdicción internacional en materia de derechos humanos, restringiendo fuertemente los derechos de defensa y a un pronunciamiento en un plazo razonable, garantizados al imputado por la Convención Americana. Dado que tales restricciones, empero, fueron dispuestas por el propio tribunal internacional a cargo de asegurar el efectivo cumplimiento de los derechos reconocidos por dicha Convención, a pesar de las reservas señaladas, es deber de esta Corte, como parte del Estado argentino, darle cumplimiento en el marco de su potestad jurisdiccional.[28]

En otras palabras, la Corte Suprema Argentina consideró que la Corte Interamericana se equivocó, no obstante lo cual, a fin de evitar incurrir en responsabilidad internacional, estima que debe seguir en el ámbito interno las interpretaciones de la Corte Interamericana incluso cuando son equivocadas y la Corte Suprema sabe que lo son.[29]

26 "Espósito, Miguel Ángel s/ incidente de prescripción de la acción penal promovido por su defensa" (CSJN, 2004, *Fallos* 327: 5668).

27 Caso "Bulacio vs. Argentina", sentencia del 18 de setiembre de 2003, serie C, número 100.

28 "Espósito, Miguel Ángel s/ incidente de prescripción de la acción penal promovido por su defensa" (CSJN, 2004, *Fallos* 327: 5668).

29 En 2011 se planteó una situación similar en el caso "Derecho, René", donde la Corte Suprema argentina aceptó por mayoría revocar su fallo como resultas de la condena en sede internacional, para lo cual debió dejar sin efecto la prescripción definitiva y afectar los derechos del procesado. La minoría, integrado por los Dres. Fayt y Argibay, sostuvo que "Si bien está fuera de discusión el carácter vinculante de las decisiones de la Corte Interamericana de Derechos Humanos a los efectos de resguardar las obligaciones asumidas por el Estado Argentino, acep-

4 UN DESAFÍO PARA EL CONTROL DE CONVENCIONALIDAD

La doctrina de control de convencionalidad Corte Interamericana de Derechos Humanos está siendo objeto de escrutinio en la actualidad e incluso algunas decisiones de cortes nacionales parecen alejarse de su versión más fuerte.[30] En este sentido, Argentina ofrece un ejemplo paradigmático para el análisis.

Como se indicó más arriba, Argentina durante muchos años abrazó a través de diferentes decisiones, prácticamente sin condicionamientos, la doctrina del control de convencionalidad tal como fuera postulada por la Corte Interamericana. Sin embargo, en un sorpresivo fallo, en 2017, esa posición parece haber variado.

La Corte Suprema Argentina en el año 2001 había confirmado el fallo de segunda instancia por la que se hizo lugar a la demanda entablada por el ex presidente Carlos Menem, a la Editorial Perfil y dos de sus directivos Jorge Fontevecchia y Héctor D'Amico por daños y perjuicios ocasionados por la publicación de dos artículos en el año 1995 en la Revista Noticias que se referían a un presunto hijo no reconocido del entonces primer mandatario fijando en consecuencia el pago de un monto indemnizatorio.[31] Los condenados llevaron el caso al sistema interamericano de protección de derechos humanos. La Corte Interamericana determinó que la decisión de la Corte Suprema que confirmó la condena civil constituía una violación del artículo 13 de la Convención Americana, ya que se había afectado el derecho a la libertad de expresión".[32]

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tar que ello tenga consecuencias como las que pretende el recurrente implicaría asumir que la Corte Interamericana puede decidir sobre la responsabilidad penal de un individuo en concreto, que no ha sido parte en el proceso internacional y respecto del cual el tribunal interamericano no declaró, ni pudo declarar, su responsabilidad… En tales condiciones, una decisión como la que se pretende no sólo implicaría una afectación al derecho de defensa del imputado (que no ha estado presente ni ha sido escuchado en el proceso ante la Corte Interamericana) sino que además colocaría al Estado Argentino en la paradójica situación de cumplir con sus obligaciones internacionales a costa de una nueva afectación de derechos y garantías individuales reconocidos en la Constitución Nacional y los tratados de derechos humanos que la integran", CSJN Derecho René, disidencia Dres Fayt y Argibay, considerando 8.

30 Véase, por ejemplo, la decisión TC/0256/14 de la Corte Constitucional de la Republica dominicana y la Contradicción de tesis 293/1. Para un análisis de diversos desacuerdos con las decisions de la Corte Interamericana véase Soley y Steininger 2018. En abril de 2019 Argentina, Brasil, Chile, Colombia y Paraguay emitieron una dirigida a la Comisión Interamericana de Derechos humanos que enfatizaba el papel que el principio de subsidiariedad y la doctrina del margen de apreciación debería cumplir en el sistema interamericano.

31 "Menem, Carlos c/Editorial Perfil S.A. y otros s/ daños y perjuicios" (2001, CSJN, Fallos 324: 2895).

32 Corte IDH, "Caso Fontevecchia y D'amico vs. Argentina", Serie C no. 238. El tribunal aclara que "no fue la norma en sí misma la que determinó el resultado lesivo e incompatible con la Convención Americana, sino su aplicación en el caso concreto por las autoridades judiciales del Estado, la cual no observó los criterios de necesidad mencionados".

Por ello dispuso, entre otras resoluciones que el estado debía "dejar sin efecto la condena civil impuesta a los señores Jorge Fontevecchia y Hector D'Amico así como todas sus consecuencias".[33] En 2016, en la segunda supervisión de sentencia, la Corte IDH consideró que si bien el estado argentino había acatado la mayoría de los mandatos de la sentencia de la Corte restaba aún dejar sin efecto la condena civil.[34]

Frente a este requerimiento, en febrero de 2017 la Corte Argentina, por mayoría, sostuvo que *ella no puede ser obligada a acatar el fallo supranacional de "dejar sin efecto" un pronunciamiento doméstico*. Afirmó que el tribunal interamericano no es una cuarta instancia que revisa o anula decisiones judiciales estatales dado que su jurisdicción es subsidiaria, coadyuvante y complementaria. "Dejar sin efecto" -añadió- equivale a "revocar" y agregó que "ese trámite está fuera de la competencia convencional."[35] Y afirmó que "dejar sin efecto la sentencia de esta Corte pasada en autoridad de cosa juzgada es uno de los supuestos en los que la restitución resulta jurídicamente imposible a la luz de los principios fundamentales del derecho público argentino". Sin embargo la Corte se preocupa en aclarar que esta decisión "no implica negar carácter vinculante a las decisiones de la Corte Interamericana, sino tan solo entender que la obligatoriedad que surge del art. 68.1. debe circunscribirse a aquella materia sobre la cual tiene competencia el tribunal internacional".[36]

En la siguiente resolución sobre Supervisión de cumplimiento de sentencia del 18 de octubre de 2017 la Corte interamericana respondió duramente a los argumentos de la Corte argentina afirmando que

> los Estados Parte en la Convención no pueden invocar disposiciones del derecho constitucional u otros aspectos del derecho interno para justificar una falta de cumpli-

33 En concepto de reparaciones la Corte interamericana dispuso además que la sentencia constituía per se una forma de reparación, que el Estado debía realizar las publicaciones dispuestas en la Sentencia de Fondo, Reparaciones y Costas, de conformidad con lo establecido en el párrafo 108 de la misma y que debía entregar los montos referidos en los párrafos 105, 128 y 129 de la Sentencia de Fondo, Reparaciones y Costas, dentro del plazo de un año contado a partir de su notificación. Cf. Corte IDH, "Caso Fontevecchia y D'amico vs. Argentina, Serie C no. 238".

34 Corte IDH, "Caso Fontevecchia y D'Amico vs. Argentina, Supervisión de Cumplimiento de Sentencia", Resolución de la Corte Interamericana de Derechos Humanos de 22 de noviembre de 2016. La anterior supervisión había sido el 19 de septiembre de 2015 donde se dejó asentado que el gobierno argentino había incumplido con su obligación de informar acerca del acatamiento de la sentencia. Corte IDH, Caso Fontevecchia Supervisión de Cumplimiento, Resolución de 1 de septiembre de 2015.

35 "Ministerio de Relaciones Exteriores y Culto s/informe sentencia dictada en el caso «Fontevecchia y D'Amico vs. Argentina» por la Corte Interamericana de Derechos Humanos", considerando 11 voto de la mayoría. Más grave es el distanciamiento que planteó la Corte Constitucional de República Dominicana en el año 2014 al declarar que el instrumento de ratificación de la CADH era inconstitucional, y por ende las decisiones de la Corte Interamericana dejaban de ser vinculantes. Sentencia TC/0256/14.

36 Considerando 20 voto de la mayoría.

> miento de las obligaciones contenidas en dicho tratado…. no se trata de resolver el problema de la supremacía del derecho internacional sobre el nacional en el orden interno, sino únicamente de hacer cumplir aquello a lo que los Estados soberanamente se comprometieron.[37]

Sin embargo, efectuó una sugestiva aclaración respecto de los alcances de la expresión "dejar sin efecto" utilizada en su decisión. Afirmó que "al ordenar esta reparación la Corte Interamericana no indicó que para cumplir el Estado tuviera necesariamente que "revocar" dichos fallos". Y agrego que "el Estado podría adoptar algún otro tipo de acto jurídico, diferente a la revisión de la sentencia, para dar cumplimiento a la medida, como por ejemplo la eliminación de su publicación de la páginas *web* de la Corte Suprema de Justicia y del Centro de Información Judicial, o que se mantenga su publicación pero se le realice algún tipo de anotación indicando que esa sentencia fue declarada violatoria de la Convención Americana por la Corte Interamericana".[38]

La Corte Argentina finalmente tomó este camino y procedió a dejar asentada la siguiente leyenda "Esta sentencia fue declarada incompatible con la Convención Americana de Derechos Humanos por la Corte Interamericana (sentencia del 21 de noviembre de 2011)".[39]

No voy a analizar todos los argumentos, méritos y deméritos de las decisiones de ambos tribunales aquí.[40] Me interesa mostrarlo como un síntoma de la necesidad de repensar no solo el ejercicio sino sobre todo los fundamentos desde los cuales se ha legitimado la particular versión del control de convencionalidad existente hoy en el sistema interamericano.

Es claro que en el terreno del control de convencionalidad se magnifica exponencialmente la clásica objeción contramayoritaria contra el control judicial de constitucionalidad.[41] En primer lugar, porque si bien respecto del control de constitucionalidad se podría replicar a los críticos que la constitución fue votada democráticamente y, con ello, tanto la formulación de la carta de derechos como la competencia asignada a los jueces para interpretarlos tendría origen democrático, en el caso del control de convencionalidad, el sistema de aprobación y sanción de la Convención sería mucho más cuestionable en cuanto a su legitimidad democrática de origen, y la potestad para controlar la compatibilidad de las disposiciones del derecho interno con las de la Convención, tal como ya hemos

37 Resolución de la Corte Interamericana de Derechos Humanos, 18 de octubre de 2017, Caso "Fontevecchia y D'Amico vs. Argentina. Supervisión de cumplimiento de sentencia", par. 14.

38 Resolución de la Corte Interamericana de Derechos Humanos, 18 de octubre de 2017, Caso Fontevecchia y D'Amico vs. Argentina. Supervisión de cumplimiento de sentencia, par. 21.

39 Resolución 4015/17, 5/12/2017.

40 Los trabajos existentes al respecto son numerosos. Véase, por ejemplo, Abramovich 2017, Alegre 2017, Clerico 2018, Saba 2017.

41 Cf. Bickel 1962. Véase también Waldron 2006. Sobre los límites de la objeción contramayoritaria al control judicial de constitucionalidad véase Orunesu 2012.

visto, ni siquiera estaría contemplada expresamente en su texto sino que devendría de una construcción doctrinaria elaborada por un órgano internacional.

En segundo lugar, la posibilidad de que los jueces en general invaliden normas del derecho interno con fundamento en disposiciones convencionales significaría no solo la imposición de un límite contramayoritario a la legislación ordinaria sino que, en sus versiones más extremas, tal como se examinó, podría incluso llegar a la invalidación de cláusulas constitucionales.

En tercer lugar, el control de convencionalidad ejercido por la propia Corte Interamericana, e incluso el ejercido por los órganos jurisdiccionales internos si es que se acepta la lectura fuerte del carácter vinculante de la jurisprudencia de la Corte Interamericana, potencia igualmente la objeción de la dictadura de los jueces, ahora de los jueces internacionales. La democracia constitucional en los países del sistema interamericano sería, de acuerdo con esta crítica "lo que decida la mayoría, siempre que no vulnere lo que los jueces interamericanos entiendan que constituye el contenido de los derechos básicos". Y si esto se conecta con la forma de selección que se prevé para los miembros del tribunal internacional, la objeción contramayoritaria cobra todavía mayor peso.[42]

Por supuesto, aun reconociendo este déficit democrático, se podría argumentar que existen otras razones de igual o mayor peso que dan fundamento al control de convencionalidad tal como lo ha construido la práctica de la Corte. En cierto sentido ese el camino que escogió la Corte Interamericana. Obsérvese decisiones como las del caso Gelman, donde la Corte Interamericano quitó toda relevancia al proceso deliberativo que condujo al estado uruguayo a dictar la denominado Ley de Caducidad sosteniendo que

> la protección de los derechos humanos constituye un límite infranqueable a la regla de mayorías, es decir, a la esfera de lo "susceptible de ser decidido" por parte de las mayorías en instancias democráticas, en las cuales también debe primar un "control de convencionalidad" (supra párr. 193), que es función y tarea de cualquier autoridad pública y no sólo del Poder Judicial.[43]

Si a esta visión le sumamos la particular visión del carácter obligatorio que el tribunal le atribuye a sus interpretaciones se podría sostener que la Corte Interamericana asume algún tipo de versión de la teoría del coto vedado que protege ciertos valores, bienes, derechos, que se consideran fundamentales y la

42 Los jueces de la Corte son elegidos a partir de ternas que proponen los Estados parte de la Convención, mediante una votación secreta y por mayoría absoluta entre los Estados parte. El aspecto deficitario en términos de credenciales democráticas del mecanismo de selección es manifiesto de la sola lectura de la normativa que lo regula. El Estatuto no exige siquiera que en la formación de la terna participen los parlamentos de los países miembros.

43 Corte IDH, Caso *Gelman vs. Uruguay*, Sentencia de 24 de febrero de 2011, par. 239.

Corte interamericana es el intérprete y defensor privilegiado de los mismos.[44] Esta forma de legitimar el control de convencionalidad es claramente sustantivo, donde o bien se presupone algún tipo de objetividad moral que torna a los valores que el control defiende verdaderos y accesibles o bien porque se da por sentado que cuentan con el respaldo de todos. Sin embargo esta estrategia tiene sus límites. Al respecto Waldron ha señalado que:

> [la] legitimidad sustantiva elude el arduo trabajo que realmente tiene que desempeñar la legitimidad. La legitimidad sustantiva persuade a aquellas personas que respaldan el resultado de la decisión judicial y que comparten los méritos sustanciales de la misma. Sin embargo, la legitimidad tiene que hacer su trabajo más complejo con aquellos que se oponen sustantivamente al resultado de la decisión del juez. Y, por definición, lo que hemos llamado legitimidad sustantiva es incapaz de desarrollar esta labor.[45]

Creo que este es el problema que saca a la luz un caso como Fontevecchia. Quizás haya que pensar que la legitimidad del control de convencionalidad exige que se tome en consideración la aptitud que tiene, en tanto diseño y práctica, para lograr que otros acepten y respalden sus decisiones incluso cuando puede darse el caso que se esté en desacuerdo con ellas.[46] En otras palabras, la legitimidad que se requiere es de naturaleza procedimental. La reivindicación que hace la Corte argentina al margen de apreciación nacional puede ser en este sentido una estrategia viable.

La doctrina del margen de apreciación nacional tiene su origen en la jurisprudencia del Tribunal europeo de derechos humanos a fin de otorgar un grado de deferencia a los estados a la hora de garantizar los derechos garantizados por la CEDH.[47] En el caso Fontevecchia ese concepto es definido en el voto concurrente del juez Rosatti como una esfera de reserva soberana que implica que "no es posible hacer prevalecer automáticamente, sin escrutinio alguno el derecho internacional-sea de fuente normativa o jurisprudencial- sobre el ordenamiento constitucional."[48]

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44 Sobre el concepto de coto vedado veáse Garzón Valdez 1989. Sobre las dificultades que tiene esta justificación para enfrentar la objeción democrática véase Orunesu 2012: cap. 3.

45 Waldron 2018: 18.

46 Cf. Waldron 2018: 16.

47 Sobre este concepto y sus alcances véase, entre otros, Brauch 2012, Clérico 2018, Acosta Alvarado & Nuñez Poblete 2012, Føllesdal 2016, Føllesdal 2018, Krisch 2008, López Alfonsin 2017, Iglesias Vila 2017.

48 Considerando 5. En el voto conjunto de Lorenzetti, Highton y Rosenkratz se hace referencia al margen de apreciación nacional conectándolo con el principio de subsidiariedad. Creo que el concepto de subsidiaridad que utiliza aquí la Corte argentina es diferente al que privilegia la Corte Interamericana. Para la Corte interamericana, según lo expresado en su resolución de Supervisión la subsidiariedad es entendida en términos puramente procedimentales: el sistema interamericano es subsidiario en la medida que entra a operar una vez agotadas las instancias nacionales. El sentido que parecen invocar en el fallo de la mayoría es la que parece solaparse con el concepto de margen de apreciación nacional, donde subsidiariedad se asimila a defe-

Por supuesto, aquí es importante identificar sobre qué aspectos puede recaer el escrutinio. El escrutinio puede referirse en primer lugar sobre los significados atribuidos a las formulaciones normativas en juego y/o sobre la operación de subsunción del caso individual en los casos genéricos definidos por las formulaciones normativas interpretadas. En este sentido el margen de apreciación sería particularmente útil para aquellos casos donde el cumplimiento automático de una decisión del tribunal internacional colisione con otro derecho de rango constitucional o convencional que se considera particularmente valioso.

También el margen de apreciación nacional puede habilitarse respecto de la determinación de los remedios requeridos para la reparación de un derecho cuya violación se ha constatado en sede internacional.[49] En este contexto podría ubicarse la resolución de la última supervisión de la Corte Interamericana en el caso Fontevecchia. Sin embargo, más allá de admitir la posibilidad de elección de remedios, la Corte interamericana no ha sido receptiva frente a la posibilidad de admitir algún margen de apreciación nacional. Y ello es consistente con su insistencia en afirmar el carácter obligatorio de sus criterios interpretativos. Es ilustrativa a este respecto lo afirmado por el ex Juez de la Corte Interamericana Cançado Trinidade:

> [L]a doctrina del llamado 'margen de apreciación' floreció... en la aplicación de la Convención Europea de Derechos Humanos, como una deferencia a la supuesta 'sabiduría' de los órganos del Estado en cuanto a la mejor manera de dar efecto a las decisiones de los órganos convencionales de protección en el ámbito del derecho interno. Esta doctrina presupone la existencia de Estados verdaderamente democráticos, con un Poder Judicial indudablemente autónomo…Esta doctrina sólo podría haberse desarrollado en un sistema europeo de protección que se creía ejemplar, propio de una Europa occidental (antes de 1989) relativamente homogénea en cuanto a sus percepciones de una experiencia histórica común…Ya no se puede presuponer, con la misma seguridad aparente del pasado, que todos los Estados que integran su sistema regional de protección sean verdaderos Estados de Derecho. Siendo así, la doctrina del "margen de apreciación" pasa a requerir una seria reconsideración. Afortunadamente tal

rencia. Gargarella sugiere que tanto el principio de subsidiariedad y el margen de apreciación nacional serían en cierto sentido lo mismo esto es reconocer un cierto margen de deferencia frente a ciertos actores estatales, solo que el de subsidiariedad sería un principio pensado para las legislaturas en tanto que la doctrina del margen de apreciación estaría pensada para la tarea de adjudicación (Cf. Gargarella 2016). Sobre los diferentes sentidos del principio de subsidiariedad véase, entre otros, Jachtenfuchs & Krisch 2015, Føllesdall 2016, Iglesias Vila 2017.

49 Por supuesto a esto habría que agregar que también se puede reconocer el margen de apreciación respecto de la aplicación entendida como las decisiones institucionales del estado nacional que traducen las normas convencionales en normas internas (por ejemplo incorporando su texto a la jerarquía constitucional a través de una reforma constitucional, o dictando normas específicas que reglamenten algunos de sus derechos). Este sentido está reconocido en la propia normativa de la convención.

doctrina no ha encontrado un desarrollo paralelo explícito en la jurisprudencia bajo la Convención Americana sobre Derechos Humanos.[50]

Parecería que la razón subyacente al rechazo del margen de apreciación nacional reside pensar que la admisión de cierto margen de apreciación nacional necesariamente equivale a habilitar zonas de no cumplimiento de los derechos tutelados por la convención. Sin embargo, creo es posible explorar una lectura alternativa. La admisión del margen de apreciación nacional en todos sus niveles, y en especial en el nivel de identificación de normas, podría verse como una oportunidad para habilitar la participación en la discusión torno a los alcances de nuestros derechos en el sistema interamericano.

Las cada vez más frecuentes invocaciones a la necesidad de un diálogo intercortes como herramienta para paliar las deficiencias de legitimidad democráticas de origen y ejercicio en la práctica interamericana por parte de la Corte Interamericana requeriría el abandono de la tesis fuerte en torno a la obligatoriedad de sus criterios interpretativos.[51] Además se requiere que los tribunales nacionales al invocar el margen de apreciación, no lo asimilen a una simple fórmula de no acatamiento, sino que tomen en serio las opiniones de los órganos del sistema interamericano, ofrezcan sólidos argumentos para su apartamiento y estén dispuestos a ofrecer salidas alternativas. En una aproximación de estas características la articulación del control de convencionalidad con márgenes de apreciación podría dar la oportunidad de reconstruir la práctica del sistema interamericano de tal forma que no vea al proceso de tutela de derechos humanos en el nivel de la adjudicación en una lectura adversarial –cortes vs. cortes, sistema interamericano vs. estados– sino como parte de una construcción común.

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50 Cancado Trinidade 2001: 386. Para una evaluación de los posibles usos de la doctrina del margen de apreciación véase Føllesdal 2017.

51 El propio fallo Fontevecchia invoca este argumento. Véase también Gargarella 2016.

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Marisa Iglesias Vila*

The conventionality control and the Fontevecchia case: Is the margin of appreciation the panacea?

In the paper I comment on some of Claudina Orunesu's claims in her article "Conventionality control and international judicial supremacy". Orunesu offers a critical analysis of how the Inter-American Court of Human Rights justifies and develops its conventionality control principle. She draws on the Argentine Supreme Court judgment in the Fontevecchia case to support her claim that the I/A Court should combine the requirement of an internal conventionality control with the European doctrine of the national margin of appreciation. Taking on board the Fontevecchia holding, I engage in a critical review of her proposal by arguing that a reasonable margin of appreciation doctrine would lead to questioning the reasoning of the Argentine Supreme Court in this case. Instead of assuming an adversarial rationale that put the focus on democratic concerns, I suggest approaching the Inter-American institutional framework in cooperative and systemic terms. Once we follow a cooperative logic, deference to national authorities is generally justified when domestic institutions are better situated than an international court for decision-making on human rights. However, the strength of the better situated argument is conditioned on the state's reliability as a cooperative actor in the Inter-American system. And this reliability is in turn conditioned on the state's demonstrating its capacity to meet its cooperative duties within the framework of the Convention. In the paper I focus on three such cooperative responsibilities: the duty of impartiality, the duty to adopt a culture of justification, and the duty to embrace a conventional perspective.

Keywords: Inter-American Court of Human Rights, Fontevecchia case, systemic legitimacy, margin of appreciation, cooperation, culture of justification

1 INTRODUCTION

In this paper I comment on some of Claudina Orunesu's claims in her article "Conventionality control and international judicial supremacy".[1] Orunesu offers a critical analysis of how the Inter-American Court of Human Rights (from now on the *I/A Court H.R.*, or the *I/A Court*) justifies and develops its conventionality control principle. Her criticism focuses on the strong version of this doctrine, which requires national judges, on the one hand, to give strict precedence to conventional norms and holdings over domestic decisions, and, on the other hand, to do this task by following the interpretative criteria fixed by the I/A Court H.R.

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1 See Orunesu 2020: 45-62. Also Orunesu 2022 (in Spanish).

Her three main arguments against a strong conventionality control run as follows:

(a) Such a strong demand on national judges exceeds the legal powers of the I/A Court and lacks textual support in the wording of the American Convention on Human Rights (from now on the *Convention*, or the *Pact of San José*).

(b) In some cases, this doctrine might entail the invalidity of constitutional clauses, with the paradoxical effect of settling the supremacy of convention norms over national constitutions, despite the pluralism found in member states as to the provisions concerning the constitutional status of international treaties. According to Orunesu, conventional supremacy is thus problematic in terms of hierarchy.

(c) The strong version of the doctrine has problems of democratic legitimacy, since it may promote a dictatorship of judges, in this case the dictatorship of the justices of an international court (whose selection procedure is, in addition, far from satisfactory).

Orunesu's proposal is to combine the requirement of an internal conventionality control with the European doctrine of the national margin of appreciation. Bringing together both doctrines would facilitate states' participation in the interpretation of convention rights and enhance judicial dialogue, with the effect of making up for the democratic deficit of the I/A Court. This will be so insofar as national judges (1) do not use the margin of appreciation as an excuse for non-compliance, (2) take the Court's opinions seriously, (3) offer strong arguments for dismissing its opinions, and (4) come up with reasonable alternatives.[2]

Generally speaking, I agree with Orunesu's suggestion. I also find that the I/A Court should have a more flexible reading of the domestic conventionality control. Nonetheless, I have difficulties in determining the scope of our agreement, as her paper does not get to the heart of the rationale and foundations of the margin of appreciation doctrine. In fact, we disagree on our assessment of the Argentine Supreme Court judgment in the Fontevecchia case, where the Court dismissed the request submitted by the Ministry of Foreign Affairs and Culture to implement the holding of the I/A Court.[3] Orunesu draws on this case to support her claim that the I/A Court should introduce the national margin of appreciation in its jurisprudence. I would instead say that a reasonable margin of appreciation doctrine would lead to questioning the reasoning of the Argentine Supreme Court in this case. I will first elaborate on this doctrine, and then come back afterwards to the Fontevecchia case, in order to check the extent of our differences as to the dynamics of the margin of appreciation.

2 Orunesu 2020: 60.

3 Corte Suprema de Justicia de la Nación (National Supreme Court of Justice), 14 February 2017, "Ministerio de Relaciones Exteriores y Culto s/ informe sentencia dictada en el caso 'Fontevecchia y D'Amico vs. Argentina' por la Corte Interamericana de Derechos Humanos". See also I/A Court H.R., Case of Fontevecchia and D'Amico v. Argentina. Merits, Reparations and Costs. Judgment of November 29, 2011. Series C No. 238.

2 THE MARGIN OF APPRECIATION DOCTRINE

The European Court of Human Rights (from now on the *ECtHR*, or the *Strasbourg Court*) has adopted this doctrine in order to grant a degree of deference to member states' standards in protecting convention rights.[4] The ECtHR has offered various reasons to justify such deference. First, it has noted that the system of human rights protection in Europe is the product of a division of labour between the member states and the ECtHR. States hold the primary responsibility for such protection, and the Strasbourg Court only intervenes in a subsidiary fashion, by entering a particular controversy once internal remedies have been exhausted. Second, when culturally sensitive issues such as morality or religion are at stake, there is no consensus among member countries as to their regulation, and national authorities may be better positioned to appreciate relevant social circumstances and manage internal tensions (since they are closer to the daily reality of their citizens). Nevertheless, according to the ECtHR itself, this margin is limited, subject to Strasbourg supervision, and will vary as a function of sensitive cultural considerations, the right in question, the nature of the interest alleged by the national authorities, and the state of the European consensus on the matter.[5]

Under this doctrine, the Court tends to avoid engaging in abstract examinations of compatibility between state measures and the European Convention, and focuses instead on reviewing whether national authorities have exceeded their margin of appreciation in rights protection. This leads to a contextualized assessment of the denounced breach of the Convention, which accommodates the internal stakes as well as the legal, political, and social circumstances of each country. Such a contextual assessment of compatibility with the Convention allows the ECtHR to offer distinct decisions on similar cases occurring in diverse national settings.

From this general overview we may extract some initial remarks applicable to the Inter-American system of human rights. First, the margin of appreciation does not work as a tool to allocate powers, but instead offers guidance as to how the jurisdictional power of the international court should be exercised. Second, the logic of this European doctrine is not entirely applicable to disagreements on the determination of remedies and on the execution of the judgments of the I/A Court, since those issues involve technical aspects, and, additionally, in the Strasbourg system the execution of the Court's judgments tends to be left to the discretion of each member state. But still, it pays to rethink those issues from the perspective of the margin of appreciation doctrine.

4 For a general characterization of the European margin of appreciation doctrine, see Arai-Takahashi 2002; Letsas 2006; Legg 2012.

5 *Handyside v. United Kingdom*, App. No. 5493/72, Eur. Ct. H.R., December 7, 1976, par. 48 and 49.

Orunesu conceives of the national margin through the concurring opinion of Justice Rosatti with respect to the Argentine Supreme Court's judgment in the Fontevecchia case. Here Rosatti links the margin to a sphere of sovereign reservation, which implies that "it is impossible for international law—either of normative or jurisprudential source—to prevail automatically, without scrutiny, over the constitutional order."[6]

In my opinion, this way of understanding the idea of the margin operates within an adversarial rationale—states versus the Inter-American system, national courts versus international courts—which Orunesu herself rejects in her article. This adversarial logic is also evidenced in Orunesu's focus on the countermajoritarian objection, which creates a certain tension in her reasoning. To avoid this tension, one option would be to pay less attention to democratic concerns, and to view the Inter-American institutional framework in cooperative and systemic terms. My suggestion is to approach the margin of appreciation doctrine by considering the normative framework endorsed by Allen Buchanan, in particular his understanding of legitimacy in a human rights system as an ecological issue.[7] I will refer to the idea of "systemic legitimacy" to capture this view.[8]

3 SYSTEMIC LEGITIMACY AND MEMBER STATES' COOPERATIVE RESPONSIBILITIES

According to Buchanan, the legitimacy of institutions at the international level is an ecological matter.[9] A system of human rights operates through the coordinated action of various institutions committed to achieving certain common goals. The effective operation of this system demands mutual recognition between the actors involved. In turn, this recognition makes such cooperation possible, and a cooperative undertaking is what is needed to achieve the shared goals. On this basis, we cannot determine whether any institution of this network is legitimate simply by looking at the characteristics of the institution itself. Instead one must understand how it interacts with the other actors. What I will call "systemic legitimacy" values the moral authority of each institution in interactional terms and asks what kinds of relationship and functional specialization would reinforce and improve the legitimacy of each implicated actor and of the system as a whole. Thus national actors and their measures may have democratic legitimacy without having systemic legitimacy, and the

6 Par. 5 of Judge Rossati's opinion.

7 Buchanan 2013.

8 I follow here Carlos Rosenkrantz's suggestion that "systemic legitimacy" is a more suitable expression than "ecological legitimacy" for referring to this approach to legitimacy issues.

9 Buchanan 2013: 219.

international body and its decisions may have systemic legitimacy even without democratic credentials.

Along these lines, I suggest understanding the margin of appreciation as the degree of deference to national authorities that contributes to the systemic legitimacy, in this case, of the Inter-American system and its actors. Now, the margin is tied up with a normative question: how the division of labour in the implementation of the Convention should be organized, given that member states have the primary responsibility to ensure convention rights while the Inter-American system complements such national protection.

Once we follow a cooperative logic, perhaps the strongest reason for deference to national authorities is the fact that, in plural settings, domestic institutions may be better situated than an international court for decision-making on human rights.[10] When it can be argued that the state is better situated, because a particular controversy cannot be adequately resolved without a profound understanding of the particular circumstances in a given society, we may have reasons of systemic legitimacy to support deference. Otherwise, we might be asking the international court to do something that another institution is better equipped to do, at the expense of the general efficacy of the system.

Within the Pact of San José framework, the traditional reluctance to grant a national margin of appreciation has been mainly based on the history of dictatorships and the democratic fragility experienced in many states of the region. This argument has been used to question whether the states are better situated than the I/A Court and the Inter-American Commission on Human Rights (from now on the *IACHR*) for decision-making on human rights issues. As cited by Orunesu, this is the reasoning of the former Judge Cançado Trindade to justify his bold rejection of incorporating the margin of appreciation doctrine into the Inter-American system.[11]

In recent years, however, the role of the Inter-American System bodies and, in particular, the I/A Court's traditional reluctance to adopt the margin of appreciation doctrine are under pressure. In April 2019, the governments of Argentina, Brazil, Chile, Colombia and Paraguay issued a significant Joint Declaration to the Inter-American system of Human Rights. Here the signatory states mention the principle of subsidiarity, demand respect for their legitimate space of autonomy in the protection of convention rights through their own democratic processes, and emphasize the state's margin of appreciation in the fulfilment of its convention duties. These statements react to an interventionist Court whose maximalist approach has been subject to criticism.

10 In the rest of the paper, I will focus my comments on this reason. For the connection between the margin of appreciation and the best situation of national authorities, see, for example, Spielmann 2012.

11 Orunesu 2020: 59. On this reluctance see also Barbosa 2012.

Jorge Contesse, for instance, objects to such an interventionist stance by paying attention to the evolution in the subject matter submitted to the I/A Court jurisdiction, which runs parallel to the region's political transformation.[12] Contesse points out that mass human rights violations perpetrated by authoritarian regimes are being replaced by matters pertaining to the relatively commonplace violations witnessed in stable democratic systems. He argues that this change demands a shift in the I/A Court's approach, from one tending towards a maximalist and expansive reasoning to one anchored in the principle of subsidiarity and the margin of appreciation doctrine.

Even if we assume that the democratic fragility argument is running out of steam against the margin of appreciation doctrine in Latin America, what we are thereby ruling out is only a general argument against including the doctrine in the I/A Court's reasoning. We still have no answer as to when the state, in case of a complaint of a violation of convention rights, is better situated to resolve its internal human rights controversy.

In my view, the strength of the better situated argument depends not only on the type of case or situation at stake, but also has to do with the state's reliability as a cooperative actor in the Inter-American system. And this reliability is in turn conditioned on the state's demonstrating its capacity to meet its obligations within the framework of the Convention. Beyond the generic duties of effective respect and protection, in a cooperative system of human rights, states shall be subject to three conventional obligations.

(a) The first is a duty of impartiality or neutrality in human rights protection, which is compromised when the state, for example, tends to privilege certain social groups, adopts comprehensive doctrines, or yields to the dominant morality. In these cases, the state ceases to be better positioned to resolve internal conflicts than international bodies, since its lack of impartiality is part of the conflict. In such instances, the state's restriction of rights calls for strict scrutiny on the part of the international court.

(b) The second is the duty to adopt what has been labelled as a "culture of justification", which subjects any public institution (administrative, legislative, or judicial) to demands of justification centred on the aim of protecting basic rights.[13] This responsibility has two dimensions: a passive one, in which the political power has the burden of proving that its

12 Contesse 2016: 124-145.

13 According to Dyzenhaus (2015: 425-426): "A culture of justification is not only one in which parliamentarians offer political justifications to the electorate for their laws, but is also one in which they offer legal justifications in terms of the values set out in the bill of rights. That is a kind of political justification. But it is more than a justification of why one policy is better than another since it is also a justification of why the policy is consistent with the legally protected rights of those it affects. Moreover, it is a justification not only to citizens but also to courts, a feature inherent in the structure of a bill of rights that permits rights to be limited."

governmental policy is not incompatible with human rights, and an active one, in which the political power has to prove that its policies and legal instruments actually advance those rights. A sound culture of justification (which goes beyond confirming the democratic character of the state, or the fact that the measure in question is the product of a democratic institution) contributes to the trustworthiness of national authorities. For this reason, we may say, following Roberto Gargarella, that the deliberative quality of the measure in question, that is, the degree of intensity and the depth of the internal debate surrounding its national adoption, should become a central factor in expanding or reducing the national margin of appreciation.[14]

(c) The third duty is the adoption of a conventional perspective. A state's being better positioned to decide should depend on the capacity of its national authorities to espouse an external perspective in its everyday institutional activity, that is, on the state's capacity to self-regulate as a cooperative actor in a human rights system. This "convention perspective" does not belong to the international court but is rather shared by all the institutions that work together to enhance the effectiveness of the system. As noted by Jean-Marc Sauvé, states must retain a double perspective: national characteristics and traditions, and also international standards and consensus.[15]

National authorities meet this responsibility in different ways, for instance, when public powers show their willingness to allow external controls to correct deficiencies in their democratic functioning (especially those affecting minorities), or when they seek advice from human rights committees or expert bodies. The duality demand is also attended when, in addition to integrating the jurisprudence of the international court, national judiciary exercise a conventionality control, at least as a duty with regard to the result (leaving in the state's hands the means to bring it about according to its judicial traditions and domestic structures).

If Orunesu were to agree on the crucial role of those three responsibilities for a margin of appreciation doctrine, and on the relevance of meeting them to test the strength of the better situated argument, perhaps she would also be more reluctant to use the 2017 holding of the Argentine Supreme Court to support her general criticism of the I/A Court. I will devote the next few pages to explaining why my approach to the margin of appreciation leads to this conclusion.

14 Gargarella 2016. On the relevance of deliberative quality to the scope of the margin of appreciation, see Spano 2014.

15 Sauvé 2015: 23.

4 THE CHALLENGE MADE BY THE ARGENTINE SUPREME COURT: IS THE MARGIN OF APPRECIATION THE PANACEA?

The refusal of the Argentine Supreme Court (from now on, *the AS Court)* to overturn the civil conviction rests on two main considerations. The AS Court argues, on the one hand, that the I/A Court is exceeding its authority, and, on the other hand, that attending to such a demand would contravene the constitutional principles of the Argentine legal system.

To defend the lack of jurisdiction, the AS Court deploys textual and functional reasons. Regardless of the general usefulness of textual claims to this type of debate (which I doubt), the AS Court's textual arguments are unconvincing. It is true that the literal wording of the Convention does not state that the I/A Court has the authority to request a national Supreme Court to revoke a final judgment, but article 63.1 of the Convention enables the I/A Court to "rule that the injured party be ensured the enjoyment of his right or freedom that was violated", and "to rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied". Therefore, the provision does not entail by itself that a general requirement of rendering the judgment ineffective exceeds the powers assigned to the I/A Court.

The AS Court supports the lack of jurisdiction claim on additional grounds: on the one hand, the fourth instance doctrine—that is, the claim that the I/A Court is not a fourth instance with the power to invalidate internal judicial decisions—and on the other hand, the national margin of appreciation, grounded in the principle of subsidiarity (following Føllesdal's words, a principle of power allocation that establishes a "rebuttable presumption for the local").[16] Its reasoning, however, here has the same adversarial character as in its textual analysis of the Convention. My general impression is that the AS Court adopts a statist reading of the subsidiarity principle.[17] In contrast with the cooperative view favoured by systemic legitimacy, such a statist conception, aside from promoting the Westphalian rendition of the international system, steps away from a cooperative view because: (a) it focuses on just one aspect of this institutional relationship; (b) it assumes both that national authorities have primary and independent legitimacy and that democratic pedigree is a necessary element of institutional legitimacy in a human rights system;[18] and (c) it ignores the fact that subsidiarity does not simply constrain the international court's powers *vis-à-vis* states but also fixes the responsibilities of national authorities within

16 Føllesdal 2016: 148.

17 For a general criticism of a statist reading of the principle of subsidiarity, see Iglesias Vila 2017.

18 For a criticism of this assumption, see, especially, Buchanan 2013: 193-195.

the framework of the Convention.[19] Accordingly, while it is true, as Orunesu claims, that the legitimacy of the conventionality control required by the I/A Court depends on its aptitude "to persuade others to accept and support its decisions even when they disagree with them",[20] the legitimacy of the AS Court's reaction in this context also depends on its aptitude to persuade others to accept and support its decisions even when they disagree with them.

What we are debating here is not whether there has been a breach of the right to freedom of expression, nor what weight must be given to the national opinion as to the scope of that right. Our concern is rather the enforcement of a I/A holding which includes, again, a general requirement to render the domestic final judgment ineffective, since this judgment has led to the state's breach of a convention right. Taking on board systemic legitimacy, we may claim that, in the execution stage, the state, being better placed for technical reasons, should have a margin of discretion to determine the appropriate forms of redress. At this stage, however, we may still require national authorities to have an impartial decision-making process with both deliberative quality and a conventional perspective.

As a cooperative actor, the AS Court should have borne in mind the consequences of unreservedly dismissing a request to implement a judgment of the I/A Court, simply on the grounds that the Argentine state's international obligations cannot include overruling a domestic final judgment.

On the one hand, this dismissal sets a dangerous precedent for any future cases where the I/A Court may rule that the Argentine state has acted in breach of the Convention. Since the Inter-American system only operates once all domestic remedies have been exhausted, the judgment of the I/A Court will typically meet a domestic final judgment. The AS Court might continue using the same argument in increasingly clear breaches of its cooperative responsibilities, and, in criminal cases, such a view might have very serious effects in terms of human rights. A similar situation might have occurred (also with a general requirement to overturn a final judgment) in a case of a criminal sentence with the plaintiff in prison. Here, the stance of the AS Court would involve the claim that no international responsibilities are being infringed by upholding the criminal conviction, which is an unreasonable conclusion to draw once we take ecological legitimacy seriously. Therefore, an inflexible stance on this matter may lead to an evident step forward in human rights protection with the sole consequence for the state of having to pay a fair compensation to the injured party.[21]

19 See, for instance, Nowbray 2015.

20 Orunesu 2020: 58.

21 As for the idea that the 2017 AS Court Judgment creates a precedent that could have consequences for the constitutional value of human rights, see, for instance, Abramovich 2017. For a more nuanced criticism, which also pays attention to the limited risk that this judgment will affect the AS Court's future decisions regarding the enforcement of the I/A Court's holdings, see Alegre 2017: 34.

On the other hand, the AS Court's stance may have a negative spillover effect on neighbouring countries of the region, undermining the *auctoritas* of the international court *vis-à-vis* those national institutions with whom the I/A Court must cooperate to ensure the system's efficacy.

It strikes me that, from a cooperative rationale, technical impracticability is the only compelling argument for dismissing a generic requirement to render the judgment ineffective. It is true that the AS Court takes on board the impossibility argument, but, again, in an adversarial fashion. The AS Court grounds the legal impossibility of complying with the requirement in the principles of the Argentine Constitution, particularly in those principles which settle the hierarchical authority structure and the supreme character of the AS Court as the head of the judicial branch.

A reasoning of technical feasibility would be of a different nature. The AS Court would have checked the available mechanisms to enforce the I/A Court judgment, examining their legal alignment and offering solutions, or showing its willingness to find alternative remedies. If no balanced solution were available, then the AS Court, at the very least, might have assumed that not having an effective procedural channel to implement the I/A Court's general requirement posed an internal problem for the Argentine state, and that addressing this problem (in the short to medium term) fell under the cooperative commitments the state made by signing the Convention. By reasoning in this manner, the AS Court would have shown the duality that a convention perspective calls for. At the same time, undertaking this argumentative effort would have warranted the impartiality and the deliberative quality required by a culture of justification.

I shall not go into how this technical difficulty, which is faced by many domestic legal systems, is to be corrected. Commentators and judicial case law have examined several options: enforcement *ex oficio* by the national Supreme Court; or, now at the request of a party, interpreting the holding of an international court as a new fact that affects the principle of *res judicata*; or channelling the judicial enforcement through a writ of protection or by using a nullity incidental plea. In Spain, for instance, it took many years to legislate a procedural mechanism to enforce Strasbourg's judgments of conviction. It was not until 2015 that the Organic Law on Judicial Power was amended to include the fact of a judgment of conviction by the ECtHR as grounds for an appeal for reversal.

The AS Court had the opportunity to urge the legislative branch, as the Spanish Constitutional Court did in 1991, to establish a procedural mechanism for solving such technical difficulties.[22] But the AS Court did not pursue this line of reasoning and, in my view, its general stance on this issue amounts to a failure to comply with its conventional obligations.

22 Judgment of the Spanish Constitutional Court, STC 245/1991, 16 December.

Admittedly, the initial challenge of the AS Court's 2007 holding was finally overcome through a compromise solution. As the I/A Court confirms in its order of 11 May 2020 on compliance with the judgment, the following note was added to the register of the AS Court ruling of 25 September 2001: "This judgment was declared incompatible with the American Convention on Human Rights by the Inter-American Court (judgment of 29 November 2011)".

Such a compromise solution might be understood as a form of dialogue between the two courts. However, from the cooperative perspective I am defending, this conclusion is not warranted. In the cooperative undertaking I have in mind, the actors involved share the same concern with the effective protection of human rights within their regional setting, and institutional reliability, mutual recognition and long-term cooperation are instrumental to that end. The question here is whether the AS Court challenge amounts to a disagreement regarding the most effective way to restore the violated rights, taking account of what is technically possible or, in a more general fashion, regarding how to ensure the protective efficacy of the system. As commented below, the AS Court does not pursue this line of reasoning, and therefore my intuition is that the compromise solution is better described as a successful statist resistance than as an effective institutional dialogue.

To sum up, given the requirements that Orunesu points out to combine the domestic conventionality control with the margin of appreciation—which are, again, (1) that national judges do not use the margin of appreciation as a non-compliance excuse, (2) that they take the opinions of the Court seriously, (3) that they offer strong arguments for dismissing its opinions, and (4) that they come up with reasonable alternatives—it would not be a hasty judgment to conclude that the 2017 AS Court has not fulfilled them. In the end, for the margin of appreciation doctrine to be a powerful tool for the cooperative protection of human rights, we must ensure that member states contribute to a common construction, to use Orunesu's last words.

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Ángeles Ródenas*

La vida secreta de los conceptos
(O sobre el arte de decantar conceptos)

El objeto de este trabajo es someter a examen crítico la concepción de los conceptos jurídicos del positivismo normativista defendida por Cristina Redondo, así como plantear algunas posibles estrategias de defensa por parte de las otras dos concepciones de los conceptos jurídicos criticadas por Redondo: el interpretativismo dworkiniano y el reduccionismo rossiano.

Parablas claves: Redondo (María Cristina), la teoría de los conceptos jurídicos, el positivismo normativista, Ross (Alf), Dworkin (Ronald), conceptos institucionales, propiedades necesarias de los conceptos, jurisprudencia de conceptos, instituciones jurídicas

1 INTRODUCCIÓN

En su trabajo "Institutional Concepts: A Critical View on the Reductionist and Interpretive Approaches"[1] Cristina Redondo lleva a cabo una sugerente reflexión sobre tres enfoques de análisis de los conceptos jurídicos, a los que denomina, respectivamente, el enfoque reduccionista, el enfoque interpretativista y el enfoque del positivismo jurídico normativista. Redondo expone con gran claridad estas tres aproximaciones y, además, lleva a cabo una valoración crítica de las dos primeras, contraponiendo sus inconvenientes a las ventajas que presenta el enfoque del positivismo jurídico normativista. Aunque Redondo insiste en que los tres enfoques no resultan incompatibles, ya que versan sobre diferentes objetos y tiene diferentes finalidades, tanto del subtítulo de su trabajo –una crítica a las posiciones reduccionistas e interpretativistas– como de su defensa del enfoque del positivismo jurídico normativista cabe inferir cierta predilección de la autora por este último.

Precisamente el objeto de este trabajo es someter a examen crítico la defensa de la concepción de los conceptos jurídicos institucionales del positivismo normativista de Redondo. En el apartado 2 –*Tres enfoques sobre los conceptos jurídicos institucionales*– presentaré de la manera más sintética posible la reconstrucción que Redondo lleva a cabo de los tres enfoques antes mencionados. En el apartado 3 –*La prueba de la brujería*– expondré brevemente la forma en la que Redondo evalúa los logros de estos tres enfoques, poniendo a prueba su capacidad para reconstruir "el concepto jurídico de brujería" y, asimismo, apun-

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1 Redondo 2020: 103-127.

taré algunas posibles estrategias defensivas del enfoque reduccionista y del interpretativista frente a las críticas de Redondo. Pero el núcleo de mis diferencias con Redondo se condensa en los dos últimos apartados. En el apartado 4 –*El arte de decantar conceptos*– me plantearé cómo puede el positivismo jurídico normativista "identificar las propiedades distintivas y necesarias de los conceptos". Finalmente, concluiré en el apartado 5 –*La esencia del positivismo jurídico normativista*– cuestionaré las supuestas ventajas que Redondo atribuye al enfoque del positivismo normativista a la hora de analizar los conceptos jurídicos institucionales.

2 TRES ENFOQUES SOBRE LOS CONCEPTOS JURÍDICOS INSTITUCIONALES

Como acabo de señalar, Redondo lleva a cabo un análisis de tres posibles enfoques relativos a los conceptos jurídicos institucionales, a los que denomina, respectivamente, el enfoque reduccionista, el enfoque interpretativista y el enfoque del positivismo jurídico normativista.

2.1 El enfoque interpretativista de Dworkin

Redondo toma como referente del enfoque interpretativista a Dworkin. Como es sabido, Dworkin distingue entre tres tipos de conceptos: conceptos criteriológicos (*criterial concepts*), conceptos de clase natural (*natural kind concepts*) y conceptos interpretativos (*intepretative concepts*).[2] Tanto los conceptos criteriológicos como los de clase natural proporcionan un test para la correcta aplicación de los mismos: en los conceptos criteriológicos dicho test depende de los acuerdos o convenciones existentes en el uso del concepto; mientras que en los conceptos de clase natural el test depende de cuál sea la esencia o estructura natural (física o biológica) de los ejemplos o instancias del concepto en cuestión. A diferencia de los conceptos criteriológicos y de los de clase natural, los conceptos interpretativos, como el de Derecho, son sensibles a los valores que quienes los usan atribuyen a aquello a lo que los conceptos se aplica. Así, por ejemplo, toda teoría jurídica, aun cuando no siempre lo identifique y analice explícitamente, usa un concepto de Derecho. Aunque Dworkin únicamente se preocupa del concepto de Derecho, y no de conceptos jurídicos más específicos como los de jurisdicción, república, familia, etc., Redondo defiende -a mi juicio acertadamente- que este interpretativismo dworkiniano sería extensible a estas instituciones normativas más circunscriptas, puesto que la extensión a e las mismas presupone el mismo tipo de actitud interpretativa que subyace al Derecho en general.

2 Dworkin 2006: 9-12; Dworkin 2011: 158-163.

2.2 El enfoque reduccionista de Ross

El segundo enfoque del que se ocupa Redondo en su trabajo es el que denomina reduccionista o realista y considera como su exponente a Ross[3]. Como es sabido, Ross sostiene que algunos conceptos jurídicos como el de "propiedad" carecen de referente, ya que su función es operar como término de enlace, reemplazando, en ciertas ocasiones, una disyunción de hechos condicionantes y, en otras, una conjunción de consecuencias normativas. Concretamente, cuando decimos: "El propietario puede percibir los frutos y disponer de los mismos", la palabra "propietario" sustituye y resume la disyunción de hechos que, según un determinado sistema jurídico, condicionan las consecuencias normativas mencionadas (el permiso de percibir y disponer de los frutos). En otras ocasiones, el término "propiedad" o "propietario" sirve para reemplazar el conjunto de consecuencias normativas previstas. Por ejemplo, cuando decimos: "quien recibe una cosa por compra, herencia o prescripción es el propietario de la misma". En este caso, lo que hacemos es usar la palabra "propietario" en lugar de enumerar la lista entera de obligaciones, prohibiciones y permisos establecida por el sistema jurídico para este tipo de casos.

A juicio de Redondo, los conceptos jurídicos así entendidos no identifican un tipo o clase general de institución (o de entidad, propiedad o hecho institucional), sino instituciones concretas, i.e. conjuntos de normas vigentes en un lugar y tiempo determinados. Los conceptos jurídicos son solo un resumen o una forma breve de presentación de las normas que configuran una determinada institución. Asímismo Redondo sostiene que desde un planteamiento como el de Ross, intentar describir o seleccionar las características más relevantes de esta aparente "realidad" institucional es una empresa absurda que se apoya en la falsa presuposición de que hay algo que puede ser objeto de tal descripción o individuación. Analizar un concepto jurídico institucional consiste en mostrar cómo éste se reduce a un conjunto de normas existentes en un tiempo y lugar determinados.

Algo más adelante volveré sobre el enfoque de Ross para tratar de ofrecer una reconstrucción (algo más caritativa de la de Redondo) que muestre toda la potencialidad de este enfoque, dejando al margen la cuestión de si es o no más coherente con las intenciones originales de Ross.

2.3 El enfoque del positivismo normativista de Raz (y Redondo)

El tercer enfoque del que se ocupa Redondo es el del positivismo normativista, tomando como referente de dicho enfoque a Raz. Conforme al PJN, según Redondo,

> es posible identificar conceptos que definen tipos de instituciones jurídicas. Por ejemplo, instituciones jurídicas específicas como el dinero, la monarquía, la propie-

3 Ross 1957: 818-821.

> dad, como así también, la institución jurídica más general que llamamos "Derecho" u "ordenamiento jurídico". Un concepto, tal como lo entiende esta posición, es un conjunto de propiedades distintivas que los ejemplos (o al menos los ejemplos paradigmáticos) que recaen en su ámbito de aplicación necesariamente satisfacen.[4]

Desde esta perspectiva "un concepto jurídico institucional constituye un ejemplo o caso específico de institución lingüística. Es una institución lingüística que delimita un tipo de institución jurídica y cuyas instancias de aplicación son específicos ejemplos de instituciones jurídicas".[5]

3 LA PRUEBA DE LA BRUJERÍA

Para evaluar los logros de estas tres concepciones, Redondo pone a prueba la capacidad de cada una de ellas de reconstruir "el concepto de jurídico de brujería". Seguidamente expondré brevemente los inconvenientes que Redondo atribuye a los dos primeros enfoques y las ventajas que Redondo ve en el positivismo jurídico normativista.

3.1 El localismo y escepticismo de Ross

De acuerdo con Redondo, una propuesta como la de Ross adolecería de dos grandes dificultades que le impedirían dar cuenta del concepto institucional general de "bruja" o "brujería".

Por un lado, tal concepto colapsaría con "el contingente contenido que un ejemplo de esta institución tiene en un momento y lugar específicos", lo que, a su vez, "oculta el hecho de que es el concepto general el que permite identificar la existencia de ejemplos de instituciones del mismo tipo".[6] Llamaré a esta primera objeción de Redondo contra Ross *la objeción del localismo*.

Por otro lado, Ross, en su trabajo de 1951 asocia la aceptación de entidades, propiedades o hechos institucionales a la aceptación de entidades, propiedades, o hechos meramente aparentes, generados por supersticiones primitivas. Concretamente, Alf Ross compara nuestras creencias de que bajo ciertas circunstancias existen ciertos hechos o propiedades institucionales con las creencias de los integrantes de una tribu primitiva en que, bajo ciertas circunstancias, un individuo deviene tû-tû pueden perfectamente explicarse sobre bases empíricas compatibles con nuestro conocimiento científico, con la aceptación y la justificación de enunciados referidos a entidades de carácter mágico, cuya admisión puede considerase sistemáticamente falsa, y que deberíamos rechazar. Al hacer esta analogía, asimila la aceptación y la justificación de enunciados

4 Redondo 2020: 111.

5 Redondo 2020: 112.

6 Redondo 2020: 119.

referidos a entidades o propiedades institucionales, que pueden perfectamente explicarse sobre bases empíricas compatibles con nuestro conocimiento científico, con la aceptación y la justificación de enunciados referidos a entidades de carácter mágico, cuya admisión puede considerase sistemáticamente falsa, y que deberíamos rechazar.[7]

Llamaré a esta segunda objeción de Redondo contra Ross *la objeción del escepticismo*.

De la *objeción del localismo* voy a ocuparme en el apartado cuarto –*El arte de decantar conceptos*- en el que trataré de ofrecer una reconstrucción del enfoque de Ross resistente a la crítica de Redondo. Aquí voy a ocuparme sólo de la objeción del escepticismo, para lo cual es esencial contextualizar su propuesta. Cuando Ross establece una analogía ente los términos *estar tû-tû* y *ser propietario* su punto de mira son las teorías basadas en las *naturalezas jurídicas*. Lo que Ross pretende criticar es la idea de que los conceptos jurídicos institucionales tengan una *esencia*, y, en su lugar, se propone explicarlos como términos de enlace entre hechos y actos condicionantes, de un lado, y consecuencias jurídicas, de otro.

No conviene olvidar que la búsqueda de las esencias o naturalezas jurídicas constituye un resabio del pensamiento de la Escuela Histórica y de su heredera, la Jurisprudencia de Conceptos; un resabio que, como certeramente apuntaba Heck, "ha perdurado en la teoría jurídica de Europa Continental mucho después de que las banderas de aquel movimiento romántico fueran arriadas"[8] y -cabría añadir- de que el segundo Ihering diese por finiquitada a la Jurisprudencia de Conceptos.

Tomemos algunos ejemplos de cómo los propios implicados explicaban su empresa de búsqueda de las naturalezas jurídicas. Por ejemplo, Esmein estipulaba:

> Toda institución, cualquiera que sea, lo mismo da que pertenezca al Derecho público o al Derecho privado, reposa sobre una idea general de la que es aplicación y desenvolvimiento. Tal idea es un principio rector, y la reglamentación que se le confiere consisdte sólo en las consecuencias que se deducen de aquel principio.[9]

En la misma línea de pensamiento, Du Pasquier postulaba

> La naturaleza de una institución jurídica estriba en los procedimientos técnicos, en las categorías jurídicas por cuya mediación el Derecho realiza y sanciona la idea general que a esa institución sirve de principio.[10]

En ese "cielo de los conceptos" (del que el segundo Ihering aconseja descender a los juristas[11]) los conceptos jurídicos son *a priori* y las instituciones jurídicas instanciaciones *a posteriori* de los conceptos esenciales. Como Heck apuntaba de manera crítica:

7 Redondo 2020: 119-120.

8 Heck 1948b: 99-256.

9 Esmein 1900: 492 y ss. (citado por Esteve 1956).

10 Du Pasquier 1942: 150 y ss. (citado por Esteve 1956).

11 Ihering 1933: 215-264.

> La jurisprudencia conceptual consideraba los conceptos científicos generales como conceptos causales fundamentales del Derecho, es decir, como causa de las normas jurídicas… Esta antigua teoría causal está hoy desechada. Aun cuando discrepen mucho las opiniones sobre el origen del Derecho, en el fondo están todos de acuerdo en que los preceptos jurídicos son históricamente anteriores a su ordenación en los conceptos generales.[12]

En línea con la objeción de Heck, Genaro Carrió, hace ya más de cincuenta años, formulaba una crítica clara y rotunda a la búsqueda de las naturalezas jurídicas:

> Las discusiones sobre supuestas naturalezas jurídicas, en cuanto los contendientes no se hacen claramente cargo de lo que están buscando, ni de la verdadera causa de su desacuerdo, son a la vez estériles e insolubles. El despilfarro de esfuerzos se origina, en este caso, en lo siguiente: se piensa que cada vez que un conjunto de reglas se presenta con una determinada unidad, que lo hace acreedor de una designación unificadora, esa designación es el nombre de una entidad *sui géneris*, poseedora de alguna característica o propiedad central de las que derivan, como quien dice en forma genérica, todas las reglas del sector en cuestión y también otras que, si bien no están contenidas expresamente en él, son "engendradas" –al igual que las primeras- por la fecunda idea central, o naturaleza jurídica.[13]

¿Es posible que la propuesta de Redondo sea un intento de resurrección del primer Ihering?

Recordemos que Redondo defiende que el positivismo jurídico normativista hace depender las instituciones jurídicas de instituciones más básicas a las que denomina *instituciones lingüísticas*, quedando las primeras subordinadas a estas últimas:

> Un punto fundamental de la propuesta del PJN es que las instituciones jurídicas presuponen y se construyen mediante instituciones más básicas: *instituciones lingüísticas*…En la visión del PJN puede decirse que existe una relación de estratificación entre estos dos tipos de instituciones…Un concepto jurídico institucional constituye un ejemplo o caso específico de institución lingüística. Es una institución lingüística que delimita un tipo de institución jurídica y cuyas instancias de aplicación son específicos ejemplos de instituciones jurídicas.[14]

Redondo continúa

> Es importante poner énfasis –prosigue Redondo- en que, entre los conceptos institucionales, por una parte, y las instituciones jurídicas, políticas o religiosas, por la otra, existe una *relación de ejemplificación*, que no es una relación inferencial, ni menos aún de identidad. Entre el contenido de un concepto institucional y la existencia de una determinada institución que recae en su ámbito de aplicación hay una *relación necesa-*

12 Heck 1948a: 527-528.

13 Carrió 1951:102-103.

14 Redondo 2020: 112-113 (los énfasis son míos).

ria o constitutiva, i.e. el concepto establece un conjunto de criterios que todo caso de aplicación necesariamente satisface.[15]

Algo más adelante trataré de mostrar que si el positivismo jurídico normativista pretende defender una tesis respecto de los conceptos jurídicos que no resulte trivial, y, por lo tanto, que justifique su pretensión de que se trata de un planteamiento alternativo, la única respuesta posible a mi pregunta sobre si Redondo intenta resucitar al primer Ihering tiene que ser afirmativa: Redondo va a necesitar asumir postulados metodológicos bastante próximos a los del modelo de ciencia jurídica del primer Ihering. Pero, antes de desarrollar esta idea, volvamos la mirada brevemente a la crítica de Redondo al interpretativismo de Dworkin y démosle al enfoque dworkiniano la oportunidad de presentarse bajo la mejor luz posible.

3.2 El dilema de Dworkin

De acuerdo con Redondo, en casos como la brujería

> referidos a instituciones basadas en creencias sistemáticamente falsas, la propuesta de Dworkin puede ser reducida al absurdo: asumirla conduce inevitablemente a una contradicción pragmática. Ello porque no es posible adoptar una actitud interpretativa respecto de un tipo de institución y, contemporáneamente, sostener que ella carece de toda posible justificación. Lo cual, en un tipo de caso como el analizado, es lo que el teórico tiene razones para sostener.[16]

Llamaré a esta objeción de Redondo contra el interpretativismo *el dilema de Dworkin*.

No creo que esta objeción de Redondo sitúe a Dworkin ante ningún verdadero dilema. A lo largo de su obra Dworkin respondió muchas veces a objeciones semejantes. Por ejemplo, respecto del Derecho nazi Dworkin sostenía –y Redondo así lo refleja- que frente al Derecho nazi no cabía el desarrollo de una actitud interpretativa justificada.[17] ¿Cómo podría entonces el interretativismo afrontar realidades jurídicas tan radicalmente injustas como el Derecho nazi o las normas que castigaban la brujería? Creo que el Dworkin de *Law´s Empire* diría que en ambos casos no sería posible pasar de la fase preinterpretativa (en la cual se identifican los materiales jurídicos) a las fases interpretativas y postinterpretativas; el acceso a ambas fases, al estar guiadas por la racionalidad práctica, estarían vedadas tanto para el Derecho nazi como para la institución jurídica de la brujería. Pero el Dworkin de *Justice in Robbes* todavía podría ofrecer una respuesta más sofisticada: supuestos como el del Derecho nazi o la brujería muestran casos marginales en los que el nivel doctrinal del concepto dworkiniano de Derecho deviene impotente para ofrecer la mejor interpretación posi-

15 Redondo 2020: 113 (los énfasis son míos).

16 Redondo 2020: 124.

17 Dworkin 1986: 104-108.

ble de estas prácticas jurídicas de acuerdo con la filosofía moral y política. Por lo tanto, en estos casos habría que acudir a lo que Dworkin denomina el *nivel adjudicativo*. Este es un último nivel de carácter residual en el concepto dworkiniano de Derecho, en el que la pregunta relevante ya no es ¿cuál es la mejor reconstrucción posible de la práctica de acuerdo con el Derecho?, sino ¿en qué casos es necesario apartarse de lo que el Derecho nos dice y aplicar, en su lugar, consideraciones de tipo moral? No puedo ocultar que mis simpatías estarían con esta hipotética recomendación de Dworkin al tribunal encargado de juzgar los delitos de brujería.

3.3 Las ventajas del positivismo jurídico normativista

En contraste con las dificultades de Ross y de Dworkin, Redondo sostiene que el positivismo jurídico normativista se encuentra en una mejor posición para "identificar una institución y contemporáneamente *sostener que no disponemos con relación a ella de ninguna teoría adecuada, inteligible, o verdadera, capaz de justificarla*". [18]

Con indudables resonancias del primer Ihering, Redondo entiende que "los enunciados conceptuales puros" pueden ser determinantes para obtener conclusiones que permitan resolver problemas en los casos particulares:

> Aun no siendo traducible en enunciados sobre el contenido de las instituciones que permite identificar, todo concepto institucional delimita en un determinado modo una clase de institución y, consecuentemente, podremos llegar a conclusiones sustanciales muy distintas acerca de la misma según cómo hayamos identificado el concepto… En todo caso, tomando nuevamente como ejemplo el concepto de Derecho, los enunciados conceptuales puros que identifican o analizan el contenido de este concepto pueden ser determinantes al momento de obtener conclusiones doctrinarias o judiciales en un caso en particular.[19]

4 EL ARTE DE DECANTAR CONCEPTOS

Vayamos ahora al nudo gordiano del trabajo de Redondo. Redondo critica lo que denomina la *tesis de la necesaria traducibilidad* del contenido de las tesis meta teóricas conceptuales propias del positivismo normativista, o bien en tesis relativas al contenido de las instituciones jurídicas concretas, o bien en tesis relativas a su justificación. En su crítica a la *tesis de la necesaria traducibilidad* de los conceptos jurídicos, Cristina toma como aliado a Raz y asume la aproximación propuesta por este último a los conceptos institucionales. Y es aquí donde empiezan mis mayores discrepancias.

18 Redondo 2020: p. 125 (el énfasis es mío).

19 Redondo 2020: p. 113-114 (los énfasis son míos).

De acuerdo con Raz, podemos identificar significados criteriológicos que destacan un conjunto de propiedades necesarias y distintivas de instituciones sociales como el Derecho, la monarquía, la jurisdicción, sin necesidad de una explicación o teorización valorativa.[20] El 'análisis', en este caso, tiene como punto de partida los rasgos necesarios y caracterizantes de un tipo de institución (i.e. un concepto criteriológico) tal como los participantes lo entienden, pero es independiente del contenido de las reglas en las que contingentemente dichas instituciones consisten.

Pero ¿cómo identificar las propiedades necesarias y distintivas de los conceptos? ¿Cómo decantar los conceptos institucionales para desechar lo que en ellos hay de contingente y apropiarnos sólo de sus rasgos necesarios?

Voy a sostener que, según qué sea lo que entendamos por propiedades necesarias de un concepto institucional, el tamiz que usamos para cribar los conceptos institucionales y apropiarnos solo de sus rasgos necesarios será diferente: según qué sea lo que pretendemos obtener como resultado del cribado, vamos a seleccionar un tamiz u otro.

Se me ocurren al menos tres formas básicas de entender lo que son las propiedades necesarias de los conceptos institucionales. Puede tratarse: (1) de propiedades éticamente necesarias; (2) de *propiedades empíricamente necesarias*, o bien (3) de propiedades lógicamente necesarias. Pues bien, según sean las propiedades necesarias de las que nos que nos interese apropiarnos, seleccionaremos un tamiz distinto para cribar los conceptos.[21]

4.1 Las propiedades éticamente necesarias: el tamiz de la racionalidad práctica

Comencemos por las propiedades éticamente necesarias. Si en nuestra aproximación a los conceptos institucionales lo que buscamos es captar aquellas propiedades que resultan justificadas desde el punto de vista de la racionalidad práctica, parece imprescindible someter a los conceptos institucionales al cribado de la racionalidad moral y política. Por ejemplo, cuando afirmamos que la diferencia de sexo entre los dos cónyuges de un matrimonio no es una característica necesaria del concepto de matrimonio, no estamos negando que históricamente a las parejas del mismo sexo se les haya negado el acceso al ma-

20 Raz 1998: 249-282.

21 "I conclude that there are three distinct sources of necessity —the identity of things, the natural order, and the normative order— and that each gives rise to its own peculiar form of necessity. The three main areas of human thought —metaphysics, science and ethics— should each give rise to their own form of necessity. Neither form of necessity can be subsumed, defined, or otherwise understood by reference to any other forms of necessity; and any other form of necessity, if my survey is complete, can be understood by reference to them. … I must admit to finding some satisfaction in the thought that the three main areas of human inquiry—metaphysics, science, and ethics—should each give rise to their own form of necessity" (Fine 2005: 260).

trimonio; lo que pretendemos señalar es que no hay razones, desde el punto de vista de la racionalidad práctica o moral, para excluir de la institución a las parejas del mismo sexo.[22]

Pero, obviamente, este no puede ser método de cribado de los conceptos que Raz y Redondo defienden ya que llevaría, en último extremo, a incurrir en la primera de las dos reducciones criticadas por Redondo: supondría identificar las propiedades necesarias y distintivas de los conceptos institucionales pasándolos por un cribado de racionalidad práctica.

4.2 Las propiedades *empíricamente necesarias*: el tamiz de la constancia

Alternativamente, otra forma de apropiarnos de los rasgos necesarios de los conceptos institucionales sería tratar de determinar lo que de *empíricamente necesario* hay en los mismos. Volviendo al ejemplo del matrimonio, cuando afirmamos que la pertenencia al género humano de los cónyuges es una característica necesaria del concepto de matrimonio, podemos pretender señalar que ésta es una propiedad constante en todas las formas de matrimonio que se han generado a lo largo de la historia.

Naturalmente, para determinar qué propiedades de un concepto institucional resultan ser empíricamente necesarias no nos basta con la autocompresión de los sujetos involucrados en la práctica en un momento dado. Dicha autocomprensión tiene que ser el punto de partida, pero, por utilizar un símil de las matemáticas, lo que precisamos es esclarecer el factor constante de los conceptos institucionales, despreciando los rasgos variables de dicha autocomprensión.

¿Cómo calcular entonces el factor constante de los conceptos institucionales? Recordemos que Redondo nos previene del *localismo* del método del positivismo jurídico realista de Ross.

> En esta visión -señala Redondo- los hechos, propiedades o entidades institucionales, sencillamente no existen. En tal sentido, intentar describir o seleccionar las características más relevantes de esta aparente 'realidad' institucional es una empresa absurda que se apoya en la falsa presuposición de que hay algo que puede ser objeto de tal descripción o individuación.[23]

Ahora bien, me parece que una visión algo más sofisticada de la metodología Tû-Tû propuesta por Ross para el análisis de los conceptos jurídicos nos permitiría apropiarnos del factor constante de los conceptos institucionales,

22 Este es claramente el punto de vista de Dworkin, para quien –como Redondo nos recuerda en su trabajo– analizar o explicar este tipo de conceptos consiste en ofrecer una teoría sustantiva, en comprometerse con un conjunto de principios normativos que ofrezcan la mejor justificación moral de las prácticas y normas concretas en las que consiste el tipo de institución a la que el concepto se aplica.

23 Redondo 2020: 110.

sin renunciar por ello a una metodología empirista. Se trataría simplemente de superponer lo que intuimos que pueden ser diferentes instancias históricas de una misma institución tipo y descubrir los solapamientos en los antecedentes y en las consecuencias normativas asociadas. Por ejemplo, como he mencionado anteriormente, la pertenencia al género humano de los cónyuges es una propiedad que permanece constante y, así, sería un rasgo *empíricamente necesario* del concepto institucional de matrimonio.

¿Sería para el positivismo normativista esta sofisticación del modelo Tû-Tû de Ross un tamiz adecuado para apropiarse de los rasgos necesarios de los conceptos institucionales? Sospecho que no. Al fin y al cabo esta versión del modelo de Ross, aunque ya no se limita al análisis de los conceptos jurídicos en un tiempo y lugar determinados, descansa también en una metodología empirista; asumir la versión que he propuesto nos llevaría a incurrir en la otra de las dos reducciones criticadas por Redondo: supondría inferir el contenido del concepto del contenido normativo constante de una serie histórica de sus concreciones.

4.3 Las propiedades lógicamente necesarias: el tamiz de la racionalidad conceptual

En suma, al positivismo normativista no le interesa someter a los conceptos institucionales ni al tamiz de la racionalidad práctica ni al de la constancia empírica para apropiarse de sus rasgos necesarios. Por el contrario, lo que al positivismo normativista le interesa son "instituciones lingüísticas de segundo nivel", que son previas a las instituciones jurídico políticas reales, y de las que las instituciones reales constituyen instanciaciones.

Y esto nos lleva a fijar la atención en la tercera forma de apropiarnos de los rasgos necesarios de los conceptos institucionales a las que antes he hecho alusión. Se trataría de determinar cuáles son sus propiedades *lógicamente necesarias*. Naturalmente, cuando aludo a las propiedades lógicamente necesarias de los conceptos no me estoy refiriendo a una necesidad lógica en sentido estricto, sino a una necesidad lógica en sentido amplio,[24] en virtud de la cual, las propiedades necesarias de los conceptos serían aquellas que de manera necesaria se infieren lógicamente de verdades conceptuales básicas. De ahí que este tipo de necesidad lógica en sentido amplio sea llamada también necesidad metafísica.[25]

24 "Given the notion of metaphysical necessity, the various narrower notions of can each be defined by restriction. Each of these other forms of necessity can, in other words, be regarded as a s*pecies* of metaphysical necessity" (Fine 2005: 235 y ss.).

25 "Many philosophers of the 'old school' would take it to be that of logical necessity in the narrow sense. This is the sense in which it is necessary that anything red is red, though not necessary that nothing red is green or that I am a person. The philosophers of the 'new school', on the other hand, would take the single underlying notion to be that of logical necessity in the broad sense or what is sometimes called 'metaphysical' necessity. This is the sense of necessity which obtains in virtue of the identity of things (broadly conceived).Thus in this sense not

5 LA ESENCIA DEL POSITIVISMO JURÍDICO NORMATIVISTA

Si las propiedades necesarias de los conceptos que el positivismo normativista anda buscando son aquellas que de manera lógicamente necesaria se infieren de verdades conceptuales básicas, cabe preguntarse hasta qué punto es coherente este esencialismo lingüístico con su programa positivista de ciencia del Derecho. La Escuela de la Exégesis, la Jurisprudencia de Conceptos y el Formalismo Jurisprudencial ya transitaron hace más de un siglo por ese camino y su propuesta se dio de bruces con "la revuelta contra el formalismo", un movimiento de reacción frente al carácter metafísico e idealista de las escuelas formalistas anteriores. El éxito del positivismo jurídico normativista supondría una repetición cíclica de la historia.

Pero, sobre todo, cabe preguntarse por la utilidad de la empresa analítica del positivismo normativista. Redondo defiende la superioridad del enfoque del positivismo normativista –frente al positivismo jurídico realista y al enfoque interpretativista– debido a que el enfoque normativista

> permite, sin caer en contradicción, identificar una institución y contemporáneamente sostener que no disponemos con relación a ella de ninguna teoría adecuada, inteligible, o verdadera, capaz de justificarla.[26]

Pero yo creo que un juicio de las características anteriores se obtiene de combinar una aproximación a los conceptos institucionales de tipo empirista, que nos lleva a afirmar que instituciones como la brujería han existido, y una de tipo valorativo, que nos lleva a afirmar que no existe ninguna teoría capaz de justificarla. Por el contrario, no veo cómo el positivismo normativista podría sustentar ninguna de ambas afirmaciones (ni mucho menos la conjunción de las mismas): la empresa analítica del positivismo normativista, por sí misma, no permite discriminar ni (i) entre instituciones reales e instituciones imaginarias ni (ii) entre instituciones racionalmente justificadas y no justificadas (como la brujería).

Naturalmente, nada de lo que hasta aquí he sostenido niega la necesidad de una empresa analítica de reconstrucción de los conceptos institucionales. Pero

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only is it necessary that anything red is red or that nothing is both red and green, but also that I am person or that 2 is a number" (Fine 2005: 235 y ss.).

"Suppose one starts with the narrow notion of logical necessity (or with some other suitably narrow notion). The main problem will then be to define the broader notions of necessity; and the obvious way to do this is by relativization. Now let it be granted that there are some basic conceptual truths – perhaps given by the definitions of the various concepts - and that the class of such truths can be defined without appeal to any modal notions (besides logical necessity). We might then define a proposition Q to be a conceptual necessity if it follows from the definitions, i.e. if the conditional, if P then Q, is logically necessary for some conjunction P of basic conceptual truths. The conceptually necessary truths, in other words, may be taken to be those that are logical necessary relative to or conditional upon the basic conceptual truths" (Fine 2005: 235 y ss.).

26 Redondo 2020: 125.

pienso que esta empresa analítica sólo puede tener sentido como un enfoque auxiliar, coadyuvante de los otros dos enfoques –el planteamiento reduccionista no localista que he defendido y el interpretativista- que serían las perspectivas que ofrecen criterios para seleccionar las propiedades necesarias de los conceptos institucionales.

Si la empresa analítica se concibe como un enfoque auxiliar, no me parece que el positivismo jurídico normativista marque una diferencia significativa respecto del reduccionismo rossiano o el interpretativismo dworkiniano, hasta el extremo de justificar que el positivismo jurídico normativista pueda ser considerado como un enfoque sobre los conceptos jurídicos alternativo a los otros dos: si toda la propuesta analítica de reconstrucción de los conceptos institucionales del positivismo jurídico se reduce al análisis lingüístico de los conceptos jurídicos, no parece existir nada propio y distintivo en este enfoque: ¡claro que para reconstruir conceptualmente una institución jurídica necesitamos del lenguaje!, pero este requerimiento está ya satisfecho por los enfoques de Dworkin y de Ross.

En suma, creo que el enfoque del positivismo jurídico normativista presenta más inconvenientes que ventajas: si lo que el positivismo jurídico normativista propone es un criterio propio y diferenciado que permita identificar los rasgos necesarios de los conceptos jurídicos institucionales, no veo cómo puede escapar a la acusación de esencialismo; pero, alternativamente, si renuncia a este criterio distintivo, y lo que simplemente sostiene es que a la hora de reconstruir conceptos jurídicos institucionales precisamos llevar a cabo análisis lingüísticos, entonces estamos ante una tesis verdadera, pero trivial.

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Ángeles Ródenas*

The secret life of concepts
(Or on the art of winnowing concepts)

This paper aims to critically examine Redondo's characterization of normative legal positivism's theory of legal concepts, as well as to set forth some potential strategies for defending the two other theories of legal concepts that Redondo criticizes: Dworkinian interpretivism and Rossian reductionism.

Keywords: Redondo (Maria Cristina), normative legal positivism, theory of legal concepts, Ross (Alf), Dworkin (Ronald), institutional concepts, necessary properties of concepts, conceptual jurisprudence, legal institutions

1 INTRODUCTION

In her article "Institutional concepts: A critical view on the reductionist and interpretive approaches",[1] Cristina Redondo reflects on three analytical approaches to legal concepts, which she calls the *reductionist* approach, the *interpretive* approach, and the *normative legal positivism* approach, respectively. Redondo presents these three approaches very clearly and also conducts a critical evaluation of the first two approaches, comparing their weaknesses with the strengths of the normative legal positivism approach. Although Redondo insists that these three approaches are not incompatible, since they employ different objects of study to different ends, both the subtitle of her article—"A critical view on the reductionist and interpretive approaches"—and her defence of normative legal positivism suggest her preference for this third approach.

This paper aims to critically examine Redondo's defence of normative positivism's theory of institutional legal concepts. In section 2, I will summarize, as concisely as possible, her description of the three approaches mentioned above. In section 3, I will briefly describe how she evaluates the achievements of these three approaches by testing their ability to reconstruct the legal concept of witchcraft, and at the same time I will present some potential strategies for defending the reductionist and interpretive approaches from her critiques. The core of my disagreement with Redondo then appears in the final two sections. In section 4, I explain how normative legal positivism can "identify the distinctive and necessary properties of concepts". Finally, in section 5, I question the

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1 Redondo 2020: 103-127.

supposed advantages that Redondo attributes to the normative positivism approach to analysing institutional legal concepts.

2 THREE APPROACHES TO INSTITUTIONAL LEGAL CONCEPTS

As mentioned in the introduction, Redondo carries out an analysis of three possible approaches to institutional legal concepts, which she calls the *reductionist* approach, the *interpretive* approach, and the *normative legal positivism* approach, respectively.

2.1 Dworkin's interpretive approach

Redondo uses as a model of the interpretative approach Dworkin's interpretive conception of law. As we know, Dworkin distinguishes between three types of concepts: criterial concepts, natural kind concepts, and interpretative concepts.[2] Both criterial concepts and natural kind concepts provide a test for their own correct application. For criterial concepts, the test depends on the agreements or conventions existing in the use of the concept, while, for natural kind concepts, the test depends on the natural essence or structure (physical or biological) of the examples or instances of the concept at issue. Unlike criterial concepts and natural kind concepts, interpretative concepts, such as *law*, are sensitive to the values that those using them attribute to the objects to which the concepts are applied. Thus, for example, all legal theory, even when it does not identify or analyse it expressly, uses a concept of law. Although Dworkin was concerned only with the concept of law, and not with specific legal concepts like jurisdiction, the republic, the family, etc., Redondo argues—correctly, in my opinion—that Dworkinian interpretivism can be extended to these more limited normative institutions, since it presupposes the same type of interpretative attitude that underlies the concept of law in general.

2.2 Ross's reductionist approach

The second approach that Redondo considers in her article is the reductionist or realist approach, which is based on the Rossian model.[3] As we know, Ross argues that some legal concepts, such as "property", lack a reference point, since their function is to operate as terms of connection, replacing, in some cases, a disjunction of determining facts and, in others, a conjunction of normative consequences. For example, when we say: "The owner can receive the fruits and dispose of them", the word "owner" replaces and summarizes the disjunction of facts

2 Dworkin 2006: 9-12; Dworkin 2011: 158-163.

3 Ross 1957: 818-821.

that, according to a specific legal system, condition the normative consequences there mentioned (i.e. the right to receive and dispose of the fruits). On other occasions, the term "property" or "owner" serves to replace a combination of foreseen normative consequences. For example, when we say: "A person who receives something through sale, inheritance, or prescription is the owner of that thing." In this case, we are using the word "owner" instead of reporting the entire list of duties, prohibitions, and rights established by the legal system for this type of case.

In Redondo's view, legal concepts thus understood do not identify a general type or class of institution (or entity, property, or institutional fact), but rather specific institutions, that is, combinations of norms that are in force in a set place and time. Legal concepts are only a summary or a brief manner of presenting the norms that make up a given institution. As such, Redondo argues that using Ross's approach to try to describe or select the most relevant characteristics of this apparent institutional "reality" is an absurd task that is based on the false assumption that there is something that can be the object of such a description or individuation. Analysing a legal institutional concept consists in showing how it reduces to a combination of norms existing in a specific place and time.

Later on, I will return to Ross's approach in order to offer a reconstruction (one that is somewhat more charitable than Redondo's reconstruction) that shows the full potential of this approach, leaving aside the question of whether or not it is more faithful to Ross's original intent.

2.3 Raz's (and Redondo's) normative positivism approach

The third approach that Redondo considers is normative positivism, for which she uses Raz as a model. According to normative legal positivism, Redondo writes,

> it is possible to identify concepts that define types of legal institutions. For example, specific legal institutions, such as money, the monarchy, property, as well as the more general legal institution that we call "law" or "legal order". A concept, such as it is understood by this position, is a group of distinctive properties which the examples (or at least the paradigmatic examples) that fall into its field of application necessarily satisfy.[4]

Viewed from this perspective, "a legal concept is a linguistic institution endowed with a semantic content that defines a kind of legal institution and refers to concrete legal institutions endowed with legal—political or moral—content".[5]

3 THE WITCHCRAFT TEST

To assess the achievements of these three approaches, Redondo tests their capacity to reconstruct the legal concept of "witchcraft". In this section, I will

4 Redondo 2020: 111.

5 Redondo 2020: 112.

briefly present the disadvantages that Redondo attributes to the first two approaches, and the advantages that she sees in normative legal positivism.

3.1 Ross's localism and scepticism

According to Redondo, a proposal like Ross's would suffer from two great difficulties that would prevent it from giving an account of the general institutional concept of "witch" or "witchcraft".

First, on the one hand, this concept would collapse into "the contingency contained within this example, of this institution having a specific time and place", and that, "[a]t the same time, … the general concept that allows us to identify the existence of examples of institutions of the *same* type is hidden from view."[6]

I will call this first objection raised by Redondo against Ross the *localism objection*.

Second, on the other hand, Ross, in his 1951 work, associates the acceptance of entities as properties of institutional facts, to the acceptance of entities as properties of merely apparent facts, generated by primitive superstitions. Specifically, Alf Ross compares our belief that under certain circumstances there are certain facts or institutional properties, to the belief of members of a primitive tribe where under certain circumstances an individual becomes *tû-tû*. In this analogy, he equates the acceptance and justification of statements referring to entities or institutional properties, which can be perfectly explained on empirical foundations compatible with our scientific knowledge, with the acceptance and justification of statements referring to entities of a magical nature, whose admission can be considered systematically false, and that should be rejected.[7]

I will call this second objection raised by Redondo against Ross the *scepticism objection*.

I will address the *localism objection* in section 4, where I will attempt to offer a reconstruction of Ross's approach that resists Redondo's critique. Here, I address only the *scepticism objection*, and to do this it is necessary to contextualize his proposal. When Ross draws an analogy between *being tû-tû* and *being an owner*, his focus is on theories based on *legal natures*. What Ross intends to criticize is the idea that institutional legal concepts have an *essence*, and he proposes, instead, to explain them as terms that link conditioning facts and acts, on the one hand, and legal consequences, on the other.

Let us not forget that the search for legal essences or natures is a flaw in the thinking of the Historical School and its heir, the Jurisprudence of Concepts; a flaw that, as Heck correctly points out, "has persisted in the legal theory of Continental Europe long since the flags of that romantic movement were

6 Redondo 2020: 119.

7 Redondo 2020: 119-120.

lowered"[8] and, one might add, since the second Jhering brought an end to the Jurisprudence of Concepts.

Let's examine some examples of how the people involved explain their search for legal natures. Esmein, for example, writes:

> Every institution, no matter which one, whether belonging to public law or private law, rests on a general idea of what is its application and development. This idea is a guiding principle and the rules that it confers consist only of the consequences that are deduced from that principle.[9]

Similarly, Du Pasquier writes:

> The nature of a legal institution consists of technical procedures: legal categories through whose mediation the law achieves and sanctions the general idea that serves as a principle for that institution.[10]

In that "Heaven of legal concepts" (from which the Jhering advises jurists to descend[11]) concepts are *a priori* and legal institutions are *a posteriori* instantiations of essential concepts. As Heck critically observes:

> Conceptual Jurisprudence considered general scientific concepts to be fundamental causal concepts of law, that is to say, as the cause of legal norms … Today, this old causal theory is rejected. Even when opinions about the origins of law differ greatly, at their core they all agree that legal prescriptions go before their organization in general concepts.[12]

In line with Heck's objection, Genaro Carrió, now more than fifty years ago, formulated a clear and robust critique of the search for legal natures:

> Debates about supposed legal natures, when those arguing clearly take responsibility neither for what they are seeking nor for the true cause of their disagreement are at once fruitless and unsolvable. These wasted efforts are originated, in this case, in the following: it is thought that each time that a combination of laws is presented with a specific unity, which makes one believe in a unified designation, that designation is the name of a *sui generis* entity, possessing some characteristic or central property from which are derived, as they generally say, all the rules of the sector at issue, as well as others that, although they are not expressly contained in it, are "engendered"—as the first—by the productive central idea, or legal nature.[13]

Might Redondo's proposal be an attempt to resurrect the first Jhering?

Recall that Redondo argues that normative legal positivism makes the most basic legal institutions depend on what she calls *linguistic institutions*, leaving the former subordinate to the latter:

8 Heck 1948b: 99-256.

9 Esmein 1900: 492ff. (cited in Esteve 1956).

10 Du Pasquier 1942: 150ff. (cited in Esteve 1956).

11 Jhering 1933: 215-264.

12 Heck 1948a: 527-528.

13 Carrió 1951: 102-103.

> A fundamental point of the NLP [normative legal positivism] proposal is that legal institutions presuppose and are built using more basic institutions—*linguistic institutions* … In the vision of NLP it can be said that a relationship of stratification exists between these two types of institutions … An institutional legal concept constitutes an example or specific case of a linguistic institution. It is a linguistic institution that delimits a type of legal institution and whose instances of application are specific examples of legal institutions.[14]

Redondo continues:

> It is important to emphasize that, among the institutional concepts on the one hand, and the legal, political, or religious institutions on the other, there is a relationship of exemplification that is not an inferential one; even less one of identity. Between the content of an institutional concept and the existence of a specific institution that falls within its field of application, there is a necessary or constitutive relationship, i.e., the concept establishes a group of criteria that all cases of application necessarily satisfy.[15]

Later, I will try to demonstrate that, if normative legal positivism plans to defend a thesis about legal concepts that is not trivial and, as such, justifies its aspiration to be treated as an alternative approach, then the only possible response to my question as to whether Redondo is attempting to revive the first Jhering is in the affirmative. Redondo will need to adopt methodological postulates that are quite close to those of the first Jhering's model of legal science. Before developing this idea, however, let's return briefly to Redondo's criticism of Dworkin's interpretivism, and give that approach the opportunity to be presented in the best possible light.

3.2 Dworkin's dilemma

According to Redondo, in cases such as witchcraft,

> referring to institutions based on systematically false beliefs, Dworkin's proposal can be reduced to absurdity: assuming it leads inevitably to a pragmatic contradiction. That is because it is not possible to adopt an interpretative attitude with respect to that type of institution and at the same time argue that it lacks *all* possible justification, which is what the theorist has reasons to argue in the type of case that was analyzed.[16]

I will call this objection raised by Redondo against interpretivism *the Dworkin dilemma*.

I do not believe that this objection places Dworkin in any real dilemma. Throughout his work, Dworkin often responds to similar criticisms. For example, with respect to Nazi law, Dworkin argues—as Redondo recognizes—that in the face of Nazi law it is not possible to develop a justified interpretive attitude.[17] How, then, could interpretivism confront legal realities as radically un-

14 Redondo 2020: 112-113 (my emphasis).

15 Redondo 2020: 113 (my emphasis).

16 Redondo 2020: 124.

17 Dworkin 1986: 104-108.

just as Nazi law or norms that punish witchcraft? I believe that the Dworkin of *Law's Empire* would say that in both cases it would not be possible to proceed beyond the pre-interpretive phase (in which the legal materials are identified) to the interpretive and post-interpretive phases: since these phases are guided by practical rationality, access to them would be prohibited both for Nazi law and for the legal institution of witchcraft. The Dworkin of *Justice in Robes*, however, could offer an even more sophisticated answer: in marginal cases like Nazi law or witchcraft, the doctrinal level of the Dworkinian concept of law is powerless to offer the best possible interpretation of legal practices in accordance with moral and political philosophy. Therefore, in such cases it would be necessary to resort to what Dworkin calls the *adjudicative level*. This is an inessential last level in the Dworkinian concept of law, at which the relevant question is no longer which is the best possible reconstruction of the practice in accordance with the law, but instead: in which cases is it necessary to depart from what the law is, and apply in its place moral considerations? I must admit that my sympathies lie with this hypothetical recommendation from Dworkin to the court that is responsible for judging cases of witchcraft.

3.3 The advantages of normative legal positivism

In contrast with the difficulties of Ross and Dworkin, Redondo argues that normative legal positivism finds itself in a better position "to identify an institution, and at the same time *argue that we don't have, in relation to it, an adequate, intelligible, or true theory that is capable of justifying it*".[18]

Undeniably echoing the first Jhering, Redondo explains that "pure conceptual statements" can be critical for obtaining conclusions that allow us to solve problems in particular cases:

> Even when they are not possible to translate into statements about the content of the institutions which they allow us to identify, all institutional concepts delimit in a specific way a kind of institution, and consequently, we can reach substantial conclusions about it that are very different from each other, according to how we have identified the concept … In any case, taking again the concept of law as an example, the pure conceptual statements that identify or analyze the content of this concept can be critical when obtaining doctrinal or legal conclusions in a specific case.[19]

4 THE ART OF WINNOWING CONCEPTS

We have now arrived at the Gordian knot of Redondo's work. Redondo criticizes what she calls the *thesis of translatability* of the content of meta-theoretical conceptual theses belonging to normative positivism, either in theses relating to

18 Redondo 2020: 125 (my emphasis).

19 Redondo 2020: 113-114.

the content of concrete legal institutions or in theses relating to their justification. In her critique of the *thesis of translatability* of legal concepts, Redondo allies herself with Raz and adopts his approach to institutional concepts. Here is where my greatest differences begin.

According to Raz, we can identify criteriological meanings that highlight a combination of necessary and distinctive properties of social institutions such as law, monarchy and jurisdiction, without needing any value-based explanation or theorization.[20] The "analysis", in this case, takes as its starting point the necessary and characteristic qualities of a type of institution (i.e. a criterial concept) as understood by the participants, but it is independent of the content of the rules that those institutions contingently consist in.

But how can we identify the necessary and distinctive properties of concepts? How can we analyse institutional concepts, discarding what is superfluous and focusing only on their necessary characteristics?

I will argue that, depending on what we understand to be the necessary properties of an institutional concept, the process that we use to winnow institutional concepts down to just their necessary characteristics will be different. Depending on what we plan to gain as a result of this winnowing, we will select either one process or another.

There are at least three basic methods for determining the necessary properties of institutional concepts. The method can concern (1) *ethically necessary* properties, (2) *empirically necessary* properties, or (3) *logically necessary* properties. Depending on which idea of necessity interests us, we will choose a different process of winnowing down the concepts.[21]

4.1 *Ethically necessary* properties: The practical rationality sieve

Let's begin with properties that are *ethically* necessary. If, in our approach to institutional concepts, we are looking to capture those properties that are justified from the perspective of practical rationality, it seems essential to winnow down the institutional concepts using moral and political rationality. For example, when we assert that the spouses' being of different sexes is not a necessary characteristic of the concept of marriage, we are not denying that, historically,

20 Raz 1998: 249-282.

21 "I conclude that there are three distinct sources of necessity —the identity of things, the natural order, and the normative order— and that each gives rise to its own peculiar form of necessity. The three main areas of human thought —metaphysics, science and ethics— should each give rise to their own form of necessity. Neither form of necessity can be subsumed, defined, or otherwise understood by reference to any other forms of necessity; and any other form of necessity, if my survey is complete, can be understood by reference to them. … I must admit to finding some satisfaction in the thought that the three main areas of human inquiry—metaphysics, science, and ethics—should each give rise to their own form of necessity" (Fine 2005: 260).

same-sex couples have been denied access to marriage. What we are trying to point out is that there are no reasons, from the point of view of practical or moral rationality, to exclude same-sex couples from this institution.[22]

But, obviously, this cannot be the method of winnowing down concepts that Raz and Redondo defend, since it would, at its extreme, fall victim to the first of Redondo's objections mentioned above; that is, it would entail identifying the necessary and distinctive properties of institutional concepts by submitting them to a practical rationality sieve.

4.2 *Empirically necessary* properties: The unchanging factor sieve

Alternatively, another way to find the necessary elements of institutional concepts would be to determine which of their properties are *empirically* necessary. Returning to the example of marriage, when we assert that the spouses' belonging to the human race is a necessary characteristic of the concept of marriage, we may attempt to demonstrate that this is a property that is constantly found in all known real[23] forms of marriage.

Naturally, to determine which of an institutional concept's properties are empirically necessary, the self-understanding of the subjects involved in a given moment is insufficient. Such self-understanding has to be the starting point, but, mathematically speaking, what we need is to clarify the constant factor of institutional concepts, disregarding the variable characteristics of our self-understanding.

How, then, do we calculate the constant factor of institutional concepts? Recall that Redondo warns us of the *localism* of Ross's method of realist legal positivism. Redondo writes:

> In this view, institutional facts, properties, or entities simply *do not exist*. In that sense, trying to describe or select the most relevant characteristics of this apparent institutional "reality" is an absurd undertaking supported by the false presupposition that there *is* something that can be the object of such description or individuation.[24]

It seems to me, however, that a somewhat more sophisticated vision of the Tû-Tû methodology proposed by Ross for the analysis of legal concepts would allow us to find the constant factor of institutional concepts, without abandoning an empirical methodology. This would simply require superimposing what

22 This is clearly the view of Dworkin, for whom —as Redondo reminds us in her article—analysing or explaining the type of concept consists in offering a substantive theory, which commits to a combination of normative principles that provide the best moral justification of the specific practices and norms that exemplify the type of institution to which the concept is applied.

23 In classical (Greek and Roman) mythology, human beings are married and have children with gods and goddesses very often.

24 Redondo 2020: 110.

we understand to be different historic examples of the same type of institution and discovering the overlap in their antecedents, and in the associated normative consequences. For example, as I mentioned earlier, the spouses' belonging to the human race is a constant characteristic and, as such, *empirically* necessary to the concept of marriage.

Would this more sophisticated model of Ross's Tû-Tû methodology be an adequate process for determining the necessary characteristics of institutional concepts for normative positivism? I suspect not. At the end of the day, this version of Ross's model, although it is no longer limited in its analysis of legal concepts to a specific place and time, still rests on an empirical methodology. So adopting the version that I have proposed would lead us to fall victim to the other of Redondo's two objections; that is, it would entail inferring the content of the concept of the constant normative content from its historical series of instantiations.

4.3 *Logically necessary* properties: The conceptual rationality sieve

In sum, normative positivism is not interested in subjecting institutional concepts to the practical rationality sieve, or the unchanging factor sieve, to determine their necessary qualities. On the contrary, normative positivism is interested in the "second-level linguistic institutions" that predate real political legal institutions, and of which real institutions are instantiations.

This brings us to the third way of finding the necessary qualities of institutional concepts to which I alluded above. This method concerns which properties are *logically* necessary. Naturally, when I refer to the logically necessary properties of concepts, I am not referring to logical necessity in a strict sense, but rather to logical necessity in a broad sense,[25] by virtue of which the necessary properties of concepts would be those that are inferred logically from basic conceptual truths in a necessary manner. Accordingly, such broad logical necessity is also called metaphysical necessity.[26]

25 "Given the notion of metaphysical necessity, the various narrower notions of necessity … can each be defined by restriction. Each of them can be regarded as a *species* of metaphysical necessity" (Fine 2005: 237).

26 "Many philosophers of the 'old school' would take it to be that of logical necessity in the narrow sense. This is the sense in which it is necessary that anything red is red, though not necessary that nothing red is green or that I am a person. The philosophers of the 'new school', on the other hand, would take the single underlying notion to be that of logical necessity in the broad sense, or what is sometimes called 'metaphysical' necessity. This is the sense of necessity that obtains in virtue of the identity of things (broadly conceived). Thus, in this sense not only is it necessary that anything red is red or that nothing is both red and green, but also that I am person or that 2 is a number" (Fine 2005: 236).
"Suppose one starts with the narrow notion of logical necessity (or with some other suitably narrow notion). The main problem will then be to define the broader notions of necessity; and the obvious way to do this is by relativization … Now let it be granted that there are some

5 THE ESSENCE OF NORMATIVE LEGAL POSITIVISM

If the necessary properties of concepts that normative positivism seeks are those that are logically necessary, on the basis of inferences derived from basic conceptual truths, then one wonders to what extent this linguistic essentialism is coherent with the positivist agenda of legal science. The School of Exegesis, the Jurisprudence of Concepts, and Jurisprudential Formalism followed this path for more than a century, and their proposal fell flat on its face with "the revolt against formalism", a movement that rejected the metaphysical and idealistic character of the older formalist schools. The success of Redondo's normative legal positivism would entail a cyclical repetition of history.

Above all, however, one questions the usefulness of the analytical undertaking of normative positivism. Redondo argues that the normative positivism approach is superior—as compared to realist legal positivism and the interpretive approach—because the normative approach

> allows us, without falling into a contradiction, to identify an institution, and at the same time argue that we don't have, in relation to it, an adequate, intelligible, or true theory that is capable of justifying it.[27]

I believe, however, that a judgement of the previous characteristics is obtained from combining an empirical approach to institutional concepts, which leads us to assert that institutions such as witchcraft have existed, with a value-based approach, which leads us to assert that there is no theory capable of justifying this institution. As for normative positivism, I do not see how it can support either of these assertions (let alone the combination of the two). The analytical undertaking of normative positivism, alone, does not permit a distinction either (i) between real institutions and imaginary institutions, or (ii) between rationally justified institutions and unjustified institutions (such as witchcraft).

Naturally, none of what I have argued so far negates the need for the analytical task of reconstructing institutional concepts. Nevertheless, I think that this analytical task can only make sense as a secondary approach, supporting the other two approaches —the non-local reductionist approach that I have defended, and the interpretive approach—which would be the perspectives that offer criteria to select the necessary properties of institutional concepts.

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basic conceptual truths—perhaps given by the *definitions* of the various concepts—and that the class of such truths can be defined without appeal to any modal notions (besides logical necessity). We might then define a proposition Q to be a conceptual necessity if it follows from the definitions: that is, if the conditional, 'if P then Q', is logically necessary for some conjunction P of basic conceptual truths. The conceptually necessary truths, in other words, may be taken to be those that are logical necessary *relative to*, or *conditional upon*, the basic conceptual truths" (Fine 2005: 236).

27 Redondo 2020: 125.

If the analytical task is conceived as a secondary approach, then normative legal positivism does not seem to me to make a significant difference—in comparison with Rossian reductionism and Dworkinian interpretivism—to the point that it could justifiably be considered an alternative approach to legal concepts. If the entire analytical proposal of reconstructing the institutional concepts of legal positivism is reduced to the linguistic analysis of legal concepts, then there does not seem to be anything unique or distinctive to this approach: of course we need language to reconstruct a legal institution conceptually! But this requirement is already satisfied by Dworkin and Ross's approaches.

In conclusion, I believe that the normative legal positivism approach has more disadvantages than advantages. If what normative legal positivism proposes is its own differentiated criterion that enables the identification of the necessary characteristics of institutional legal concepts, then I do not see how it can evade accusations of essentialism. Alternatively, if it renounces this distinctive criterion and simply asserts that we need to conduct linguistic analyses when reconstructing institutional legal concepts, then we are faced with a thesis that is true, but trivial.

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SYMPOSIUM ON VISIONS OF CONSTITUTIONALISM: THEORY

Edited by Donald Bello and Ana Cannilla

Constitutional scholars are concerned with the pressing issues that liberal democracies face today and thus strive to rethink and improve the theory and practice of constitutionalism accordingly. By bringing together leading experts in constitutional and political theory to discuss relevant issues of constitutional government and democratic theory, this symposium on Visions of Constitutionalism responds to that concern.

Readers of Revus will enjoy a wide range of novel approaches to constitutionalism. Bringing fresh ideas to the fore, rethinking core debates and developing key ideas in constitutional theory and practice, the symposium unfolds in two issues of Revus. In this issue our contributors originally point out challenges and shortcomings of contemporary constitutional theory, dealing with them in ways that develop fruitful new philosophical lines of constitutional thought. In the next issue, our authors pose urgent questions of institutional design and shed light on how to make different views of constitutionalism work, ranging from theoretical proposals on how to institutionalize different forms of constitutionalism to relevant analysis on the institutional instantiations of constitutional theories presenting themselves as alternatives to more traditional approaches which underscore the role of constitutions as curbs on majoritarian political power.

We hope the symposium will help readers assess whether or to what extent our received views of constitutionalism and institutional design are fit for the purpose of tackling current political challenges to liberal democracies. Examining sundry relevant problems of constitutional theory and practice, our contributors present an ample breadth of perspectives that will add to the existing literature on constitutionalism and contribute to pushing the field of constitutional thought forward in relevant and original ways.

Eoin Daly*

Contesting the idea of disagreement as the circumstance of politics

Many political and legal philosophers believe that disagreement forms part of the "circumstances of politics", even to a point where we might say that disagreement is *the definitive circumstance* of politics. That is to say, disagreement is understood as a central problem of politics, with which the enterprise of constitutional design is centrally concerned. Disagreement is both insoluble and is constitutive and characteristic of politics as such. And, for the most part, liberal and republican theorists dispute only the subject or extent of disagreement, with Rawls emphasizing disagreement as to questions of the *good* amidst a presumed consensus on questions of right or of justice, but with Bellamy and Waldron arguing that disagreement extends to questions of right as well as good, and that constitutions should be designed accordingly. In turn, such framings of disagreement underlie questions of institutional design, most notably the problem of judicial review and its relation to democratic legitimacy. The purpose of this paper is to challenge this dominant understanding of disagreement *as such* as being a definitive circumstance of politics, and therefore, as a central problem of constitutional design. I make this argument with reference to two thinkers in particular, Jean-Jacques Rousseau and Pierre Bourdieu. Drawing on Bourdieu, I will argue that ostensible disagreement – as expressed in competing assertions or claims as to the right or the good – need not necessarily be framed in *propositional* terms, but can rather be understood as socially *performative* and as exercises of symbolic and social power. Thus, disagreement as such is not antecedent to political and social order but is rather constituted and formatted by it. In turn, I will argue that Rousseau's constitutional projects can be understood as reflecting a similar insight. In contrast to Rawlsian liberalism, the fundamental problem of political order, for Rousseau, is not a propositional one at all, concerning disagreement as to the right or the good. The starting point of political order is not the search for the good (or the right), but rather, the problem of, and the need for recognition, as the social context within which claims of right and good are asserted. A central challenge of politics, then, is how it is possible to constitute a shared symbolic universe in which political communication and political discourse can assume transparent and non-dominating forms. I will conclude by offering examples as to how constitutional design can account for this problem.

Keywords: disagreement, Rawls (John), Rousseau (Jean Jacques), constitutional design

1 INTRODUCTION

Political theorists contest the extent to which disagreement in political life is insoluble or intractable, and conversely as to the range of agreement or consensus that is aimed at or assumed. On the one hand, *normativist liberals* led by Rawls assume intractable disagreement as to the good life, but build their

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theories on an assumed agreement or consensus as to justice itself.[1] On the other hand, those I will call the *procedural republicans*, led by Bellamy and Waldron, reject the idea of basing political unity or stability on substantive moral consensus, or on any "overlapping consensus" of comprehensive doctrines, and instead they contend that disagreement extends to questions of justice as well as questions of the good.[2] For a realist sensibility, it seems important to understand disagreement – as to the good *and* the right – as being part of, or even as defining the *circumstances of politics*, as the set of circumstances that define politics and make it necessary. However, I will argue that a better realist response to normativist liberalism – compared with that exemplified by the procedural republicans – is not to contest the range or extent of disagreement and its insolubility in politics, but rather to challenge the centrality of agreement (and disagreement) as central concerns of statecraft and political thought. I will make this argument – for a different realist approach to agreement and disagreement – with reference to two, ostensibly very different thinkers, Rousseau and Bourdieu. Both are skeptical, at least implicitly, as to the political relevance or centrality of disagreement, because both view political argument itself not primarily as propositional, but rather as socially performative, as an exercise of social and symbolic power and as a site of insidious domination. The suggests that the starting point of political order is neither the search for agreement on the good (or the right), nor the establishment of an agreed decision-procedure in contexts of disagreement, but rather, the difficulty of establishing political communication in a social context defined by intractable inequalities of symbolic power. A central challenge of politics, then, is how it is possible to constitute a shared symbolic universe in which political communication and political discourse can assume transparent and non-dominating forms. I will conclude by offering examples as to how constitutional design can account for this problem.

2 SPEECH, ARGUMENT, DOMINATION: ROUSSEAUIAN INSIGHTS

While Rawls suggests that reasonable pluralism[3] – the coexistence of contradictory comprehensive doctrines – is the central problem and the starting point, so to speak of political theory and constitutional design, such considerations are curiously absent in Rousseau's thought. In fact, he depicts the starting point of politics in a radically different way. The central problem of politics is not that citizens disagree about conceptions of the good, or indeed about justice

1 Rawls 1996.

2 E.g. Bellamy 2007; Waldron 2006.

3 Rawls 1996.

either; it is not in fact that they *disagree*, as such, at all. It is, rather, that any such disagreements take place in a context of what we might now call symbolic power and symbolic violence.[4] And Rousseau's constitutional preoccupations differ accordingly. The challenge of constitutional design is not to establish stability and consensus amidst disagreement as to the good; rather it is to constitute a shared symbolic universe in which political communication can occur in non-dominating ways.[5] Thus political unity or stability can be grounded neither in a principled moral consensus nor in the agreement-procedure itself.

2.1 The genealogy of domination

Rousseau's skepticism as to reasonable pluralism is evident in the historical genealogy he sets out in the second *Discourse*, which speculatively describes the emergence of domination and servitude in different stages following man's exit from "nature".[6] A key event in this genealogy is first the emergence, and then the inflammation of man's *amour-propre*, a form of self-love that is consummated by external recognition. Rousseau hypothesises that when the first societies formed, "a value came to be attached to public esteem ... [to] whoever sang or danced best, [or] *was the most eloquent* ... and this was the first step towards inequality".[7] Man's "rank and condition" came to depend not only on his "property and power", but also his "wit, beauty and talent" – including particularly his "eloquence" – an attribute which it became necessary to "possess or affect".[8] Thus with the emergence of both first property and then social complexity, society becomes a "frenzy for distinction",[9] as man's psychological needs, and thus his propensity to both dominate and be dominated, grow exponentially. Thus the genesis of social domination lay not solely in brute coercion or even material inequality, but rather in the emergent need for recognition – as humans begin to "live in the opinion of others".[10] And Rousseau's conjecture was that this corruptible sociability became inflamed in the world of the early moderns, as opportunities and incentives for insidious forms of self-distinction exponentially grow, in particular with the emergence of luxury and the refined arts.

While Rousseau, like other republicans, understands domination as subjection to the alien other condition of being subject to the powers of an alien other, he identifies domination, then, not just with dependency on the *will* of others,

4 Daly 2017.
5 Daly 2017.
6 Rousseau 1755/2008.
7 Rousseau 1755/2008: 141.
8 Rousseau 1755/2008: 141.
9 Rousseau 1755/2008: 142.
10 Rousseau 1755/2008: 142.

but also with dependency on their *recognition*.[11] And dependency on recognition leads to domination in a number of respects. In particular, it means hierarchy and subordination become deeply *insidious*, compared with the earliest stages of society. Following the development and inflammation of *amour-propre*, social hierarchy assumes symbolic forms; the "great and rich" distinguish themselves and cement their status by creating "a different symbolic universe" and "trapping the rest into believing".[12] Social power is increasingly exercised as symbolic power, and it is internalised by its subjects, leading to a form of what we might now call symbolic violence or symbolic domination. Ostensibly innocent pursuits, particularly culture and arts, become instruments of hierarchy, driven by a "desire for distinction".[13]

For Rawls, by contrast, the historical context for the "political" conception of justice – the historical starting-point from which the need for such a conception of justice is appraised – arises with the early-modern Wars of Religion, and relatedly, with the "fact of pluralism".[14] Thus, it is a conflict based on doctrines and beliefs. The 'circumstances of justice' are predicated on a propositional problem of disagreement, and it is around this presumed starting point on which much of liberal political though centres. For Rousseau, by contrast, the context for constitutional design arises much more primordially with the inflammation of *amour-propre* and the emergence of social distinctions and hierarchies that are based on symbolic power. The departure point of political theory, then, is not the *propositional* problem of disagreement, at all, but rather a problem of performativity, within social interaction and communication, that leads to symbolic domination.

2.2 Discourse as domination

Rousseau's pessimistic view of social practice, in liberal and commercial society, applies with particular force to political discourse. Notoriously, he is deeply apprehensive towards political deliberation and speech as potentially destructive practices.[15] Seeing dissensus and debate as signs of factionalism, he argued that, far from having an illuminating or emancipatory effect, political discussion would actually prevent citizens from discerning the "general will". He suggests that the general will would emerge when citizens are informed but have "*no communication with one another*"; while "long debates, dissensions and tumult herald the rise of particular interests and the decline of the State".[16]

11 E.g. Gauthier 2006.

12 Dobel 1986: 651.

13 Barber & Forman 1978: 547.

14 Rawls 1996: ch. 1.

15 E.g. Daly 2017: ch. 4.

16 Rousseau 1988/1762: II, ch. 3.

When the general will prevails, "there are no embroilments or conflicts of interests; the common good is everywhere clearly apparent, and only good sense is needed to perceive it".[17] Thus he prefers the solemn sanctity of voting itself, over deliberative processes which he views as susceptible to manipulation and abuse. Thus "there is no question of ploys (*brigues*) or eloquence in order to secure the passage into law of what every one has already decided to do".[18] Far from the act of voting being or disciplined by deliberation, it is protected from it, an insight which he illustrates with classical reference:

> As for the method of taking the vote, it was among the ancient Romans as simple as their mores, although not so simple as at Sparta. Everyone declared his vote aloud, and a clerk duly wrote it down; the majority in each tribe determined the vote of the tribe, the majority of the tribes that of the people, and so with *curiæ* and centuries. This custom was good as long as honesty prevailed among the citizens, and each man was ashamed to vote publicly in favour of an unjust proposal or an unworthy subject; but, when the people grew corrupt and votes were bought, it was fitting that voting should be secret in order that purchasers might be restrained by distrust, giving rogues the means of not being traitors.[19]

Certainly, other republican thinkers, ancient and modern, understood the potential abuses of different modes of political discourse – not only of "deliberation" as it is now called, but especially of oratory, rhetoric and so on.[20] But generally, deliberation, subject to constraint, is otherwise understood as a foil to political domination. What makes Rousseau's view distinctive, then, is his understanding of discourse and deliberation as such – as processes centring ostensibly on disagreement and agreement – as being inherently suspect. They are inherently suspect because they offer sources of distinction, and thus outlets for corrupted amour-propre and accordingly, represent sources of insidious social hierarchy and of domination. They are part of the performative theatricality of early-modern commercial societies, the world of the phoney bourgeois who is concerned with refinement and manners over virtue and action. For Arendt, by contrast, political speech is a form of political action, through which men insert themselves in the public realm, and for Atlanticist neo-republicans like Pettit, it is a way of subjecting public power to democratic control through the formation of common interests, but for Rousseau, it is – in the liberal social universe – an instrument of artifice, of deception and ultimately of political domination.[21] In a sense, then, he rejects the kind of optimistic assumptions frequently made by deliberative-democracy theorists concerning the nature of deliberation itself as a social activity – that it can be rendered benign, sincere, egalitar-

17 Rousseau 1988/1762: II, ch. 3.

18 Rousseau 1988/1762: II, ch. 3.

19 Rousseau 1988/1762: IV, ch. 4.

20 E.g. Remer 1999.

21 Arendt 1977.

ian and so on.[22] Such theories imagine that Habermas' idealised description of the 18th century bourgeois public sphere – an elite and solidaristic space – can realistically be extended across a heterogenous mass society.[23]

Instead, Rousseau understands political speech as offers a mechanism of distinction and thus, of symbolic domination. Indeed, he explicitly associates the development of inequality with the emergence of "eloquence", and thus of performativity in speech, in the first societies. And it is because amour-propre engenders performativity-in-speech that Rousseau downplays the propositional aspect of speech in favour of its function in relation to recognition and social distinction.

In terms of the social mechanics of political speech, Rousseau, like later thinkers, recognises that discussion and speech are not primarily cognitive, but rather social competences, and that speakers are evaluated on rationally arbitrary grounds, based on the mastery of speech as a social technique (what he refers to as "eloquence"), rather than as participants in an intellectual exercise. Speech, in this view, is appraised based on what Pierre Bourdieu calls the habitus,[24] the set of unconsciously acquired techniques through which agents navigate "fields" of social power and acquire a "feel for the game". And correspondingly, "dominated agents ... tend to attribute to themselves what the distribution [of value and status] attributes to them, reproducing in their verdict on themselves the verdict [pronounced] on them".[25] Like Rousseau, Bourdieu argues that the social authority or efficacy of speech depends, in practice, on a morally arbitrary "articulatory style" – encompassing factors as ostensibly mundane as "accents, gestures, intonations, and other bodily techniques for speaking".[26]

This view finds support in contemporary political theory. Hayward has shown that the persuasiveness of political speech depends on considerations of "form and "style", that are linked to the dominant *habitus* – and that this inequality cannot be overcome by the safeguards that have sometimes been suggested by deliberative-democracy theorists.[27] As Olson argues, "people of dominant identities are ascribed greater competence than others, and not coincidentally those people are more likely to have political opinions and feel entitled to express them" .[28] Those unwilling or unable to deliberate, or who find themselves dominated in deliberation, may simply lack the required *habitus*; in Bourdieusian terms, "persons lacking the linguistic competences valorized

22 E.g. Chambers 2003.
23 Dryzek 2001.
24 Bourdieu 1987.
25 Bourdieu 1987: 452.
26 Olson 2011: 533.
27 Hayward 2004.
28 Olson 2011: 535.

in particular social and institutional domains are de facto excluded from participation in them".[29] Notwithstanding formal processes for inclusion, people's "linguistic-bodily competence" may represent a barrier to *authoritative* political speech. The social efficacy of speech has been shown to depend on arbitrary criteria that Bourdieu argues are efficacious because "they function below the level of consciousness and language, beyond the reach of introspective scrutiny".[30]

Thus Rousseau presages a later branch of critical linguistics that "sought to explore and expose how language is used as a tool for power, a means of concealment and method of marginalisation".[31] Political speech may become "a weapon to leave individuals in a state of befuddled inferiority".[32] It is this sceptical view of political speech that underlies his disparaging reference to the "refined flourishes" of political speech,[33] and his allusion in *The Social Contract* to those "political subtleties" – essentially, sophisticated forms of discourse – that he understands as undermining political equality.[34]

This invites us to reappraise the emancipatory potential of political speech. Topper argues that while Arendt focuses on the political consequences of citizens' "loss of voice", Bourdieu is more centrally concerned by "the often inconspicuous ways in which language itself becomes a mechanism of silencing, domination, or exclusion".[35] Arendt, Topper suggests, overlooks the political significance of "social distinctions embodied in and expressed through speech".[36] Bourdieu, in contrast, shows that "domination and exclusion are enacted through concrete linguistic exchanges.[37]

By contrast, liberalism and liberal neo-republicanism – theories that most tend to valorise disagreement, deliberation and speech – offer unconvincing explanations of why citizens decline to deliberatively participate. Philip Pettit, for example, suggests that while non-domination means we should be able to "eyeball" others – to look them in the eye without ingratiation or deference – we sometimes may simply decline to look others in the eye because of natural timidity[38]. From a Bourdieusian perspective, this overlooks the subtleties of so-

29 Topper 2011: 354.
30 Bourdieu 1987: 466.
31 Finlayson 201: 315.
32 Dobel 1986: 655.
33 Rousseau 1755/2008: 142.
34 Rousseau 1988/1762 : IV, ch. 1.
35 Topper 2011: 354.
36 Topper 2011: 357.
37 Topper 2011: 358.
38 Pettit 2013: 84-5, 169.

cial domination, forgetting how the "ordinary violences" of social practice are "inconspicuous and gentle".[39]

Moreover, liberals and liberal neo-republicans tend to overlook how, far from reconciling differences, deliberation itself constitutes distinctive but insidious grounds of social distinction. For Rousseau and Bourdieu, political expression cannot be conceptualised primarily as a form of "identity disclosure",[40] because we do not use political speech primarily to disclose our identities in the Arendtian sense – or perhaps our conceptions of the good in the Rawlsian sense – but rather simply to *distinguish* ourselves. Both share the insight, described by Kohn, that "miscommunication and manipulation are not accidental ... but part of the nature of language itself".[41]

To conclude this section, Rousseau believes that a stable republican community is based not on discussion and agreement, on political speech or deliberation, or indeed on an intellectual consensus derived from or aimed at *propositional* questions, at all. Rather it is based on austerity, which, in his understanding secures a transparent social universe and a communicative sphere free of encoded complexity and symbolic violence. He says: "honest (*droit*) and simple men are difficult to deceive because of their simplicity; illusions (*leurres*) and refined pretences (*pretexts*) fail to impose upon them, and they are not even subtle enough to be dupes." Thus, effective political communication occurs not through complex deliberation or reason-giving but based on a wider social austerity that precludes subtle forms of domination. He continues: "When, among the happiest people in the world, bands of peasants are seen regulating affairs of State under an oak, and always acting wisely, can we help scorning the ingenious methods of other nations, which make themselves illustrious and wretched with so much art and mystery?[42]

2.3 Agreement, disagreement and political unity

What can we conclude from this overview, then, regarding Rousseau's understanding of agreement and disagreement in politics? On the one hand, "reasonable pluralism" – or simply, the diversity of conceptions of the good in liberal society – cannot simply be understood as an exercise or expression, as Rawls claims,[43] of man's "moral powers". Rather, such doctrines are held and performed within a corrupt moral universe that is structured around distinction, symbolic power, and *amour-propre*. Therefore, a stable political conception of justice cannot be based on any overlapping consensus between comprehen-

39 Topper 2011: 355.

40 Topper 2011: 359.

41 Kohn 2000: 410.

42 Rousseau 1988/1762: Book IV, ch. 1.

43 Rawls 1996.

sive doctrines, because these competing doctrines themselves emerge within the fragmented symbolic and social order of liberal society; such identities arise and are formed or formatted within competitive social "fields" that are structured by the distribution of social, cultural and symbolic capital. More generally, republican stability, then, cannot be founded on an intellectual consensus, because the world of *ideas*, for Rousseau, is not a source of political unity, but rather a source of distinction and performativity.

Indeed, Larmore has argued that the Rawlsian idea of people living based on a "conception of the good" or "life plan" is a "procrustean habit of thought" peculiar to philosophers, and itself an affirmation about the form of a good life - and going further again, the idea of a life lived in such a (broadly speaking) *philosophical* way is itself something of a philosopher's affectation, something that is fanciful in "real life".[44] And while theorists of agonistic politics argue that deliberative democracy is "incapable of processing deep difference",[45] Rousseau is focused more on the arbitrariness and contingency of moral identity itself, viewing intellectual differentiation itself as a product and site of moral corruption.

And crucially, while Rousseau's insights on symbolic power discount the idea of political stability being derived from intellectual or rational consensus, his theory implies that *disagreement*, equally, occurs, and is performed in a context of symbolic power and symbolic violence. On the one hand, Rousseau clearly rejects the Machiavellian idea of fractiousness and tumult as a source of republican energy, fearing instability and discord from any conflict of political factions. On the other hand, his positions cast doubt on the procedural republican stance now associated with Bellamy and Waldron, which posits disagreement itself – on the right as well as the good – as defining the "circumstances of politics." Their stance is realist, in that it rejects the possibility of durable consensus concerning rights and justice. However, it still posits the procedure of argument, the procedure around disagreement, so to speak, as being itself the basis of republican and democratic stability. Thus, while citizens are presumed, in this liberal-republican view, to disagree about justice and rights, they are nonetheless assumed to agree, to a sufficient extent, on the procedure for mediating such disagreement. This procedure is itself based on discussion and argument – processes that are themselves dubious as sources of political unity, for the reasons outlined. Indeed, the procedural republicans' reasons for scepticism as to agreement on justice seem to apply with equal force, in many ways, to their idea of agreement on political procedure, because without a sufficient affective and motivational basis for political unity, there seems scant ground for republican stability in a decision-procedure that is itself supported by normativist claims about equal respect, reason-giving and so on.

44 Larmore 1999: 96.

45 Dryzek 2005: 220.

Thus, any procedural republicanism, centred on the problem of disagreement and its mediation, relies on the same mystique around the agreement-process – and its norms – that its exponents identify in the substantive principles or overlapping consensus of normativist liberalism. Moreover, the idea of the agreement-process as itself a source of political unity – a source which remains, in a sense, principled, rational and intellectual – seems equally bereft of motivational and affective force within highly differentiated, and atomized contemporary societies.

Accordingly, it seems that theories positing disagreement as the circumstance of politics, and as the central challenge of constitutional design, ironically seem to place groundless faith in the moral force of the agreement-procedure, in a manner that is just as dubious as the faith placed by normativist liberals in the substantive consensus itself. Moreover, because the antecedent agreement that supplies political unity is based on a decision-procedure, it runs up against many of the same objections that have been identified by critical theorists in relation to "deliberative democracy" – particularly in relation to the efficacy, transparency and fairness of speech itself. Its main institutional focus is the elected legislature, and its moral focus is the exchange of conflicting principled views in parliamentary debate, in particular. But this is as empirically and socially implausible as the Rawlsian emphasis on the substantive moral agreement that is institutionally expressed, typically, in judicial review. Despite aiming to institutionalize dissensus, it ends up relying, at least implicitly, on some version of the Habermasian vision of ideal speech. But it is questionable whether parliamentary deliberation provides either sufficient historical exemplars, or even a theoretical-regulatory ideal, for a reasoned decision-procedure. As Geuss and Bourdieu have both argued,[46] the ideal-speech theory is so far removed from reality as to be unhelpful, or actively a distortion, as a moral framework for political life, because it stigmatizes non-rational uses of speech as aberrational. For both Rousseau and Bourdieu as I have explained, confusion and manipulation are not accidental features or deviations in language, because symbolic domination and befuddlement are intrinsic to language, not aberrational or accidental features. Bourdieu contests Habermas' conception of an ideal speech situation in which the "rational character of communicative action would be unhindered by social constraints" – because "whatever power of force speech acts possess is ... ascribed to them by the social institution of the utterance of which the speech act is part".[47] Language has no pure form – even hypothetically – outside of social power relations, meaning that no hypothetical speech situation can offer a useful benchmark for political freedom.[48] Remer, for example, details how

46 Geuss 2019; Bourdieu 1987.

47 Bourdieu 1987: 10.

48 Finlayson 2013.

historical instances of ostensibly deliberative exercises such as the ratification of the United States Constitution – while supposedly characterized by egalitarian reciprocity and sincerity – actually resembled "oratory" more than "deliberation", proving agonistic, emotive and a-rational, and prizing eloquence over the reasoned argument celebrated by Habermas.[49] Madison, for example, worried that "irregular passions" – or the "artful misrepresentations of interested men" – might prevail over the "cool and deliberate sense of the community" (represented by institutions like the Senate.[50] But the Rousseauian perspective invites us to question the distinction between deceptive and illegitimate forms of political speech, on the one hand, and rational discourse on the other, emphasising those forms of domination that elude the proper regulation or institutional structuring of political discourse.

2.4 From agreement to austerity

Instead of consensus and agreement, then, Rousseau emphasises the non-rational basis of political community. For example, in preference to deliberation, he emphasises the value of public ritualism, placing an eccentric emphasis, in his constitutional design projects, on seemingly obscure aspects of statecraft such as ceremonies, festivals, rituals and symbols.[51] Since he is conscious of the limits and abuses of speech, verbal communication occupies a relatively modest role in this ritualistic programme. Since citizens must not only be rationally "convinced" of republican norms but also "persuaded", a-rationally, Rousseau's constitutionalism aims at "establishing a community of shared meanings".[52] Thus republican ritualism deploy various forms of "non-verbal communication ... symbols, sound, sight, ritual",[53] and Rousseau's constitutional prescriptions extend, beyond formal ceremonials such as oath-swearing, to embrace a diverse scheme of pageantry – festivals and parades, games and celebrations – deploying "the intoxicating power of ... rich sensual delights".[54] In certain surprising ways, this presages the insights of later critical discourse theorists sceptical of deliberative democracy – that we need to be emotionally connected to our co-deliberators in a manner which can "make that other person's pains and pleasures one's own".[55]

On the one hand, these ritual devices reflect his emphasis on the passions and on the a-rational aspects of political community. It also speaks to a certain view of the nature of political cognition and political reason. Rousseau's em-

49 Remer 2000.
50 Madison et al 1987.
51 Daly 2017: ch. 3.
52 Dobel 1986: 639.
53 Dobel 1986: 639.
54 Putterman 2001: 487.
55 Putterman 2001: 487.

phasis on rituals and symbols reflects a broader scepticism towards any vision of abstract political reasoning that is unsupported by passion and emotion.[56] Unless ideas take life in ritual and symbolic form, they risk, in their purely abstract or propositional form, becoming simply a plaything, an intellectual parlour game (Rousseau 1751). Rousseau thus understands that political morality is internalised – and political stability realised – through emotional and aesthetic processes. Thus symbols provide the "emotional power and persuasiveness" that give life to abstract political language.[57] Thus Rousseau envisages political ideas as taking life in public symbols – with obvious, although possibly arcane examples lying in flags, public statuary and so on.[58] Rituals, similarly – think of public awards, festivals, state funerals and the like – offer a similarly concrete, even embodied source of political meaning, although their utility in the late-modern world is of course equally questionable.[59]

These concrete constitutional devices illustrate again how, for Rousseau, the central problem of politics – and thus, the central concern of constitutional design – is not our disagreement concerning questions of the good, or the plurality of comprehensive doctrines. Rather, the starting point is the problem of establishing effective political communication in a context of symbolic domination. The origin of this symbolic domination lies in the corrupting self-love wrought by humans' need for external recognition – their need to live in the eyes of others – once they enter society. The challenge of politics is how it is possible – notwithstanding this corrupted *amour-propre* – to constitute an authentically shared and coherent universe of symbols and meanings in which not only discourse and political communication, but social practice generally, can assume transparent and non-dominating forms. Because the challenge of political theory is to create a society in which political communication can be rescued from symbolic violence, this suggests that, in contrast with Rawlsian liberalism, the fundamental problem of political order is not a *propositional* one at all, concerning disagreement as to the "good", or agreement on the "right". Rather, it concerns the possibility of political communication itself, and more specifically the problem of establishing a form of communication that is not intrinsically or insidiously dominating. Thus "establishing a community of shared meanings ... is essential to [Rousseau's] project".[60]

In response to the problem of symbolic violence, Rousseau's programme is focused not so much on the rational inculcation of republican *ideas*, but rather on the economy of recognition and symbolic power, which he aims to reorient

56 Daly 2017.
57 Dobel 1986: 648.
58 E.g. Cohen 1989
59 Putterman 2001.
60 Dobel 1986: 629.

towards transparency and equality. His constitutional programme emphasises the incentivisation of approved behaviours and habits through mechanisms of recognition – particularly through public awards, though which "the patriotic virtues should be glorified".[61] This seeks to harness, what Pierre Bourdieu later referred to as "all the hierarchies and classifications inscribed in objects … in institutions or … in language" (Bourdieu 1987: 471). Our *amour-propre*, is to be reoriented in productive and benign ways.

Liberalism, by contrast, tends to ignore the symbolic dimensions of the social and political universe, and the integrative function of political and social symbols. And arguably, by the same measure it offers implausibly optimistic accounts of how principles of justice can be realised under intractable conditions not only of scarcity and conflict, but also of alienation. Rawls (1996) envisages an "overlapping consensus" in which people with conflicting "conceptions of the good" endorse a "public conception of justice" based on their common faculties of reason. But for Rousseau, like other anti-liberals, the central problem of politics is not, as I have argued our disagreement as to the "good life", or question of ultimate truth. Rather, the challenge of political co-existence, in conditions of scarcity and conflict, is defined in large part by affect and sentiment, which in turn are dependent on social and economic life. The sources of stability (in this sense) lie both in social and economic structure and the world of symbolic power, rather than in the intellectual consensus Rawls envisages.[62]

3 IMPLICATIONS FOR POLITICAL THEORY AND CONSTITUTIONAL DESIGN

The Rousseauian perspective I have described is based on a deep skepticism concerning the emancipatory potential of political speech, and the possibility, accordingly, of basing political unity either on any intellectual consensus, or on respect, alternatively for disagreement and the associated agreement-procedure. By contrast, while most republican theorists value deliberation for its role in a politics aimed at stemming public and private domination across a range of social relationships, they generally under-account for those forms of domination that are embedded in deliberative practice itself. Such concerns are all the more salient in our contemporary politics given the apparent fragmentation of the public sphere into specialised mini-publics or 'echo chambers', the problems of populist anger and resentment, of post-truth, 'fake news' and so on, which make the deliberative ideal seem less realistic than ever.[63]

61 Rousseau 1953/1782: ch. 3.

62 See generally Jubb 2011.

63 Curato *et al.* 2020.

Such insight, in turn, might inform contemporary questions of constitutional design, and particularly those aspects of constitutional design that are aimed at or predicated on disagreement and deliberation. The Rousseauian injunction is not, perhaps, to reject or remove deliberation as such, but rather to pay more heed to the social context of deliberation, and particularly the problems of alienation and symbolic power in contexts of social complexity and differentiation.

On the one hand, and most obviously perhaps, this sceptical perspective on disagreement might cast doubt on the transformative powers of the 'deliberative wave' that has taken place in European constitutional practices in recent years, and particularly the capacity of staged deliberative exercises to regenerate political and social stability.[64] On the other hand, perhaps less obviously, this sceptical perspective casts new light on the dispute between proponents of legislative and judicial supremacy. Exponents of judicial review invoke the defence of a principled moral consensus, whereas exponents of parliamentary supremacy tend to emphasise procedural fairness, in an agreement-process, in a context of intractable disagreement on questions of justice. From the Rousseauian perspective, however, the normativist liberals rely on an implausible account of principled consensus, while the procedural republicans on an implausible account of the justice of the agreement process itself, and both ignore a more fundamental question as to the problem of mystification and non-transparency in the ways that discussions on questions of justice are conducted. For example, the problem with judicial review, perhaps, is not that it undermines an abstract idea of procedural equality, but rather that it clothes moral debate in a specialised and esoteric language from which lay citizens are excluded.[65]

Furthermore, an understanding of deliberation and discourse as insidious sources of domination invites reconsideration of how constitutions aim to structure the public sphere. On the one hand, constitutional design might take account of the pitfalls of deliberative democracy and particularly, as Afsahi puts it, "the ways in which ideals of rational and dispassionate discourse can limit the full participation of the most marginalized members of society".[66] On the other hand, however, a constitutional project might extend beyond the framework of deliberation itself as a horizon of political and social unity, looking to alternative bases of political community. Republican austerity might not take the bracing form Rousseau envisages in the 18th century context: there can be no return to a project of autarky or of social homogeneity, but unfeasible and normatively unappealing. But republican austerity might be reconceptualized around a broad aim of transparency in public life, where transparency is a foil to domination in the symbolic and social realms.

64 OECD 2020.

65 Daly 2020.

66 Afsahi 2020: 2.

Deliberation, and political discourse generally, are more likely to fulfil their aims – and to remain benign – within a shared symbolic universe. However, dissensus, as well as political unity, might be conceptualised beyond rational-propositional terms. Accordingly, a greater regard for types of communication typically understood as "non-deliberative' or "anti-deliberative" – even those normally seen as provocative, nihilistic or ostensibly vacuous speech – might actually foster greater inclusion.[67] Thus, for example, constitutional free-expression doctrines, sometimes conceptualised based on the need for a democratic sphere, might instead encompass a broader sense of the kinds of communication or expression that are democratically valuable, and certainly extend beyond 'propositional'-type speech aimed directly at consensus or understanding.

More generally, the perspective outlined invites us to consider how certain features of constitutional design might harness a public socialisation process that maximises transparency and inclusion, and minimises obfuscation and befuddlement. It is neither plausible nor attractive for a constitutional project to foster the kind of social and cultural homogeneity that Rousseau sees as the basis of republican austerity. Nonetheless, it might attend to problems of transparency and inclusion in political communication and include non-rational aids to political deliberation, perhaps by fostering the ritual and symbolic aspects of the public realm, and a consideration of how these might foster such a shared symbolic universe. For both Rousseau and Bourdieu, the problem of both deliberation and political unity is not differential identity or belief, or even differential interests, but rather differential habitus – a social division that undermines the possibility of transparent political communication. Similarly, even for Arendt, "the problem of politics is not when people are different, but when they are unable to communicate".[68] But whereas Arendt celebrates the emancipatory effects of political voice, Rousseau and Bourdieu offer sceptical perspectives on the efficacy of political discourse in a context of deep social stratification sustained in economic, symbolic and cultural domains. Certainly, such concerns have already penetrated in the concept of "deliberative democracy" itself, as evidenced in a shift away from a strict model of reasoned speech, to a more inclusive concept that incorporates or admits a broader range of communication types, including testimony, storytelling and so on, along with provocative or sarcastic modes of speech not normally thought of as meeting the requisite criteria for democratic participation.[69] Indeed, there is a growing trend in literature to recognise what Rollo calls those "forms of domination related to the imposition of speech on those who are either unwilling or unable to speak".[70] What I have

67 Afsahi 2020.

68 Honohan 2002: 124.

69 Gormley 2019.

70 Rollo 2017: 587.

suggested, in this paper, is that such concerns can usefully be connected with a deeper theoretical debate on the centrality of disagreement as such as a definitive circumstance of politics. This is a concern to which Rousseau responded with an strategy of social and cultural austerity that is both unpalatable and unfeasible in the contemporary world. It is an open question, however, whether or not constitutional design can attend to this problem say, by attempting to sustain a shared symbolic realm or ritual life, or whether the countervailing risks and costs, in terms of statist oppression, are unacceptable.

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Camila Vergara*

Towards material anti-oligarchic constitutionalism

Constitutional democracies have allowed for patterns of accumulation of wealth at the top, leading to acute inequality and dangerous oligarchization of power. Moreover, the theoretical tools that liberal constitutionalism offers are inadequate to recognize systemic corruption and structural forms of domination that are enabled by law or its absence. As an alternative, the article proposes a material methodological approach to the study of constitutions. In the first section, it offers a critical analysis of the intellectual foundations of liberal constitutionalism, engaging with the right to property, political representation, and separation of powers. In the second section, it presents the intellectual foundations of plebeian constitutionalism in the works of Machiavelli, Condorcet, and Marx. Finally, it proposes a material approach to assessing constitutions, identifying the shortcomings of contemporary legal frameworks to materialize social rights, as well as new avenues for institutional anti-oligarchic innovation.

Keywords: inequality, liberalism, social rights, systemic corruption, Condorcet (Nicolas), Machiavelli (Niccolò), Marx (Karl)

The idea that democracy is in crisis on several fronts has become commonplace. Even if it was only with the election of Donald Trump to the U.S. Presidency in 2016 that this narrative of democratic crisis went mainstream,[1] this particular cycle of political decay in our constitutional regimes has a longer history. In terms of wealth distribution and growing inequality, democracies entered a new neoliberal phase in which the mechanisms of representation began to systematically malfunction, allocating most of the benefits of accelerated economic growth to the already rich and powerful and to the detriment of the majority. After the first neoliberal experiments in the 1970s and 1980s, led by General Augusto Pinochet in Chile, Margaret Thatcher in the United Kingdom, and Ronald Reagan in the United States,[2] increasing income inequality and immiseration of the working classes was effectively de-politicized and naturalized.[3]

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1 For an 'elitist republican' interpretation on the crisis of democracy, in which elites are the culprits of decay, see Levitsky & Ziblatt 2018.

2 Slobodian (2018) offers a Euro-centric, and therefore partial, historical account of neoliberalism, that misses its illiberal origins. Chile, under Pinochet, with the help of the so-called Chicago Boys, trained in the U.S. in the 1950s, is neoliberalism's ground zero. See McClean 2017: ch. 10.

3 To the point that today it is considered legitimate that three individuals in the U.S. own more wealth than the bottom 50% of the population—while the wealth of the super-rich grew

When collectively created social wealth is consistently and increasingly accumulated by a small minority against the material interests of the majority, it means that the rules of the game, and how they are being used and abused, are benefiting the powerful *few* instead of the *many*. Since a democracy is a political regime in which an electoral majority rules, it makes sense to think that "good" democratic government would benefit (or at least not hurt) the interests of the majority. The opposite has been happening in most of the developing world as well as in advanced democracies, where the rates of inequality and corruption are growing or remain stubbornly high. The process by which a democratic society becomes increasingly oligarchic is what I have called *systemic corruption*.[4] This type of structural corruption is not the aggregation of individual self-serving illegal acts but rather the process through which the self-serving behaviour of the most powerful in society is legally enabled. In other words, corruption —the undue benefit of some at the detriment of the rest— is done through the law, not against it.[5] Even if it is evident that what is legal is not necessarily "good," and what is corrupt is not necessarily illegal, under our current juridical conception of corruption, we are unable to account for *legal* corruption, for laws and policies that promoted the interests of a few against the common good. Consequently, our democratic order has inevitably drifted into oligarchic regimes that benefit disproportionately and systematically those who already have power, reproducing and deepening inequality.

Political power is today *de facto* oligarchic. In almost all representative democracies, the people who get to decide on policy, law, and the degree of protection of individual rights —the President, members of Congress, and Supreme Court justices— are part of the richest 10%, and therefore tend to have the same interests and worldview of the powerful few who benefit most from the status quo. Even in Europe, where most of the egalitarian countries are located and there is a robust middle class, the richest 10% concentrates about 58% of the wealth while the bottom 50% only 4%. At the other extreme is Latin America, where the richest 10% controls 77% of the wealth and the bottom 50% only 1%.[6] The control of corporate interests over politics via campaign finance and lobbying, has allowed money to influence law-making, adjudicating, and public policy to build legal and material structures that disproportionally benefit the wealthy and harm the majority. Because patterns of accumulation of wealth at the top are enabled by existing rules and institutions, it is necessary to question not only our

6,000% since 1982, median household wealth went down 3% over the same period, and one out of five children currently lives in poverty in the richest country in the world. Collins 2018.

4 Vergara 2020.

5 An insight Robin (2017) has recently brought back to the political discussion: "The worst things that the US has done have always happened through American institutions and practices – not despite them."

6 World Inequality Report 2022.

political regimes as experiments that have led to acute inequality and a dangerous oligarchization of power (and therefore in need of structural reform), but also our methodological approach to the study of constitutions —as the juridical framework that ultimately allows for inequality to be validated and reproduced.

As a response to this political diagnosis, in which the crisis of democracy is due to an overgrowth of oligarchic power allowed and enabled by the juridical order, I propose adopting a material constitutional lens to rethink the republic from a structural perspective, acknowledging the necessity of approaching constitutionalism from a point of view that allows us to 'see' ever-expanding systemic corruption and oligarchic domination. In what follows I lay out the basic premises and philosophical foundations of material constitutionalism and compare this alternative constitutional ideology to legal formalism and proceduralism, highlighting the advantages of a material approach to properly account for systemic corruption and the oligarchic power that is currently being exercised and shielded from constitutional scrutiny. I begin by offering a critical interpretation of the foundations of the liberal ideology centred on private property that informed the design of the first constitutional representative governments, its relation to formalist and proceduralist legal thinking, and its limits in terms of being able to account for systemic corruption and structural forms of domination.

1 CRITICAL INTERPRETATION OF LIBERAL CONSTITUTIONALISM

Liberal constitutionalism sees the constitution as a set of "metaconstraints,"[7] with individual rights as limits on governmental action and a system of separation of powers that produces an impartial rule of law able to deliver formal equal liberty to all. The philosophical foundations of our liberal constitutional orders come from a long tradition of thinkers who justified societies ruled by elites. What I have identified as an *elitist-proceduralist* interpretation of republican government traces back to Polybius and Cicero, and then was adapted to the modern commercial society by John Locke and the Baron of Montesquieu, before finally being constitutionalized at the federal level by James Madison in the United States. The *elitism* of this interpretation is based on its endorsement of elites —those who are distinct from the common people either by birth, wealth, knowledge, popularity or technical expertise— as better suited to rule and have final decision-making power. Its *proceduralist* bent comes from the conception that normativity emanates from the respect of procedures aimed at constraining the government by the few *and* that the observance of these procedures is

7 For an interpretation of the constitution as having both regulatory and constitutive rules, see Holmes 1988.

sufficient for the rule of law to guarantee and promote liberty for all citizens.[8] In other words, elite rule is legitimate and able to guarantee liberty for all if the procedures are correctly followed. However, this proceduralist approach to the rule of law is unable to account for the slow progression of systemic corruption. Formal and proceduralist views of the constitution focus on formal rules and delegation of powers, modes of selection, and equal constitutional rights, and neglect how political decision-making is actually done, the oligarchic interests behind candidates and parties, and the evident structural gender and racial oppressions existing alongside legal protections. Combined, these focuses and neglects cause them to become blind to systemic corruption —the structural favouring of the powerful *few* over the *many*— and actually occurring domination. Moreover, because this interpretation has historically been developed from the vantage point of elites, constitutional thought tends to be conservative of the existing socioeconomic hierarchies, often turning to idealism by proposing the suppression of class conflict and the embrace of harmony, tranquillity, security, and social peace as foundational principles.

John Locke is the father of political liberalism and one of the thinkers who had the most influence on the American founders. Locke imagined a state of nature in which equality and liberty are natural, and all individuals can do as they please, "subject only to limits set by the law of nature".[9] This is a state of perfect liberty and peace because "everyone knows the rules and canons natural reason has laid down for the guidance of our lives" based on natural equality.[10] Consequently, in Locke's idealistic pre-political community, every human has natural rights that ought to be recognized and respected. He does not, however, conceive of rights as the actual power to do something,[11] but as formal entitlements that people have regardless of their actual individual capacity to exercise these rights. The formalism in the argument is more clearly exposed when Locke defines rights and equates them to property. Fundamental natural rights are for him "life, liberty and possessions," but property is the most important in this trilogy, being a precondition to sustain life and liberty. Property is made by mixing "the labour of his body and the work of his hands" with nature, an indispensable process through which we can nurture ourselves and survive. Because to make use of nature "to the best advantage of life" one would first need to have "private dominion" over it,[12] creating private property out of the commons is, for Locke, necessary.[13] Property rights are therefore understood as

8 I follow Green 2016.

9 Locke 2003: 2.4.

10 Locke 2003: 2.5.

11 Power is a relational concept that denotes both "the state of having possibilities available and representing them as such". Parietti 2022: 98.

12 Locke 2003: 5.26.

13 For an anti-egalitarian reading of Locke see Zucker 2000.

the basis of all other rights, and even rights themselves are conceived as a form of ownership.

Following Cicero, for whom the republic is established to preserve private property (*custodia rerum suarum*),[14] Locke repeatedly states that the protection of property —and not the general welfare or justice— is the main objective of the state, which is set up as an impartial "authority to decide controversies" and "punish offenders."[15] In such a system in which all are, at least formally, property owners, the only legitimate cause for rebellion against constituted authority is the violation of the "laws for the preservation of property, peace, and unity."[16] In other words, since the 'rule of law' is supposed to be the juridical expression of natural liberty, the only justified use of force in a republic is to defend the legal framework against tyranny. Locke's idealistic state built on natural equality and liberty sharply contrasted with the Britain of his time, which was extremely unequal. Revolts had broken out a few decades before the publication of the *Second Treatise* (1689) against land enclosures by "levellers" and "diggers" who asserted a right to the Commons—to the use of common land that "belongs to us who are the poor oppressed".[17] In Locke's theory of rights as property, there is no place for the collective rights to land claimed by plebeians or the recognition of material inequality and its effects on the effective enjoyment of rights. Even if in theory individuals were formally equal and free, they actually lived in a starkly unequal society in which the few rich and powerful owned most of the land and wrote laws to further oppress and expropriate the many. Between 1604 and 1914 over 5,200 enclosure bills privatizing common lands were enacted by Parliament —equivalent to 6.8 million acres or one-fifth of the total area of England.[18] Given that plebeians had rights to the common land, such as pasture, pannage, and wood picking, privatization meant the effective 'expropriation' of their rights through 'correct' procedures.

To Locke's formal equal rights and impartial state, Montesquieu —who wrote *The Spirit of the Laws* (1748) inspired by his stay in England, taking its political system as his model— added proceduralism and defined liberty in a 'negative' and individual sense. Liberty is for him both an individual "tranquillity of spirit" based on the absence of fear and a sense of security,[19] and "the power of doing what we ought to will, and in not being constrained to do what

14 Cicero 1913: 2.73.

15 Locke 2003: 7.87.

16 Locke 2003: 19.226.

17 "A Declaration from the Poor Oppressed People of England" (1649). Less than one third of the land was considered part of the commons (Clark & Clark 2001).

18 UK Parliament, *Enclosing the Land.* https://www.parliament.uk/about/livingheritage/transformingsociety/towncountry/landscape/overview/enclosingland/

19 Montesquieu 1989: II.11, 6. Contrast this definition with 'positive' liberty as autonomy through direct legislation in ancient Athens.

we ought not to will".[20] Even if social peace, rule-following, and the internalization of norms are necessary for a stable republic, if individuals do not have the ability to partake in deciding those rules, liberty in this republic is nothing more than the feeling of safety in the obedience to imposed laws. Reducing liberty to security, Montesquieu argues for a mixed representative constitution to guarantee freedom for all through "moderation". He theorized this constitution based on a Whig interpretation of the English political system, and proposed a hybrid commercial republic that incorporated the commercial spirit as a moderating force alongside the (potentially despotic) democratic virtue ("the love of equality and frugality") generated by popular sovereignty. The result was an elitist, proceduralist model in which the common people's only power was the right to elect representatives, while the few preserved their dominant position in the power structure through a formal institutional balance. By defining liberty as "the right to do everything the law permits"[21] and then arguing that good laws are those resulting from the correct procedures and institutional checks and balances, Montesquieu pegs liberty to the rule of law, closing the possibility of legitimately questioning the law from outside formal political institutions, which are effectively controlled by the few.

Following Cicero's elitist republicanism, Montesquieu argues that while man has a natural ability to perceive merit and elect, the people in general are not competent enough to be elected.[22] Even if he argued for extending the suffrage, giving the right to vote to all male citizens, he excluded those "whose estate is so humble that they are deemed to have no will of their own." In addition to excluding the poor, for Montesquieu the right of the people to legislate is only exercised indirectly, through representatives who are selected from the elites. Even though in a free state the legislative power is the prerogative of "the people as a body," he argues "the people should not enter the government except to choose their representatives; this is quite within their reach".[23] Representation thus appears not as a device to bridge the gap between the people and power, but as a mechanism to keep the people *away* from power through the formal expansion of the aristocratic procedure of election[24] to the common people.[25] While sortition —which actualizes equality— was the mode of selection used in ancient democracy, selecting rulers through voting based on superior skill, intelligence or status—which actualizes inequality by distinguishing some from the rest—was the preferred procedure for allocating power in most aristocratic republics.[26]

20 Montesquieu 1989: II.11, 3.

21 Montesquieu 1989: II.11, 3.

22 Montesquieu 1989: I.2, 2.

23 Montesquieu 1989: II.11, 6.

24 See Manin 2010.

25 Montesquieu 1989: I.2, 2.

26 For a review of elections in history, theory, and current practice, see Landemore 2020: chapters 2 and 3.

In the American implementation of Montesquieu's model, the framers wanted to accomplish the Lockean state as protector of property. This was not only an ideological project but also a material one, considering that the constitution was drafted in the aftermath of a debt rebellion that set court houses on fire and sparked an armed insurrection.[27] James Madison's legal system was designed against the 'tyranny of the majority' as the greatest danger to the republic. He argued that pressures for wealth redistribution coming from below would be inevitable because "according to the equal laws of suffrage, the power will slide into the hands of the [poor]".[28] One of the main objectives of the constitutional order that the founders were crafting was thus to legally block the democratic redistribution of property. In a Lockean fashion, in the Convention's deliberations the defence of property as the principle aim of the state was not argued for so much on normative grounds, but it was just taken for granted as a pre-political right, an obvious claim almost all delegates —rich property owners and money lenders[29]— shared. The challenge before them was then how to guard, based on republican principles, against the redistributive property claims coming from the masses.

To block these claims Madison proposed the 'filtering' of the popular will as well as multiplying the sites of political power. Given the factual pluralism in a large republic,[30] having a representative government in a large state would constitute, in itself, a guard against the 'tyranny of the majority' by effectively hindering the capacity of the masses to organize on a grand scale. The federal structure would further enhance this anti-majoritarian —but mostly anti-plebeian— feature of the large representative republic, by making it less likely for "a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project … to pervade the whole body of the Union".[31] This structural protection against the domination of the majority, however, does not apply to the domination coming from the powerful few, who do not experience the collective action problems of the masses and have plenty of material resources to corrupt public officials. To prevent corruption and domination *within* government, Madison's mechanistic model of representative government solely relied on the division of functions proposed by Montesquieu. The most effective way to counteract power was by giving officials of different departments the necessary "constitutional means and personal motives to resist encroachment of the others".[32]

27 Shay's Rebellion (1786–87). See Nobles 2012.

28 Farrand 2008: 181.

29 74% of the framers were lenders of some sort, which puts the issue of debt and currency speculation at the top of the list of the interests that delegates aimed at protecting when negotiating constitutional provisions.

30 Olson 2012.

31 Hamilton, Madison & Jay 2003: Paper 10, 79.

32 Hamilton, Madison & Jay 2003: Paper 10, 71–79.

Even if the liberal interpretation of rights as property and the procedural solutions to tyranny and corruption that derived from the doctrine of separation of powers have become the standard for determining if a state is a proper democracy with 'rule of law,' the recognition of systemic corruption and the increasing legal oligarchization of power in society demands a departure from the mainstream. It is necessary to break away from the egalitarian fantasy on which this model is based, as well as from formal and procedural approaches that tend to hide material inequalities from legal analysis. We currently lack the proper tools to recognize and remedy structural forms of domination. For example, despite their formal equal status, Black Americans are two times more likely to be stopped by police, six times more likely to serve jail time and be sentenced to mandatory minimums for non-violent offenses, and four times more likely to lose their voting rights.[33] Therefore, even if they formally have equal rights on a par with white Americans, their oppression, allowed and enabled by legal regulations (or the lack thereof) and adjudications, denies this equality. The same could be said regarding the status of women, gender and ethnic minorities, and the working classes, whose exclusion and exploitation has been systematically enabled by the law or its absence.[34] Is this inability of the liberal lens, with its focus on formal equality and procedures over relations of power and the unequal application of the law, that demands a new material approach to the study of constitutions as organizations of power that tend to create and reproduce economic and social hierarchies. Even if some contemporary liberal theory certainly tries to address and redress socioeconomic inequality, propositions fall short of amending the basis of liberal constitutionalism: the sacredness of private property, the exclusively representative nature of government, and a state that needs to be impartial and neutral to guarantee equal rights to all.[35]

2 INTELLECTUAL FOUNDATIONS OF MATERIAL CONSTITUTIONALISM

Different from the idealism, formalism, and proceduralism of the elitist strand of constitutional thought, plebeian interpretations of the republican order are realist and materialist. The basic tenants of material constitutionalism are found in plebeian republican thinkers who proposed to institutionally empower the common people to effectively control the ruling elites. Commenced by Machiavelli, who was influenced by the theory of atomic motion proposed

33 One out of every 13 African Americans has lost their right to vote due to felony disenfranchisement, compared to only one in every 56 non-black voters. Quigley 2016.

34 For the arbitrariness of rules, see Kennedy 1976.

35 See e.g., Hayek 1960; Rawls 1999.

by Epicurean philosophy,[36] this strand of thought sees conflict as productive of liberty and seeks to justify on republican grounds the active participation of the organized many in the governing structure as necessary for keeping the republic free from oligarchic domination. From Machiavelli's perspective, society is seen not as a community of equal property owners but as divided between the powerful few, who own most of the property, and the common people, who own comparatively very little. Based on this division, the design of the political order includes institutions to allow both a selected elite to rule within limits and to enable the common people to push back against the inevitable domination that eventually comes from the governing actions taken by the few. Recognizing the asymmetry of power between the *few* and the *many,* and the oligarchic tendency that comes from elite power, plebeian mixed constitutions set up popular counterpower institutions to resist the overreach of the few. Constitutional frameworks today contain nothing of the sort and therefore have left the *many* vulnerable to oligarchic domination.

For Machiavelli, the corrupting process of oligarchization does not begin in the masses (governed in part by the unavoidable egoistic tendencies of individuals) but in the legal form restraining individual interest, as well as in the procedures by which power is allocated. Individual interest is a force permanently trying to unduly influence government but only succeeding, and thus effectively corrupting the republic, if laws and procedures are already flawed, allowing for inequality and undue influence. According to Machiavelli, "an evil-disposed citizen cannot effect any changes for the worse in a republic, unless it be already corrupt".[37] Machiavelli identifies two types of corrupting norms promoting two forms of evil: license and socioeconomic inequality. Regarding limits to individual action, he argues that just as good, disciplined soldiers become rowdy through the lifting of restraints to their behaviour, the general corruption of mores is allowed to begin when "the laws that restrained the citizens… were changed according as the citizens from one day to another became more and more corrupt".[38]

Even if one might not agree with the imposition of strict moral codes to avoid corruption, Machiavelli's insight into how the law adapts to corrupt behaviour is still sound. The legalization of lobbying in the Unites States in 1995, via a reinterpretation of the First Amendment right "to petition the Government for a redress of grievances," is a clear example of this accommodation. The Lobbying Disclosure Act[39] came to regulate the already existing undue influences on gov-

36 Machiavelli's main source was Lucretius' *On the Nature of Things.* There is also a utopian materialist strand of thought of which Thomas More is the most prominent thinker.

37 Machiavelli 1989: III.8.

38 Machiavelli 1989: III.8.

39 Lobbying Disclosure Act, S.1060, 104th Cong. (1995) (enacted). https://www.congress.gov/bill/104th-congress/senate-bill/1060/text.

ernment officials, without questioning the corrupting influence that lobbying has on legislation and public policy. The $3.47 billion dollars spent on lobbyists in 2019 to influence public policy did not only give advantage to those who could afford it, but also generated what Dennis Thompson calls *institutional corruption*, a "condition in which private interests distort public purposes by influencing the government in disregard of the democratic process".[40] Even if approaching representatives to individually 'lobby' for redress is a constitutional right, the regulation of special interest groups[41] and the industry built around them to pressure the different branches of government to pursue specific paths of action clearly enables the oligarchization of power instead of combating it. Only those groups with enough resources to hire professional lobbyists —who already have special access to government officials— will get their demands met at the detriment of everybody else. In this way, systemic corruption creeps in when corrupt practices, seen as inevitable, are normalized, legalized, and finally built into the system, further eroding the juridical limits that protect the democratic republic from oligarchic takeover.

In addition to promoting moral license and undermining civic virtue, Machiavelli argues law plays a key role in allowing for inequality, which ultimately makes the protection of liberty and the republican project impossible. Because republics need relative equality to exist,[42] if laws allow for the accumulation of wealth in the hands of a few and to the destitution of the majority, the gradual transition from a good government into a corrupt one is inevitable. For Machiavelli, lords "who without working live in luxury on the returns from their landed possessions" are dangerous for any republic; they are the beginners of "corruption and the causes of all evil".[43] Bad laws enable undue influence on government from "fatal families" as well as the division of society into factions that "will strive by every means of corruption to secure friends and supporters" in order to satisfy their interests.[44] Good laws, on the other hand, establish the necessity and duty to create virtuous citizens and make sure the influence of wealth "is kept within proper limits"[45] by prohibiting the legal ability to command enormous fortunes, estates, and subjects.[46] Anti-oligarchic laws —setting limits to the command of wealth and patronage, such as the imposition of a

40 Thompson 2005: 1037; Thompson 1995.

41 Even if regulating lobbying allows for more transparency, it does not protect us from its pernicious effects.

42 Machiavelli 1989: I.55. For further analysis of the relation between inequality and constitutions in Machiavelli, see McCormick 2013.

43 Machiavelli 1989: I.55.

44 Machiavelli 1989: III.27.

45 Machiavelli 1989: I.1.

46 Even though Machiavelli refers to German citizens, who if they get gentlemen "into their hands, they put them to death," he does not want to bring equality by murdering the rich, but by adopting laws to curb inequality.

wealth tax and anti-trust laws— are thus essential anti-corruption legal provisions needed to preserve a good constitutional form.

Machiavelli's contribution to materialist constitutional thought was revisited in the 18th century, within a critical approach to the American constitution coming from the revolutionary experience in France. The strongest critic in the Girondin camp was the Marquis of Condorcet who argued that the system of separation of powers put in place in America was a complicated machine that only served to conceal a parallel ruling system based on "intrigue, corruption and indifference".[47] Following Machiavelli, for whom corruption is enabled by the methods of selection and decision-making,[48] Condorcet criticized the doctrine of separation of powers and its proceduralism, and rejected the constitutional framework put in place in America, as insufficient for controlling corruption and guaranteeing liberty. According to Condorcet, the new American constitution, which chose "identity of interests rather than equality of rights" as its organizing principle[49] —relying on the ambition of politicians to check one another rather than on the active control exercised by the people, and enshrining the separation of powers as the best design to keep the republic uncorrupted— was unlikely to serve as a real bulwark for liberty. While embracing interest over equality of rights would increase rather than ameliorate 'artificial' inequalities and the forms of domination they reproduce,[50] Condorcet criticized the system of separation of powers because it "disfigured" the simplicity of constitutions. Separation of powers would not only be unsuccessful in keeping corruption at bay, but it would also allow for its concealment and reproduction.

> Experience everywhere has proved that these complicated machines destroyed themselves, or that another system emerges alongside the legal one, based on intrigue, corruption and indifference; that, in a sense, there are two constitutions, one legal and public but existing only in the law books, and the other secret but real, resulting from a tacit agreement between the established powers.[51]

Separation of powers is thus not only an inadequate framework for keeping corruption in check, but serves to obscure the actual domination being exerted "off the books" through the actual collusion of representative institutions against equal liberty. Without a popular censorial power making sure elites are not self-serving, the American Constitution put "the fate of the State dependent on the degree of stubbornness or corruption in each branch".[52] For Condorcet, this separation of powers does not provide an adequate mechanism for main-

47 Condorcet 2007a: 199.

48 Machiavelli 1989: I.18.

49 Condorcet, *Lettre d'un Théologien*, cited in Rowe 1984: 21.

50 Rowe 1984: 30.

51 Condorcet 2007a: 199.

52 Condorcet 2007b: Letter Three, 322. For further analysis of Condorcet's critique of the American Constitution, see Mintz 1991.

taining liberty. He argues that seeing the executive, legislative, and judicial powers as independent forces that, by seeking their own interest, balance and regulate one another against the encroachment of liberty, denies the possibility of domination happening despite this formal division of government functions.[53] He questions, "What becomes of public freedom if, instead of counterbalancing one another, these powers unite to attack it?".[54]

As an alternative to the system of representative government with separation of powers, Condorcet proposed a mixed constitution in which both representative bodies and the people themselves could directly exercise political power; representatives would govern, and the people, assembled at the local level, would retain the power to initiate and veto legislation and even amend the constitution. While the U.S. Constitution gave citizens the individual right "to petition the Government for a redress of grievances," without providing any enforcement mechanism to see that petitions are taken into proper account in governmental action, Condorcet's 'popular branch' constituted an institutionalized 'collective protest' popular power aimed both at electing the members of government and censoring their decisions. His constitutional project, *Le Girondine* (1793), which was never implemented, established a network of "primary assemblies" of between 450 and 900 citizens in every district, alongside representative government. Building on already existing popular organizations as a springboard for radical change, his constitutional blueprint sought to formalize the "partial, spontaneous protests and private voluntary gatherings" that arose with the revolution, and give them "legally established procedures, [to] carry out precisely determined functions".[55]

This plebeian constitutional thought re-emerged half a century later as philosophical critique in the work of Karl Marx, who wrote his doctoral dissertation on Epicurean philosophy and proposed a material constitution as the only free democratic order. According to Epicurus's atomic theory in which atoms are the fundamental particle —never extinguished but rather transformed—, there are three types of movement due to weight (falling in a straight line), repulsion, and swerving. While the first two movements caused by weight and repulsion are materially determined, Epicurus argued that the spontaneous deviation from the pattern, the slight movement away from path dependency, remains indeterminate, without causation, and thus free. The realization of the atom happens when "all relation to something else is negated and motion is established as self-determination".[56] It is this declination as a form of self-conciseness and realization that makes possible complexity and new patterns arising independently

53 For a discussion on the difference between separation of powers and functions, see Pasquino 2009.

54 Condorcet 2007a: 199.

55 Condorcet 2007a: 190.

56 Marx 1841: 31.

from the existing order. Epicurus is therefore, for Marx, the first to theorize the scientific origin of freedom through a "natural science of self-consciousness"[57] that aims at escaping necessity.[58]

The small changes that open the possibility for a swerve at the systemic level are enabled by man-made "accidents" such as "slavery, poverty and wealth, freedom, war, [and] concord".[59] Therefore, human declinations are enabled by changes in the artificial environment, which allow for recognizing the gap between the abstract order and the material experience, opening the door for self-consciousness, the breaking away from current material patterns and their determinism, and the creation of new patterns that can give way to independent orders as new sources of regularity in movement. Constitutional orders are sources of regularity created from a form of social consciousness, and are therefore the juridical expression of the self-reflection of a society at a given point, a particular formalization of "socialized man"[60] that codifies patterns of interaction that have become self-determining and self-reinforcing. Like every other established regularity, constitutions are vulnerable to becoming formal straitjackets, far removed from material reality and oblivious to the swerving energy building up within them.

Criticizing Hegel's formalistic theory of the constitution based on abstract logic, Marx makes the crucial distinction between the *political* constitution, based on a formal principle, born out of abstraction and guided by "a pre-existing system of thought", and the *material* constitution, based on a material principle, emerging from material conditions and life experiences. The 'good' constitution is the one in which the political and material are the same. While "a constitution produced by past consciousness can become an oppressive shackle for a consciousness which has progressed", for Marx it is possible to create a constitutional order that could adapt to swerves, having within itself "the property and principle of advancing in step with consciousness; i.e. advancing in step with real human beings —which is only possible when 'man' has become the principle of the constitution."[61] The only non-oppressive 'true' constitution is thus a democracy, in which "the formal principle is simultaneously the material principle".[62]

57 Marx 1841: 62.

58 Marx 1841: 26. Leszek Kolakowski argues Marx is committed to the Epicurean doctrine of the free subject as containing "the germ" of the concept of praxis. Marx 1978: 104. For further discussion about the reception of Marx's epicureanism, see Stanley 1995.

59 Lucretius 2001: 15.

60 Marx 1975: *Critique of Hegel's Doctrine of the State*, 88.

61 Marx 1975: *Critique of Hegel's Doctrine of the State*, 75.

62 Marx 1975: *Critique of Hegel's Doctrine of the State*, 88. While Livingston and Benton translate "materielle" as "substantive" I prefer to translate it as "material" since it is more in tune with the Epicurean language. Translators for the Cambridge University Press 1970 edition, Annette Jolin and Joseph O'Malley, also chose material over substantive.

Democracy is for Marx "both form and content," a constitution founded on "real human beings" —and not on their essence or abstraction— and created by the people themselves.[63] The constitution of a democracy "is in appearance what it is in reality: the free creation of man".[64] While in "other political forms man has only legal existence," in democracy the constitutional framework is only one form of "self-determination of the people," emanating from the people. The only *material* constitution, in which the formal structure is a true expression of the people, is a democracy. All other types of constitutional frameworks based on principles and abstractions are by design "oppressive shackles" that make humans subordinate to a rational logic that is external to their material experience. For Marx, the "highest summit" of political constitutions is the modern bourgeois republic, founded on the principle and protection of private property.[65]

3 TOWARDS A NEW MATERIAL APPROACH TO CONSTITUTIONS

Since the birth of modern capital and representative democracy, there has been an acceleration of a double movement: on the one hand, the emancipation of private property from the purview of the State, and on the other, the detachment of the State from the community —becoming "a separate entity, beside and outside civil society"— and its attachment to oligarchs, being "purchased gradually by the owners of property".[66] By design, the *raison d'etre* of the liberal state is not the wellbeing of the human community but the security of property as an abstraction—the preservation of the contractual relations that reproduce the existing hierarchical society, enabling "the individuals of a ruling class [to] assert their common interests".[67] In the liberal constitution, the ideology of private property becomes, according to Marx, internalized, penetrating "into the consciousness of the normal man" and subverting our understanding of justice, which is "reduced to the actual laws" that are made to preserve contractual relations of domination.[68] Legal abstractions become internalized, skewing our sense of justice, not only because of the imposition of civil laws that are developed "simultaneously with private property" but also due to the concurrent "disintegration of the natural community" due to trade. It is within this economic transformation and the rise of the new commercial elite that civil laws were "raised to authority" and the "existing property relationships [were]

63 Marx 1975: *Critique of Hegel's Doctrine of the State,* 87.
64 Marx 1975: *Critique of Hegel's Doctrine of the State,* 87.
65 Marx 1975: *Critique of Hegel's Doctrine of the State,* 87.
66 Marx 1978: 187.
67 Marx 1978 187.
68 Marx 1978: 187.

declared to be the result of the general will".[69] Moreover, the separation of the political constitution and its laws from the material reality allows not only for a person to "have a legal title to a thing without really having a thing," but also the inversion of human priorities. While before capitalism "the production of material life" was considered a "subordinate mode of self-activity," material life now appears as the final cause of human activity, and human labour as its means.[70]

From the perspective of our 21st century society, in which production, trade, and economic growth have effectively become ends in themselves, and human labour and intellectual activity are just means to the reproduction of mere life and the endless accumulation of property for some, it seems crucial to pick up the thread of material constitutional thought to help unravel the patterns of domination weaved into the rule of law. However, after 200 years of liberal hegemony and its paradigm of formal equality, exiting its analytical bounds has been challenging.[71] To be able to detect systemic corruption and 'see' structural domination, I propose a material constitutional lens that builds on Machiavelli, Condorcet, and Marx, and aims at accounting for the influence social and economic inequalities have on political power and the law. Material constitutionalism is therefore premised on the idea that the organization of political power cannot be analysed without considering socioeconomic power structures and the ways in which states enable some kinds of actions while disabling others, targeting specific groups through the criminalization and legalization of certain actions, as well as through the selective enforcement of rules and penalties that appear as impartial. Therefore, constitutions and the rights they contain need to be studied as organizations of power, considering not only the written text and its jurisprudence, basic political and social institutions, and the rules and procedures enabling the exercise of power, but also the social effects of the con-

69 Marx 1978: 188.

70 Marx 1978: 191.

71 Approaching the material constitution from an explanatory rather than a normative perspective, Goldoni and Wilkinson (2018) define the material constitution as comprised of four basic elements: political unity, a set of institutions, social relations, and fundamental political objectives. In their account, power relations between the few and the many, capital and labour, which determines the design and use of political institutions, are replaced by "a plurality of subjects whose positions are conditioned but not determined by already established relations." They acknowledge that the strength of the material constitution rests on the social "support for the political aims (or even finality) of a regime," but refrain from challenging the basic institutions that have allowed for oligarchic domination, or from proposing to institutionally empower the common people to decide, collectively, on those political aims. Their replacement of class struggle with agonistic pluralism, and the negation of the factual dominance of material conditions over representative politics, obscures factual oligarchy and overestimates the political power individuals have to exert changes to the superstructure. Individuals today are not strictly speaking political actors able to decide on "the formation and then preservation of a particular political economy, as well as in fomenting change through putting pressure on reforming the political-economic structure"; structural oppression makes individuals powerless to resist domination and exert changes to the legal structure if collective power is not properly institutionalized.

stitutional framework in terms of socioeconomic inequality, as well as the class, racial, religious, and gender disparities in the application of the law. This new approach to the study of constitutions, which brings together law, philosophy, politics, and economics, facilitates a dialectical analysis of the relation between power and the law —that is, between the material conditions of society and the legal, juridical, and formal provisions that (allegedly) regulate them.

This material approach should not be mistaken with the school of constitutional interpretation that developed in Germany after the 1958 Lüth case, which expanded the sphere of constitutional rights into the relation among individuals.[72] The 'material' aspect of German constitutionalism refers not to the relation between power and law, but to an "expression of 'the substantive' in law,"[73] as a system of values centred on the principle of human dignity.[74] The materialist constitutionalism I propose here, on the contrary, does not have a pre-existing ethical "substance" or "spirit".[75] Rather, it is premised on the recognition that norms develop from power relations, and that the legitimacy of law should be determined depending on the role it serves in the material conflict between domination and emancipation in society. Neither law nor rights nor procedures are 'good' in themselves or guarantee by themselves a society in which everyone is equally free. There are laws that are never applied or that are applied to target a specific group;[76] rights that are mere parchment barriers for the *many* and weapons for the already powerful *few*;[77] and jurisprudence that validates unequal relations of power instead of dismantling existing relations of domination.[78]

To assess if a given institution, procedure, or law is 'good' and thus part of the normative framework of a free society, material constitutionalism considers not only the degree of conformity of institutions, procedures, and laws to the basic democratic principle of equal liberty,[79] but also their effects in enabling emancipation and discouraging oppression on the ground. Political emanci-

72 Lüth case, BverfGE 7, 198 (1958) B.II.1. It endorsed the application of constitutional norms to private law, which established the foundation of the "horizontal effect" of constitutional law, a strategy that has proven successful in accounting for rights violations coming from private agents as well as the state. See Gardbaum 2003; Tushnet 2003.

73 Bomhoff 2013: 74.

74 1949 German Constitution, Art. 1.1 "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."

75 Schmitt 2008: 155.

76 For example, see sentencing disparity on the application of drug laws that impose harsher penalties on cheap substances (American Civil Liberties Union 2006).

77 See, for example, the constitutional protection afforded to corporate political speech in *Citizens United v. Federal Election Commission* (2010).

78 For the role of lawyers and judges in legalizing relations favourable to the wealthy and their corporations, see Pistor 2019.

79 Identified as the principle of representative government for the first time by Condorcet. For an analysis of the principle, see Urbinati 2008.

pation, which according to Jacques Rancière consists in the materialization of a logic of equality that is anti-hierarchical and conflictual,[80] is inevitably self-emancipation; by defying the structures of oligarchic rule and appearing as a political actor, the plebeian people materially perform the logic of equality and their own emancipation.[19] Consequently, emancipatory law not only favours socioeconomic equality but also empowers the common people, giving them decision-making prerogatives to become political actors —and not mere electors— within the democratic constitutional structure.[81] Democratic, material constitutionalism imposes then an immanent normative referent for judging laws and institutions: their impact on enabling the (self)emancipation of the *many* and on disabling oligarchic domination. This new lens establishes a constitutional ideology that does not aim at neutrality but at redressing inequalities of power within society. A material approach to legality therefore would stand as an alternative, on the one hand, to Kelsenian legal positivism—which denies the political nature of constitutions and reduces their analysis to jurisprudence, excluding the application of law and its consequences in material terms— and on the other, to proceduralism—which masks the growing oligarchic influence on government that happens without a direct transgression of separation of powers and electoral rules. A material assessment of constitutions and structural forms of inequality would force us not only to study rules, procedures, and the courts but also to include their impact on power relations, as well as to engage in institutional innovation to give binding power to the common people so that they can effectively resist oligarchic domination.

There are currently very few constitutions in the world that partially aim at redressing material and political inequalities— and they do a rather poor job. The most emblematic examples of legal frameworks with justiciable socioeconomic rights are the constitutions of Brazil (1988), Colombia (1991), and South Africa (1996), which are part of a transformative constitutionalism that transcends formal equality and pushes for the materialization of basic rights such as healthcare and housing. However, despite the incorporation of these rights, their materialization has been slow and uneven since it is individuals, through the courts, who must demand that the State comply with its constitutional duty to guarantee them. As judges do not have the authority to decide on the budget, rights have only been guaranteed to the extent that is "reasonable," which has meant that the rights of many people continue to be systematically negated.[82] Separation of powers and the lack of an institutional authority to

80 Rancière 1998: 101.

81 For the positive effect that mechanisms of direct democracy have on equality, see Kramling 2022.

82 For a study of the territorial inequities in the enjoyment of the right to healthcare, see Ferraz 2020. For an overview of law, policy, and implementation of a consistently underfunded right to adequate housing in South Africa, see Dawson & McLaren 2014.

mandate and oversee structural change have proven to be insurmountable barriers to the lack of political will by governments with short-term goals driven by electoral cycles. More recent constitutional experiments in Venezuela (1999), Ecuador (2008), and Bolivia (2009) have gone further than justiciable social rights, building popular institutions and mechanisms of participation into their structures to materialize rights through the executive and legislative functions. However, their innovations have also failed to adequately guarantee rights because they have not effectively empowered the citizenry to autonomously participate in decision-making and control of government.

Venezuela incorporated a new basic institution, the Citizen Power —comprised of the offices of the People Defender, the General Prosecutor, and the General Comptroller of the Republic— aimed at guaranteeing rights, overseeing the correct application of the law, and investigating and punishing "actions that undermine public ethics and administrative morals" (art. 274). However, even if this Citizen Power was designed to be independent from the government, the current systematic denial of social rights —such as access to healthcare, adequate nutrition, and clean water— and the egregious crimes that have been perpetrated by security forces with impunity[83] belie its declared autonomy. The Ecuadorian constitution also vowed to be participatory and gave citizens the right to "initiate, reform or repeal juridical norms" through a mechanism of *indirect* popular initiative that requires the gathering of signatures to introduce a proposal into the legislative debate (art. 61.3). However, this mechanism of popular participation has not allowed the common people to have real political power. To date, of the 21 indirect popular initiatives that managed to gather enough signatures to be considered by Congress, none have been approved with their original content.[84] Finally, the Bolivian Constitution empowered local communities by granting rights to "participation and social control," so residents could design and monitor public policies, and in this way push for the adequate materialization of basic rights in their communities (art. 241 & 242). However, these rights to participate and oversee government action remain largely unrealized, which has had a negative impact on the materialization of socioeconomic rights. As the case of the right to water shows, even if the MAS government has been progressively realizing this right since 2006, the lack of meaningful citizen participation in decision-making and accountability processes has resulted in great disparities. Notwithstanding the national increase in the access to clean water since the mid-2000s, from 71% of the population to 83%, the gains have been unequally distributed. Cochabamba, the epicentre of the 2000 water war —during which social movements demanded the "creation of public, democratic water utilities with citizen participation and community

83 UN Human Rights Report, 2019.

84 Herrera 2018. For a critical analysis of the rights of nature and the extractivist state in Ecuador see Vergara 2022.

oversight," but got instead only a few seats in the directory of the corrupt public water company— has had negligible improvements, with approximately half of its population still lacking access to water.[85]

To be able to go beyond the constraints imposed by formal equality and the anti-majoritarian organization of power that has yielded societies with billionaires, opulence, and waste alongside growing ranks of oppressed groups living in precarity, it is necessary to intervene the basic structure to incorporate new institutions like Condorcet's network of primary assemblies,[86] as well as binding participatory mechanisms to force representative governments to adequately fulfil the rights of the most vulnerable and stop kicking the bucket down the electoral road. Politicians are not keen to spend their time in office investing in the long-term fulfilment of the rights of the most vulnerable, since it is unlikely that they will be able to reap the benefits in the next electoral cycle. Self-emancipation demands material and institutional resources, and a material lens forces us to reckon with the fact that socioeconomic rights cannot be divorced from political power. Having justiciable socioeconomic rights in the constitution is not enough to materialize them. It is necessary to think outside of the liberal constitutional box and pair these rights with direct democracy mechanisms to assure their adequate fulfilment and defence against oligarchic overreach.

4 CONCLUSION

If we follow Machiavelli and take as a premise that all constitutions and the laws they produce could tend to foster corruption, then we need to grapple with the relativity of the 'rule of law,' which both neoliberal and neorepublican thinkers argue is the mark of liberty. If corruption is the vehicle for oppression, and it originates not only in individuals but also in laws and the use of procedures, then the rule of law must not be necessarily understood as a source of liberty. Moreover, because laws can be written and used as tools for oppression, they appear at best as weak tools to combat corruption and at worst as instruments to uphold and reproduce domination instead of combating it. If one agrees that the minimal normative expectation of liberal democracies is that governments should advance the interests of the majority within constitutional safeguards, increasing income inequality and the relative impoverishment of most citizens should be seen as a clear sign of corruption. However, both inequality and corruption have been depoliticized; while inequality is seen as a natural and inevitable outcome of free market societies, corruption has been reduced to individual misconduct, which prevents us from fully capturing the systemic

85 Baer 2015.

86 Condorcet (2007a: 204-205) also proposed a national council of overseers, a popular office of enforcement and surveillance.

effects that inequality and corruption have on the enjoyment of individual and collective liberties.

Analysing the constitution through a materialist lens that does not originate in a natural egalitarian fantasy, or in abstract original positions, where inequalities are obscured by veils of ignorance, but that rather begins with real existing inequalities and relations of domination that have endured despite formal equality, separation of powers, and transparency laws, seems necessary to correctly diagnose the oligarchic malaise that has taken over representatives institutions, distorting public purposes even in the most egalitarian democracies. The material lens opens a range of new institutional solutions to systemic corruption —from anti-oligarchic laws setting limits to wealth accumulation, to a national network of local assemblies with the power to monitor and direct representative government— as well as new normative grounds to justify the adequate fulfilment of new socioeconomic and political rights. Only by pushing the boundaries of the hegemonic liberal interpretation of rights and the doctrine of separation of powers, which has been disturbingly tolerant to extreme degrees of inequality, can constitutionalism contribute to reverting the process of oligarchization of power that transpires not only in conformity with legality but that is also enabled by it.

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Ana Cannilla*

Political constitutionalism in the age of populism

This article examines the relationship between populism and political constitutionalism. It claims that while political constitutionalism is at odds with, and better than, the wide range of experiences labelled under the term 'populism', political constitutionalists would do well to distance themselves from the claim that the constitution is political "all the way down". First, the article argues that the normative ambiguity of the term 'populism' makes it ill-fated for the purposes of constitutional theory and a call for clearer language for constitutional discussion is defended. Second, it argues that political constitutionalism should abandon, or significantly adjust, its commitment to what the article calls *constitutional lawlessness* and is defined as the idea that the constitution is and ought to be entirely malleable. The reasons offered for this proposal differ from those advanced by legal constitutionalism and instead hang on the democratic authority that political constitutionalists vindicate for majoritarian institutions. Political constitutionalism, the article concludes, should grant some of the normative advantages of the law to the outcomes of constitutional decision-making processes. The move makes political constitutionalism more consistent in its own right and, importantly, safer from the charge that it feeds different sorts of constitutional disorder.

Keywords: populism, constitutionalism, constitutional crisis, political constitutionalism, illiberalism

1 INTRODUCTION

Political constitutionalism faces a crucial challenge today. At a time when electoral majorities are supporting illiberal and authoritarian governments globally, the traditional defence of majoritarian decision-making and popular sovereignty endorsed by political constitutionalists seems more questionable than ever before. The rise of populism across Europe and the Americas has brought to the constitutional surface the most feared threat to liberal democracy: the possibility that political majorities abuse minorities precisely through the democratic process. In this context, it comes as no surprise that long-standing concerns regarding the tyranny of the majority and the appropriate role of courts are intensely revisited. Some scholars argue that populism justifies the need for judicial constraints on majoritarian institutions and that, if anything,

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the independence and powers of courts should be strengthened.[1] Others are sceptical that the old remedies of liberal constitutionalism work as well as expected, claiming that countermajoritarian solutions will not help in times when citizens demand more participation, not less, in political decision-making.[2]

In this article I will be siding with the latter group but, instead of making a general case for political constitutionalism, what I want to address here is the relationship between populism and political constitutionalism. While the relationship between populism and constitutionalism has recently started to gain attention, the connections between populism and political constitutionalism need of further exploration. In particular, the implications of their shared majoritarian readings of the constitution deserves examination. This article argues that while political constitutionalism is at odds with, and better than, the wide range of experiences labelled under the term 'populism', political constitutionalists would do well to distance themselves from the claim that the constitution is political "all the way down". The reasons offered for this proposal differ from those advanced by legal constitutionalists. The move makes political constitutionalism more consistent in its own right and, importantly, safer from the charge that it feeds illiberal or authoritarian constitutionalism.

In developing my argument, the article proceeds in four steps. Section II surveys the literature on populist constitutionalism, outlining the different views on the topic to show that the label is, at the very least, extremely contested. In Section III, I take on populism to explain why views on the relationship between populism and constitutionalism are so disputed. In a nutshell, I argue that the term populism fails to do the work constitutional theorists want it to do. Indeed, the shortcomings of populism are so problematic that I claim we are better off without the term, at least for the purposes of constitutional theory. Moreover, its ambiguity leads to the conflation of authoritarianism with democratic and legitimate appeals to popular and parliamentary sovereignty. This mistakenly detracts from political constitutionalism as a worthy theory of constitutional government in liberal democracies. Unlike legal constitutionalists, political constitutionalists endorse the view that constitutional decision-making belongs to the political, not the juridical, arena. A reason for this is that they sometimes envisage constitutional disagreement as political "all the way down". Legal constitutionalists denigrate this position as self-defeating but, as I will defend in Section IV, their critique is wanting. That said, there is one way in which political constitutionalism can fall prey to self-defeat when it insists on the view that the constitution is political 'all the way down'. If there is nothing legal in the constitution, political constitutionalism can hardly live up to its promise to enable self-government in a society of equals. I develop this critique

1 Kuo 2019; Prendergast 2019.

2 Suteu 2019; Loughlin 2019.

of what I call *constitutional lawlessness* in Section V. I argue that political constitutionalism should abandon or significantly moderate its commitment to the idea that the constitution is and ought to be essentially malleable, for reasons that hang on the democratic authority that political constitutionalists claim for majoritarian institutions. Instead, political constitutionalists should grant some of the normative advantages of the law to the outcomes of constitutional decision-making. This, I will conclude, does not weaken the merits of political constitutionalism. On the contrary, it will immunise it from the critique that it can fuel different sorts of constitutional disorder.

2 POPULIST CONSTITUTIONALISM

In recent years, the literature on constitutionalism and populism has grown considerably. As populism became a major topic in other social sciences, most obviously in political science, and as it gained geopolitical traction (initially in Latin America, then in Central and Eastern Europe, and more recently in the US, the UK, and continental Europe), scholars of constitutional law have turned to the wide scholarship on populism and taken issue with its constitutional dimension. A survey of the literature reveals a huge divergence in the understanding of what populist constitutionalism comprises.

In his book *What Is Populism?*, Jan-Werner Müller argues that populism and constitutionalism are not as contradictory as they seem.[3] Populists, he argues, do not oppose constitutional systems and their institutions. While populists usually criticize constitutionalism when they are in the opposition, they frequently seek to establish new populist constitutional orders once in power, either by promoting constituent processes or by approving deep constitutional amendments.[4] In Müller's view, the core element of populism is anti-pluralism rather than anti-constitutionalism. Populist leaders, he claims, hold the view that "it's possible for the people to be one and -all of them- to have one true representative".[5] Populism, in his view, is a "moralistic imagination of politics" that splits the alleged "morally pure and fully unified people against elites who are deemed corrupt or in some other way morally inferior".[6] In populist constitutionalism, constitutions are partisan instruments to make the promises of such moralized antipluralism true, by occupying power in what would otherwise seem liberal constitutional institutions.

3 Müller 2016.

4 Müller 2016: 62-63; Landau 2018.

5 Müller 2016: 20.

6 Müller 2016: 19-20. See similarly Mudde & Rovira Kaltwasser (2017: 5) who define populism as "a thin-centered ideology that considers society to be ultimately separated in two homogeneous and antagonistic camps, 'the pure people' and the 'corrupt elite'".

In a similar way, Paul Blokker defines populist constitutionalism as a variant of political constitutionalism "but with a specific twist".[7] Political constitutionalists tell us that politics should enjoy primacy over law. In this 'revolutionary' tradition, political institutions have authority over courts in constitutional decision-making, not vice versa as legal constitutionalists argue.[8] The connection between this political strand of constitutionalism and populism comes as no surprise, since a common feature of all accounts of populism includes an alleged defence of popular sovereignty.[9] But an appeal to defend and represent the general will cannot by itself be dismissed as populist. What then is distinctive about populist constitutionalism? In Blokker's view the answer lies in a defence of popular sovereignty, but also in the prevalence of majority rule, an instrumental use of constitutions, and a strong resentment towards law and courts. When combined, these elements ultimately usher in policies that violate the principles of pluralism and inclusiveness.[10] Thus, in practice, populist constitutionalism is at odds with the political constitutionalist idea of giving all citizens equal say and equal vote.[11] As Kim Scheppele notes, reality shows that populists are hardly committed to populism in any serious sense.[12] Once in power, populists ignore their appeals to popular sovereignty and their previous criticisms of constitutional government and instead make corrupt use of constitutional institutions to hold on to power.

These accounts of populist constitutionalism share an exclusionary understanding of populism.[13] Here, populism is understood as a disease that corrodes constitutionalism's commitment to pluralism, individual rights, and the rule of law. By conceiving of the political framework in friend-foe terms, between the allegedly pure and ordinary majority of people and its impure opposition and minorities, it excludes the latter from the political game based on ethnicity, sexual identity, gender, religion, and other characteristics that should be protected by constitutional law.[14]

Given this hostility against the core values of constitutional democracy, constitutional scholars have strongly reacted against populists. Hence, it is commonly agreed that the role that courts should play in today´s democracies is

7 Blokker 2018: 116.

8 Corrias 2016; Blokker 2019.

9 See e.g., Canovan 1999: 4 "Populists claim legitimacy on the grounds that they speak for the people: that is to say, they claim to represent the democratic sovereign, not a sectional interest such as an economic class."

10 Blokker 2019.

11 Similarly see Alterio 2019.

12 Scheppele 2019.

13 The terms "exclusionary" and "inclusionary" populism were introduced by Mudde and Rovira Kaltwasser. See Mudde & Rovira Kaltwasser 2012.

14 See e.g., Bugaric 2019.

to "reinforce constitutional constraints".[15] Although it is conceded that "sometimes courts themselves embrace populism"[16] and that courts will only be able to resist populists "as long as they have a strong support of initiatives within civil society",[17] most scholars seem to agree that the point of constitutionalism is precisely to resist the kind of threat that populism poses to liberal democracy.[18] Legal constitutionalism conceives of law and courts as a limit to the excesses of ordinary politics and majoritarian democracy. Certainly, this reaction is a tantalising one. Our liberal constitutional systems were designed for resisting the kinds of threats posed by populism today. If the countermajoritarianism found in strong judicial review could be possibly justified by political constitutionalists it was for non-core cases, to use Waldron's well-known distinction.[19]

Yet, it appears that things are not so simple. It is far from clear that constitutional courts are willing or able to limit anti-pluralist or illiberal decisions of elected branches, whether executive or parliamentary.[20] Moreover, judicial intervention sometimes appears to be counterproductive, having enhanced judicial backlash instead of a commitment to the rule of law.[21] Importantly, populism and social discontent towards our basic liberal institutions (constitutional courts included) can be analysed not just as a disease but also as a symptom or even a potential cure to the internal tensions of modern constitutionalism.[22]

With this in the background, other scholars seek to distinguish between 'good' and 'bad' populist constitutionalism. From this standpoint, only some varieties of populism are intrinsically incompatible with the core elements of liberal constitutionalism. The sort of populist constitutionalism described previously is bad because it delivers authoritarian politics and is committed to nativist, patriarchal, and racist policies and discourses. To hold on to power, bad populists attack the rule of law, the independence of the judiciary, and promote partisan constitutional reform. Examples of bad populism include Latin American parties such as the United Socialist Party of Venezuela (PSUV), Donald Trump and the Tea Party movement in the U.S., or the Hungarian Civic Party (Fidesz) led by the country's Prime Minister Viktor Orbán in Europe. Yet good populism,[23] also referred to as democratic or emancipatory,[24] inclusion-

15 Issacharoff 2017.
16 Harel 2017.
17 Arato 2017.
18 Kuo 2019; Harel 2017; Prendergast 2019; Issacharoff 2015.
19 Waldron 2006.
20 Bugaric 2019; Sadurski 2019.
21 Pin 2019; Candia 2019.
22 Walker 2019; Doyle et al 2019.
23 Halmai 2019.
24 Bugaric 2019.

ary[25] or left-wing,[26] is essentially different. It is so different that some authors consider bad populism to be false populism, or indeed not populism at all.[27] Like its bad version, good populism endorses the thin ideology of a society separated in two opposed camps, 'the pure people' and the 'corrupt elite',[28] but in this case its aim is to promote pluralism and the inclusion of traditionally underrepresented groups. Good populists are not intrinsically corrupt nor are their constitutional proposals necessarily partisan. Examples of good populism include political parties like Podemos (Spain) and Syriza (Greece); political leaders like Bernie Sanders, Alexandria Ocasio-Cortez in the United States, or Jeremy Corbyn in the United Kingdom; transnational initiatives like the European movement DiEM-25 or social movements like Occupy Wall Street.

What these cases share, it is argued, is a preference for forms of government that stress the value of popular sovereignty in political decision-making (for instance by favouring mechanisms of direct democracy or by fostering political activism and social movements), with the recurrent aim to democratize the economy. In this sense, not only is populist constitutionalism not necessarily a bad thing, but it might foster the best normative readings of the constitution.[29] For this reason, it is also argued that the choice between a form of constitutionalism that is committed to liberal values and a form of populism that is reactionary and authoritarian, or led by "apostles of mob rule", is a false dichotomy.[30] There is room today for good populism, as there was before too.[31] Finally, there are also those who consider the divide between good and bad populism as a simplification of a rather complex phenomenon of incremental constitutional practice.[32]

The ambiguity of 'populist constitutionalism' evidenced from the above is unsurprising as it mirrors the ambiguity of the term 'populism' in the political science literature. In the following section, I argue that this ambiguity is more problematic than is usually conceded. It is so problematic, I will hold, that constitutional scholarship is better off without the term.

3 CALLING A SPADE A SPADE

The literature on populism is abundant, sophisticated, and interdisciplinary. Yet, as we saw with the previous discussion of populist constitutionalism, the value of populism as an analytical tool is far from obvious. The term remains

25 Mudde & Rovira Kaltwasser 2012.
26 Tushnet 2019.
27 Halmai 2019; Scheppele 2019.
28 Mudde & Rovira Kaltwasser 2017.
29 Tushnet & Bugaric 2020.
30 Howse 2019.
31 Tushnet & Bugaric 2020.
32 Doyle et al 2019.

highly contested and there are dozens of alternative and conflicting conceptions and definitions of populism, such as a strategy,[33] a style,[34] an ideology,[35] a political experiment,[36] a "way of constructing the political"[37] or even the "essence" of it,[38] the inner periphery[39] or the spectre of democracy,[40] a corrective and a threat to democracy,[41] a "moralistic imagination of politics",[42] a form of plebeian politics[43], "the people in moral battle against the elites",[44] or a disfigurement of representative democracy.[45] In a gracious exercise of intellectual honesty, Moffit and Tormey noted a few years ago that:

> "it is an axiomatic feature of literature on the topic to acknowledge the contested nature of populism […], and more recently the literature has reached a whole new level of meta-reflexivity, where it is posited that it has become common to acknowledge the acknowledgement of this fact."[46]

Considering this state of affairs, the applicability of the term remains challenging to discern. To be sure, not all the issues raised by the ambiguity of the term should concern constitutional theorists. Perhaps populism proves useful as a tool for political scientists to describe the behaviour of political parties and their leaders, to analyse voters' preferences, or to design strategies of electoral campaign.[47] But it is very difficult to examine the relationship between populism and constitutionalism when the available definitions for the former are so varied and contradictory, not least to evaluate whether populism is, in and of itself, compatible or incompatible with core elements of liberal constitutionalism. It is difficult to think about how constitutionalism can help to protect liberal democracies if we do not agree on what are the most serious threats these societies are facing. Making it even more challenging, most studies acknowledge that the case of populism is never clear-cut, but a matter of degree.[48]

33 Weyland 2001: 14.
34 Moffitt 2016.
35 Mudde 2004; Mudde & Kaltwasser 2012.
36 Frei & Rovira Kaltwasser 2008.
37 Laclau 2005: xi.
38 Laclau 2005: 22.
39 Arditi 2004.
40 Arditi 2007.
41 Rovira Kaltwasser 2012.
42 Müller 2016: 19.
43 Vergara 2020.
44 Mansbridge & Macedo 2019: 60.
45 Urbinati 2019.
46 Moffitt & Tormey 2014: 2.
47 E.g., Mouffe 2018.
48 Muller 2016: 74: "whether a particular claim is democratic or populist will not always be a clear-cut, obvious matter".

The problem is not only one of conceptual ambiguity. If that was the case, many other key terms in legal and political theory would be susceptible to the same critique. Rather, the key problem of populism inheres in its normative ambiguity. Unlike other contested ideas like democracy, freedom, or equality, we cannot agree on whether populism is a good or a bad thing, whether it threatens or offers a useful corrective for liberal democracies. If we cannot agree on whether populism is ideally to be eradicated, controlled, or fostered, then it will hardly take us far in the sort of questions that constitutional scholars are due to answer, such as: What are the limits of legitimate government? What is the best institutional design of a constitutional system? Which rights are fundamental? - and so forth.

For present purposes, the pitfalls of the term are threefold. First, populism fails to point out a novel, distinctive feature of politics and constitutionalism. Scholars of constitutionalism seem to agree that populism excludes, or aims to exclude, some people (not "pure people") from the polity and its decision-making processes by denying their legitimate political agency and restricting their rights.[49] We have better, clearer, and well-established terms to do that work for us. When the exclusion is based on gender, nationality, race and so forth, we speak of sexism, xenophobia, and racism correspondingly. In the unfortunate but not uncommon cases where these exclusions overlap, and when the basic procedural values of liberalism like the rule of law or separation of powers begin to fray, we speak of illiberalism, authoritarianism, or even fascism.[50] Thus, we should move beyond acknowledging the contested meaning of the term to test it against other, more serviceable concepts. This is relevant not only because populism fails to do the conceptual work we want it to do. The term also obscures the actual wrongness of such authoritarian governments, which are often closer to far-right ideology and institutional arrangements that bolster executive powers to the detriment of plural parliaments than to perennial two-sided power struggles for political hegemony.

Second, an excessively ambiguous concept like populism might also divert us from the causes of democratic decline. Instead of struggling to determine the meaning of populist constitutionalism, perhaps we could concentrate on more tangible forms of illiberalism and authoritarianism and pay heed to the root causes of popular discontent. I do not intend to elaborate on the extent or causes

49 Or, in the case of good populism, by controlling the political influence and eliminating the privileges of corporations and millionaires. While the literature is, for good reasons, more concerned with bad populism than with good, my argument works against the term across the board: we could speak, for instance, of democratic socialism for these cases.

50 Jason Stanley has powerfully argued that fascist politics can take place in countries that still stand as formal democracies, and identifies the practices lately ascribed to populists as fascist tactics or fascist politics. See Stanley 2018.

of democratic backsliding across the globe here,[51] and we will never know if the fate of liberal democracy would have been any better had it followed the 'revolutionary' tradition of constitutionalism, but it is a possibility worth exploring. If anything, it is unlikely that constitutional democracy's decay is primarily due to an excessive display of popular or parliamentary sovereignty within liberal democracies over the last decades. In this sense, the crisis of legitimacy that our liberal institutions seem to suffer today should not be confronted from the anti-popular sensibility that characterizes legal constitutionalism. Doing so risks fuelling the political disaffection that in turn feeds authoritarian political parties. As political constitutionalists never tire of emphasizing, constitutional attempts to save democracy from its demos do not appear to be the best solution to deep political challenges.

Third, the ambiguity of populism jeopardizes the value and potential of political accounts of constitutionalism by conflating authoritarianism and sundry moral and political claims of sovereignty. Populist-based analyses of constitutional practice risk taking alternatives to legal constitutionalism as if these were prone to authoritarianism due to their preference for popular or political decision-making processes.[52] The bias matters because scholars use concepts and ideas not only to describe how constitutions work, but also strategically, to establish how constitutions can legitimately work. Scholarship often reveals an anti-popular sensibility (or anti-populist, if you want) that penalizes majoritarian constitutional decision-making by default, casting a blanket shadow of suspicion over proposals within the political constitutionalist spectrum. Arguably, critics of liberal constitutionalism consider the model guilty, even if only partially, of the problems of political disaffection that liberal democracies currently face.[53] Political constitutionalism aims to rectify this by defending the constitutional merits of popular and parliamentary sovereignty that inform democratic decision-making against its legalistic counterpart. But, while political constitutionalism defends democratic sovereignty against a judicial countermajoritarian elite, it is at odds with any version of the phenomena recently packed under the label 'populism'. The reason, chiefly, is that the popular and political constitutionalist defence of majoritarian decision-making is driven by the idea of political equality and not merely of self-government, as an authoritarian view of constitutionalism would imply. That said, there are some grounds for the suspicion that political constitutionalism is a self-defeating view that makes liberal

51 On this point see e.g., Graber et al. 2018.

52 Not long ago, the label 'populist constitutionalism' was not as pejorative as it is now. It was often used interchangeably with popular constitutionalism, the American form of political constitutionalism that famously attacks judicial supremacy in constitutional decision-making and favours instead practices of participatory democracy. See Tushnet 1999, Kramer 2004, Balkin 1995.

53 See e.g., Loughlin 2019; Walker 2019.

democracies vulnerable to tyrannical forms of government. In the following section, I elaborate how these are different from what legal constitutionalists and scholars of populist constitutionalism have pointed at.

4 FROM MORAL DISAGREEMENT TO CONSTITUTIONAL LAWLESSNESS

Political constitutionalists share a sceptical view of the idea of courts as guardians of democracy. The reasons for their opposition to judicial review, typically courts' low democratic pedigree, have been widely discussed in the last decades.[54] In the two next sections, I focus on a tricky feature of political constitutionalism that I call *constitutional lawlessness*. I will refer to constitutional lawlessness as the idea that the constitution does not share, and ought not share, the normative advantages and disadvantages of the law. I will argue that one does not need to commit to constitutional lawlessness to endorse political constitutionalism. Rather, abandoning constitutional lawlessness closes the door to potential illiberal or authoritarian turns of the constitution that scholars of populism rightly fear.[55] My claim is that, by rejecting the idea that there are no such things as constitutional norms, political constitutionalism can better live up to its promise of self-government in a society of equals.

Let me start by clarifying that, contrary to what it is often asserted, most political constitutionalists are not moral relativists. Political constitutionalism needs not, and usually does not, deny the existence of moral facts that law aims to safeguard.[56] In my understanding of political constitutionalism, scepticism does not lie in the realm of moral ontology. What political constitutionalism denies, particularly in its British version, are constitutional facts. It is the ontology of constitutionalism that is at the heart of political constitutionalists' scepticism towards constitutional *law*. Other than uncontested, thin, procedural rules regarding how laws ought to be made, political constitutionalists fail to recognize the democratic value, and in some cases even the existence, of substantive constitutional precommitments of the people themselves or of their elected representatives. This constitutional scepticism will be my target here.

Although not all political constitutionalists endorse constitutional lawlessness in the same way, to a greater or lesser extent the idea that the nature of the constitution is, and ought be, entirely malleable is shared by all. From American popular constitutionalist Mark Tushnet's idea that "all constitutional provisions

54 See Gargarella 1996; Tushnet 1999, Waldron 1999 and Waldron 2006, Bellamy 2007.

55 For instance, Mudde recently linked British political constitutionalism to populism: "[i]n essence, the populist position on constitutionalism holds many similarities to extreme interpretations of parliamentarianism, such as the Westminster model" see 2021: 235 note 3.

56 Waldron 1999: 164–187.

are up for grabs at all times"[57]or Richard Parker's claim that "there are no supra-political *guarantees* of anything",[58] to British political constitutionalists John Griffith famously arguing that "law is politics carried on by other means"[59] and Richard Bellamy's idea that "the democratic process *is* the constitution"[60] and that there "can be no higher rights-based constitutional law that sits above or beyond politics",[61] or Jeremy Waldron's critique of constitutionalism as a form of limited government,[62] all sceptics of judicial review agree that the constitution is more about what happens to be decided in the legislature at present than it is about what was decided in the past. This view makes it difficult to justify the democratic merits of any legal norm to which government is bound to and, in turn, makes it easier for illiberal or authoritarian actors to game the constitution. Before I attempt to save political constitutionalism from constitutional lawlessness, let us briefly examine how legal constitutionalists have taken aim at it.

The view that there is no objective or neutral way to solve constitutional disagreements in the circumstances of politics is a core epistemological assumption of political constitutionalism. If there is no Archimedean way to solve reasonable disagreements, they argue, the best that democracies can ultimately do is to count heads.[63] Democratic voting thus stands above all other methods to solve constitutional disagreements in a society of equals. But legal constitutionalists argue that, if the epistemological argument is correct, there are no reasons to think it will not apply to second order disagreements, namely disagreements about the fairness of counting heads in the first place.[64] It follows, they tell us, that procedural issues are subject to the same sort of disagreement as substantive issues are claimed to be. There is nothing in the circumstances of politics that should logically move us closer to legislative supremacy and away from strong judicial review of legislation. Both institutional design options would be subject to the same kind of disagreement that political constitutionalists use as grounds against judicial review in constitutional decision-making. To make things worse for political constitutionalism, critics add, an understanding of the constitution as nothing more than majoritarian politics will in practice leave minorities out of the decision-making processes that political constitutionalists regard as fundamental. Political constitutionalism is then doomed to abandoning its chief principle: equal participation of all members of the political community.[65]

57 Tushnet 1999: 42.
58 Parker 1993: 583 (italics in the original).
59 Griffith 2001: 59.
60 Bellamy 2007: 5 (italics in the original).
61 Bellamy 2011: 90.
62 Waldron 2016: 23-45.
63 Waldron 1999: 113; Bellamy 2016.
64 Christiano 2000.
65 Kavanagh 2003.

I am not sure this is the best way to interpret the claims put forward by political constitutionalists. First, the infinite regress kind of critique is a *reductio ad absurdum* of the argument. Why would processes of constitutional decision-making be subject to an infinite number of disagreements? As will be recalled, political constitutionalists depart from a position, the circumstances of politics, where there happens to be a need to arrive at collective decisions.[66] The circumstances of politics in the sort of democracies that political constitutionalists have in mind imply the disposition of its members to arrive at a collective decision peacefully and without questioning the validity of the agreed process in the first place. This means that in ordinary politics there will be some commitment at best and pragmatism at worst, to accept the resulting outcome of a process in which members or their representatives played fairly. Since political constitutionalists accept that there is no perfect way to settle disagreements, this is not a frustrating or invalidating point to their theory.[67]

Arguably, this does not involve ruling out discussions on the merits of majority rule itself; there may well be democratic arguments for, say, sortition or countermajoritarian mechanisms at some stages of a decision-making processes. But it should be conceded that, in liberal democracies, there happens to be less disagreement in the process of "counting heads" than in the issue of whose heads are to be counted.[68] Notably, in liberal democracies majority rule is the ultimate process used not only in ordinary politics but also in judicial decision-making. The recurring problem for legal constitutionalism seems not to be the legitimacy of the majority rule itself, but whose majority rules.[69] Surely, which majority rules is an extraordinarily relevant question, and no political constitutionalist wants majorities making the wrong decisions. This applies to judicial majorities as well and, inescapably, their decisions are more contingent on who sits, when, and in which court than legal constitutionalists seem willing to acknowledge.

This brings me to the second kind of self-defeating accusation against political constitutionalism. Defenders of judicial review argue that, without the protection of minorities from majoritarian discrimination, political constitutionalism gives away its chief normative claim: the value of equal voice and vote in political decision-making. I will say less than what the issue merits here, but again on both sides of the debate one will find acknowledgments that neither courts nor legislatures are infallible guardians of minority rights.[70] It is far from clear that we are always safer in the hands of one institution than the other, as the outcomes are more context-dependant than is desirable. Notably, to make their argument safe against cases where minorities rights are systematically infringed, political

66 Waldron 1999: 108–113.

67 Bellamy 2016.

68 See contra Mac Amhlaigh 2016: 185.

69 See Tushnet 1999, Waldron 2014.

70 See e.g., Sadurski 2002.

constitutionalists claim that the argument for parliamentary (or popular) sovereignty is not universal: only those societies that have a track record of respect for human rights can morally afford supreme legislatures. This distinction allows us to apply different yardsticks of legitimacy to different majorities. In imperfect but otherwise full democracies, political constitutionalism contends, the core of the case against judicial review is strong because majorities are trustworthy.

So, constitutional lawlessness is not a problem for the reasons put forth by legal constitutionalists. I believe it is a problem, nonetheless, for other kind of reasons. In the following section, I argue that there is some truth in the claim that political constitutionalism can fall into a self-defeating paradox with its commitment to the view that constitutional politics goes 'all the way down'. If there is nothing legal in the constitution, there is not much that the people or their representatives are truly deciding for themselves in the decision-making processes that political constitutionalists vindicate for them. It seems an ill-fated way to empower individuals if the agreements at which they arrive are not taken seriously enough to give them at least some of the advantages of that knotty thing we call law. Coming to terms with this inconsistency will make political constitutionalism a sounder project.

5 WINNERS IN THE CONSTITUTION

So far, we have seen that political constitutionalism doesn't envisage constitutions as fixed, legal settlements on how to run a liberal democracy, but as part and parcel of the ordinary political process. With its uncodified constitution, its traditional defence of parliamentary sovereignty, and its characteristic constitutional conventions, the picture features most prominently in British political constitutionalism and is often summarized in John Griffith's famous claim that "[e]verything that happens is constitutional. And if nothing happened that would be constitutional also".[71]

As anticipated, I don't think this is the best kind of approach to what constitutionalism is about. Even under the UK constitution things can be, and often are, quite different. For instance, while there are no procedural differences between the enactment of constitutional and ordinary law,[72] UK courts have distinguished both (and established a hierarchy between them) by looking into whether the matters regulated in them are constitutional.[73] Some parts of con-

71 Griffith 1979: 19.

72 For the orthodox understanding of parliamentary sovereignty that justifies this, see Dicey 1915: 78 who, on this point, famously wrote "neither the Act of Union with Scotland nor the Dentists Act, 1878, has more claim than the other to be considered a supreme law".

73 See Thoburn v Sunderland City Council [2002] EWHC 195 (Admin) at [62] where the European Communities Act 1972 was defined as a "constitutional statute"; beyond the distinction

stitutional law are regarded so valuable, namely constitutional principles and fundamental rights, that UK courts have interpreted statutes against otherwise *prima facie* legislative intention, by reference to common law principles and rights.[74] But courts are not alone in granting constitutional law a 'higher law' explicit or implicit status. It is difficult to imagine that, say, citizens in devolved nations could be persuaded that the different Acts that establish devolved institutions in Scotland, Northern Ireland, and Wales ought not be regarded as worthy of protection from the vicissitudes of ordinary politics.[75] It is for this sort of reason that political constitutionalists should start to recognize that, to a significant extent, constitutions are treated as legal norms by officials and citizens and thus recognize constitutionalism and parliamentarianism as differentiated practices.

As with any other part of the law, constitutions are not set in stone and are largely the result of social and political struggles. But they are no less the way to pinpoint and entrench the result of these struggles, even if only in an open-ended manner. In this sense, the hegemonic establishment of common rules is not in and of itself the elitist perversion that some political constitutionalists see.[76] Neither is constitutional disagreement in and of itself a good thing.[77]

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between 'constitutional' and 'ordinary' statutes see R (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3 on the possibility of a conflict between two "constitutional instruments" at [208]; see more recently an endorsement of the view that some acts of parliament enjoy "constitutional character" R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 [67]. For an account of the implications of this trend for the principle of parliamentary sovereignty in the United Kingdom see Elliott in Jowell and O'Cinneide 2019.

74 See Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 and R (Privacy International) v Investigatory Powers Tribunal and others [2019] UKSC 22 where the court effectively disapplied ouster clauses; see also (R) Jackson v Attorney General [2005] UKHL 56, [2006] 1 AC 262 where in obiter three Law Lords qualified the principle of parliamentary sovereignty by reference to a "constitutional fundamental" see e.g. at [102] (Lord Steyn): "The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. […] In exceptional circumstances […] [the] Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish", at [107] (Lord Hope): "The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based" or at [159] (Lady Hale): "The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny."

75 Particularly considering the references to the permanency of devolution arrangements introduced by the Scotland Act 2016 and the Wales Act 2017, see Scotland Act 1998, s 63A (1) and the Government of Wales Act 2006, s A1 (1), see Elliott in Jowell and O'Cinneide 2019: 33.

76 This pinpointing moment is often seen as a fraud to popular sovereignty by sceptics of judicial review, particularly when it refers to top-bottom constituent processes. See e.g., Ran Hirschl's 'hegemonic preservation thesis' in Hirschl 2007.

77 Disagreement is, as I see it, just a matter of fact. Political constitutionalists like Gee and Webber 2010: 290 insist that the role of disagreement in the political model of constitutionalism (and the low degree of normativity that it brings) makes the constitution "contingent, con-

Rather, constitutionalization is a unique opportunity for the practice of citizen self-government that these scholars purport to uphold.

Political constitutionalists should not miss it so easily.[78] When we claim that the constitution is to be modified in and by any ordinary process at a constant rate, we undermine the emancipatory value of political constitutionalism: that people settle disagreements in a meaningful way. The point of political constitutionalism is not (or not only) that people or their representatives get to decide on crucial issues of public law. It is that their decisions are taken as more than minor victories to be reversed in the course of ordinary political action. The linear timescale of political constitutionalism departs from a starting point, the circumstances of politics, continues through a moment of voting, and arrives at a final stage of settling the disagreement. Indeed, it does not imply (as legal constitutionalists would argue) that this disagreement is then settled forever and must be insulated from political contestation as much as possible. But this is different than saying that there is a democratic reason to dismiss the normative superiority of constitutional settlements. Arguably, constitutions have the aspiration of channelling and formalizing the course of future political action. No more but no less. It is one thing to reject the view of constitutions as unmovable pre-commitments and panacea for constitutional disagreement, and it is another to overlook the value of people meaningfully agreeing on the establishment of whatever fundamental rules of government they choose to give themselves. To put it simply: politics precedes law, it does not fulminate it.

Political constitutionalists are often sceptical on this point because they worry that the rigidity of law locks up conservative, anti-popular views into the constitution.[79] Institutional arrangements like strong judicial review of legislation or rigid amendment procedures seem inconsistent with the idea of a constitution that is brought up to date by the political majorities of the day. But there is room between legal constitutionalism and the realpolitik view of the constitution that political constitutionalists endorse. The idea that we should be vigilant of moralistic, elitist impositions of views among citizens should not make us abandon the attempt to build moralized conceptions of constitutionalism.[80] On the condition that it is available for change in a feasible manner, there is nothing wrong with the entrenchment and hierarchical organization of principles and rights in

tested and even, at times, messy—but […] none the worse for it". My point is that it makes it none the better either.

78 Note that constitutionalization comes in different forms: from entrenchment or amendments decided by legislative supermajorities, referendums, or constituent assemblies to judicial decisions, be it common law constructions developed by the courts or specific rulings on the constitutionality of primary legislation. Not all these options of institutional design can promote democratic self-government in the same way.

79 E.g., Griffith 1979: 15; Bellamy 2016: 215-216.

80 For an account of 'moralized constitutional theory' see Kyritsis 2017.

a constitutional democracy. Surely the opportunity to fix the content of constitutional law is not risk free but, hopefully, a decent number of the outcomes of popular decision-making will be worthy of a higher law status. This is, arguably, the starting assumption of political constitutionalism: overall, people are trustworthy to take fundamental decisions. Although under a more rigid constitution minorities will have to work harder to accomplish changes, these groups would not be better off with a constitution that is too flexible. In a legal context where everything can change easily, securing rights would require demanding levels of mobilization and might simply exhaust the chances of social groups aiming at bottom-top constitution building. Hence, constitutional decision-making should be accomplished by political representatives or by direct consultation to the citizenship, but this should not lead us to hold that parliament should have the power to amend the constitution with one simple majority vote.[81]

Acknowledging the legal nature of constitutions matters also in terms of the authority and sustainability of constitutional government. If the constitution is no more than the ordinary process of passing laws (as political constitutionalists hold), what amount of reasons for action could be drawn from this never ending battle over fundamental issues? How helpful is it for constitutional identity to win fundamental rights that the legislature can easily shrug off? In Richard Bellamy's view, this concern "seems exaggerated given these same objectors generally accept that constitutional courts can and do overrule their precedents and revise their competences without a descent into anarchy".[82] But this response is unsatisfactory for at least two reasons. First, because the parallel with courts does not work well. Despite all the politicization of constitutional courts that can take place in today's constitutional democracies, it cannot possibly amount to the political task that parliaments carry out. Moreover, constitutional courts are not responsible for representing the people nor for satisfying their demands, so they cannot be used as a mirror to legislatures in a worse of two evils fashion. If constitutional courts are to exist, they should not rule to the beat of contingent majorities. Unless we want to duplicate parliaments (and that would get us back to the starting competition for constitutional supremacy), political constitutionalists should argue in favour of courts as independent, unelected, and countermajoritarian bodies.

81 In most countries with a codified constitution, processes of constitutional amendment take more than a simple majority vote in the legislature. This is due to the understanding that key constitutional matters are to be settled by clear majorities. This seems a good idea not only for normative reasons but also for practical ones. Arguably, the wider the support for change is, the greater the allegiance by dissenters will be. For a defence of the democratic value of codified constitutions and constitutional amendment procedures, see King 2019:32 noting how in the case of the UK's flexible constitution "there is not even agreed criteria for what would constitute a constitutional amendment in the UK, and hence nothing to prevent 'amendments' being affected even without an Act of Parliament".

82 Bellamy 2016: 210.

Second, and perhaps more importantly, the argument of authority is essential if political constitutionalism does not want to get dangerously close to the same kind of decisionism that is characteristic of authoritarian forms of government and that worries critics of populist constitutionalism. If we like saying that political constitutionalism is at odds with any form of authoritarianism, then we cannot at the same time say that political constitutionalism is constitutional because it refers to a form of government with a constitution but not under one. Even if the political constitution is more available to democratic amendment that what legal constitutionalists would like, it does not follow that political constitutionalism should overlook the idea of government limited by a constitution. This is true not only for political reasons. It is also a sounder ontological position to adopt. If we hold that conflict and dissent in constitutional politics are always ineliminable it will be difficult to defend the existence of any will of the people that majoritarian institutions are fit to identify and flesh out, not least that courts should stick to. Furthermore, if anything, taking the long road to constitutional decision-making will hardly bring less legitimacy to the process and the outcome. Rather, it will enhance both. While short-cuts like majority vote are perfectly legitimate, one does not need to be a deliberative democrat to recognize the value of the outcomes of longer, thorough, decision-making processes. The latter makes it harder for illiberals to coopt the process through piecemeal law-making and, at the same time, it makes the outcome easier to accept by those who are defeated in the political process. Along the way, constitutional decision-makers are honouring, not bypassing, robust legislative processes. The form such well-deserved honours take can include many of the advantages of ordinary law, such as some levels of entrenchment of rights or the benefits of judicial moral reasoning. It seems excessive that, to spare us some of the disadvantages of the law (such as the unavailability of some law to ordinary political challenge and the practical and normative complications of bringing legal change through courts) we lose all of the advantages (such as the entrenchment of human rights, a fair level of rights-based adjudication, or the possibility of institutional resistance against illiberalism).

In conclusion, the idea of the constitution as politics 'all the way down' stands a bit as a mirage. From a distance, it appears as the instantiation of citizen empowerment. Yet on closer inspection, its normativity vanishes.[83] What is left is the politicization of constitutional law, albeit one that comes in different varieties: from the inclusive, democratic form that political constitutionalism defends, to the authoritarian forms that scholars of populist constitutionalism worry about. The form that this politicization takes is what constitutionalists should be concerned with, not the language of sovereignty that political leaders across the board use in their quest for power, and that keeps scholars of populism so busy.

83 Goldoni 2010: 944-945.

6 CONCLUSION

Although they rarely put it this way, the political constitutionalist defence of legislative over judicial supremacy is underpinned by concerns about the sustainability of the citizens' bond with their representative institutions.[84] From this standpoint, constitutions need to be open for contestation so that citizens can have a say in it. For the same reason, constitutions need to offer them a reasonably certain picture of the political framework to which they are expected to show allegiance, even if the picture is more precarious and provisional that what legal constitutionalists are ready to accept. This is a vital issue at a time when, presumably, anything close to constitutional nihilism will not help us rebuild the liberal democratic project. A view of constitutionalism in which all options are always available for change in the most flexible way clears space for the decisionism that scholars of populist constitutionalism worry about. Political constitutionalists would do well to concede that the price, if any, of recognizing some of the advantages of the law to the constitution is not as high as they argue. Granting that constitutional law is law, that it is normatively higher than other parts of the law, that some of it deserves special amendment procedures, or that it is no less political when it comes in written form does not involve handing the constitution over to the judiciary. On the contrary, it can make political constitutionalism better by delivering on the promise of self-government in a society of equals.

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84 See e.g., Sumption 2019: 24.

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M. Victoria Kristan*

Sovereign schliberties

Where Pettit's international protection of individual freedom falls short

Distinguishing between basic liberties and sovereign liberties is today a cornerstone of the most prominent republican theories of democracy and their promotion of freedom as non-domination. The two sets of liberties are intended to function together to guarantee individual freedom at all levels of governance, both domestically and globally. Basic liberties belong to the national sphere of governance, where they contribute to the free and equal civic status of the individual and are correlatively linked to the protection of the individual by a system of state laws and norms. Sovereign liberties, on the other hand, operate in the international sphere where they constitute 'state freedom' as an external (global) dimension of individual freedom. According to the republican adage "No free individual without a free state", this external dimension of individual freedom implies the absence of international domination of states by other states or internationally active agencies and bodies, just as the internal (domestic) dimension of individual freedom implies, among other things, the absence of individual domination by other individuals or agents. However, the author of this essay argues that sovereign liberties, as conceived, are inadequate to protect states and their people from certain kinds of external domination, namely, those arising from state-to-state relations in international law and the circumstances of global domination.

Keywords: democratic theory, republicanism, freedom, domination (international dimension), basic liberties, sovereign liberties, Pettit (Philip)

1 THE RELATIONSHIP BETWEEN BASIC LIBERTY AND SOVEREIGN LIBERTY IN REPUBLICAN THOUGHT

We live in turbulent times: The rule of law is in decline[1] and more and more democracies are being drawn into populist 'authoritarian' regimes[2] that exert dominating power and fundamentally shape the degree of political freedom available in a state. These two phenomena have direct impacts on freedom.[3] The scholarship on freedom is therefore attracting increasing attention from both

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1 See von Bogdandy et al. 2021; Palombella 2020.

2 See Urbinati 2019.

3 According to Pettit (2012), and all republicans in general, freedom requires the rule of law in the form of social institutions and policies to protect it.

the public and experts. This essay focuses on a particular strand of this scholarship, namely, republicanism and its normative proposal for how to promote and defend the political freedom of individuals in a globalized world.

Republicanism today distinctively conceives of political freedom as 'non-domination', i.e., as the absence of both arbitrary interference into one's choices and non-deliberative control over them.[4] Republicans claim that other competing notions of political freedom—whether they come from Hobbes, Rousseau, Mill, Berlin, or Rawls[5]—are incapable of ensuring non-domination either because they focus solely on avoiding actual interference (thus ignoring the problem of potential interference through non-deliberative control) or because they have a blind spot for arbitrariness (Pettit 1997, Pettit 2009).

In the republican view, freedom is an attribute of individuals and corporate agents, including states.[6] However, republican theory is characterised by what is known as 'normative individualism', which assumes that something is only good if it is good for the individual (List & Pettit 2011: 182). Consequently, republicans perceive 'no difference in the value of two institutional arrangements unless there is a difference in the value for individual human beings of those arrangements' (Pettit 2015: 52). This means that 'there will be no difference of value between an arrangement under which a corporate agent is dominated and an arrangement under which it is not, unless there is a difference of value in the impact on individual human beings' (Pettit 2015: 53). The republican ideal of political freedom as non-domination is thus fundamentally geared to achieving individual freedom.

Another central element of republican political thought is the adage that an individual can only be truly free as a citizen in a free state (Skinner 2010: 99). For this reason, republicans emphasize two dimensions of individual freedom as non-domination, one within and one outside the state.[7] While the first, internal dimension, of individual freedom implies the absence of domestic domination of the individual by other individuals, private entities, or state authorities, its external dimension implies the absence of international domination of their state by other states or internationally operating agencies or bodies.

To secure both dimensions of individual freedom, republicans deploy two sets of liberties. The first set applies domestically, contributes to the free civic status of the individual, and is correlatively linked to its protection by a system of state laws and norms. This set is composed of the 'basic liberties'–or 'fundamental liberties', as they are also called–, such as freedoms of thought and speech, association, and assembly, to provide some of the most prominent

4 Pettit (1997; 2010b: 141), Skinner 2008.

5 See Hobbes 1994a and Hobbes 1994b, Rousseau 2018, Mill 1978, Berlin 1969 and Rawls 1971.

6 Pettit 2012; Skinner 1998; Skinner 2010.

7 Pettit 2014; Laborde & Ronzoni 2016.

examples. In contrast, the other set of liberties deployed by republican scholars to promote and defend political freedom in a globalized world operates on the international stage, where it establishes the freedom of states as corporate agents. It is composed of the 'sovereign liberties' and includes, for example, the state's freedom of association with other states, its freedom of expression, and above all, the principle of non-intervention applicable to all states, according to which they cannot interfere in the internal affairs of another state unless there is a strong justification, as for example the protection of human rights.[8] The sovereign liberties as attributes of states are thought to 'mimic' the basic liberties as attributes of individuals (Pettit 2015: 48).

Of course, there is much more to republican political thought than I have just described.[9] Nonetheless, this sketch provides the necessary context for a proper understanding of the challenge I seek to pose against the current republican view of promoting and defending political freedom in a globalized world. As you can imagine, I'm not the only critic,[10] but my position is somewhat original although I contribute to the existing objection that republicanism does not provide a way to protect an individual from the domination exercised by an agency from outside her or his state (Laborde and Ronzoni 2016, Martí 2010, Bohman 2004). The novelty of my argument lies in revealing an unexplored reason for this failure: i.e. the sovereign liberties as attributes of states do not mimic properly the basic liberties as attributes of individuals. I demonstrate this in three steps. First, in section 2, I briefly describe how the basic liberties function in a constitutional state. Then, in section 3, I look at the nature of sovereign liberties in international law and compare it with the functioning of basic liberties domestically. Finally, in section 4, I show that sovereign liberties as conceived by Pettit and other republican scholars are inadequate to protect states and their peoples from certain kinds of external domination, namely those arising from (*a*) state-to-state relations in international law and (*b*) the 'circumstances of global domination'.[11] Therefore, as indicated in the title of the paper, I propose to speak of sovereign 'schliberties' rather than calling them liberties.

8 See Wedgwood 2000.

9 Very good introductions are offered in Laborde 2013, Pettit 2012, Bellamy 2011, and Skinner 2010.

10 See the debate concerning the existing objection that republicanism is indistinguishable from some sufficiently nuanced liberal conceptions of freedom as non-interference (Larmore 2001, Kramer 2008, Carter 2008) and the view that republicanism fails to address the problem of structural domination (Allen 2016). However, these two objections are beyond the scope of this article.

11 Globalization poses a challenge to freedom as non-domination. Whatever definition of globalization one has in mind, it is clear that globalization has changed the geography of international relations. It is causing a social reorganization of actors and relationships that challenges the traditional international legal relationships between states and international organizations, international non-governmental organizations, standard-setters, and other hybrid regulatory bodies, among others. Globalization enables traditional and novel non-traditional

2 BASIC LIBERTIES IN A CONSTITUTIONAL STATE

Basic liberties apply in the national sphere of governance, where they contribute to the free civic status of individuals. They cannot do the job alone. In the republican tradition, revived by Quentin Skinner and Philip Pettit, basic liberties protect the free civic status of the individual within a state along with what republicans consider the basic elements of a 'mixed constitution': a rule of law in which all citizens are equal, a separation[12] and sharing of powers that denies control to any single ruling individual or body, and a degree of representation that gives each sector of the citizenry a presence in government (Pettit 2013: 171).

Within this institutional framework of a constitutional state, basic liberties identify those individual choices that need to be protected so that the individual can be a free, non-dominated citizen.[13] In other words, they have the important function of preventing the domination of the individual within a state. The promotion of basic liberties is motivated by the common premise in republican thought that domination is the foremost evil and that it must be avoided. Traditionally, the subject of domination, to which most attention has been paid in literature, has been the individual. It has been said that an individual is dominated in a particular choice or set of choices if other individuals, private entities, or state authorities *could* interfere in their choices or in their decision as to which option to choose (Pettit 2012: 26-28). This is the core of the idea of domination. It includes both actual and potential interference, as has just been made clear by the use of the verb "can". This is an important distinction between republican and liberal thought.

In republicanism, freedom isn't a predicate of actions, but rather a status of persons capable of living as they please by virtue of not being subject to the will of another. Republicanism recognizes that there can be interference without domination and domination without interference. The former occurs when interference isn't arbitrary, for example, when it's subject to suitable checks and

actors to interact and produce decisions, rules, or norms. Most decisions and rules created by global actors have some impact on our lives, though they are mainly created without any participation or control by the people. Other decisions are made by traditional actors, such as states, but their impact goes beyond their borders and interferes in the lives of people who are not their citizens.

12 Not everyone agrees that a mixed constitution requires a separation of powers (see e.g., Almond 1966 and Vile 1967), but I will leave that argument aside here.

13 Pettit sketches a neo-republican version of the basic liberties. He concedes that almost every political theory, except for Rawls, refers to basic liberties, even if the question of how to identify them is conspicuously neglected (Pettit: 2008). Rawls considers basic liberties to be the first condition for justice, including the freedom to judge as one sees fit, the freedom to speak one's mind, the freedom to associate with others, the freedom to own private property, to vote, and to nominate oneself for office (Rawls 1971: 61).

controls and tracks what Pettit has called 'commonly avowable interests'.[14] By contrast, domination without interference can be described by the classical republican paradigm of unfreedom: slavery. Even if your master is benevolent and doesn't interfere with your actions, you're dependent on his will and vulnerable to his interference: this makes you unfree. Advocates of freedom as non-interference, according to Pettit, are unable to recognize that there's unfreedom when "some people hav[e] dominating power over others, provided they do not exercise that power and are not likely to exercise it" (Pettit 1997: 9).

For the concept to be meaningful even in the contexts of social coexistence, where interference in one's own life by others is necessarily omnipresent, not every kind of actual or potential interference in one's choices counts. This is why freedom as non-domination was defined in the republican tradition as the absence of arbitrary interference in, or non-deliberative control over, the relevant sets of choices, and the relevance was determined by what are now called basic liberties. An individual is therefore dominated by (subjected to the will of) another agent, individual, private entity, or a state authority to the extent that he or she is subject to (actual or potential) arbitrary interference with, or non-deliberative control over, one of his or her basic liberties.

According to the republican understanding, there is no fixed list of basic liberties for every moment and every political community. This means that the relevant set of choices we have just spoken of is contextual in the sense that it varies with time, socio-economic possibilities, and the values shared in a political community. In fact, it is "a system of [positive] law that serves to define the basic liberties for a society and to provide appropriate protection and resourcing for the person's exercise of their basic liberties" (Pettit 2016: 58). In other words, basic liberties are usually established by constitutional provisions or provisions of a "Bill of Rights" reinforced by constitutional interpretation by a range of public authorities, legislatures, executives, administrative authorities, and most prominently, courts. However, Pettit believes that every system of law should include "some versions of the liberties of thought and speech, association and religion, occupation, and residence, as well as the liberty of enjoying certain rights of ownership and exchange" (Pettit 2016: 52). In contrast, Pettit adds, one system of law "might allow everyone the freedom to try to gain the upper hand in competitive exchanges, for example– this is implicit in the ideal of market freedom– while another might argue that competition of that kind ought to be severely regulated [and limit the opportunity for certain groups]" (Pettit 2016: 52).

14 In line with this characterization, Laborde (2013: 1544) offers the following example of non-arbitrary interference: When the state interferes in people's lives, collects taxes, and imposes coercive laws, it can do so in a non-arbitrary manner if it only pursues ends or uses only means derived from the public good (the common, recognizable interests of citizens). In this case, the law is not an affront to freedom, but, as John Locke saw, "enlarges freedom".

That said, Pettit (2008) has established some conceptual constraints as to what types of choices and what sets thereof can be considered candidates, which must be defined as relevant by a system of law and thus protected as basic liberties. These constraints are referred to by Pettit as 'personal significance', 'equal co-enjoyment' and 'feasible extension'.

While, as we shall see, the constraints called 'personal significance' and 'equal co-enjoyment' set a barrier that each single choice-type must pass if it is to be considered one of the basic liberties that ought to be protected (or even a candidate for these basic liberties), the constraint called 'feasible extension' affects the formation of entire candidate sets of basic liberties to be protected in a given society. I will present three conceptual constraints in the following order: (I) the constraint of the feasible extension, (II) the constraint of personal significance, and (III) the constraint of equal co-enjoyment.

(I) *The constraint of the feasible extension* means that any proposal to grant the status of basic liberty to (some of the) liberties that pass the barrier of the other two constraints, must be extended to other liberties that pass that barrier, provided that those other liberties can be adequately protected in a given society without denying or substantially undermining the protection of the former. Any candidate set of basic liberties in a given society is closed under the constraint of the feasible extension. This rule of closure fulfils two hierarchically ordered objectives, which I will here call (a) maximum scope and (b) maximum number. The objective of a *maximum scope* of the liberties included in the set avoids Hart's (1973: 542-5) criticism of the idea that basic liberties could be restricted in their scope in the interest of having a larger system of liberty as a whole (i.e., a larger number of individual liberties). The objective of a *maximum number* of the liberties included in the set requires that no unnecessarily restricted set of choice-types can be a candidate set of basic liberties (Pettit 2008: 260). As a result of the first objective (i.e., maximum scope), each candidate set of basic liberties will be smaller than the set of all those liberties that pass the barrier of the other two constraints (i.e., personal significance and equal co-enjoyment). This is because some of the liberties that satisfy the constraints of personal significance and equal co-enjoyment conflict with each other, which means that the greater the number of liberties protected as basic liberties the more the scope of some of these will be limited. In contrast, the second objective of the feasible extension constraint (i.e., maximum number) ensures that each candidate set will be a maximum subset of the total set of all those liberties that satisfy the other two constraints (i.e., personal significance and equal co-enjoyment). The only members of the total set that remain outside of a particular candidate set are those that conflict significantly with the liberties included in the original, non-extended proposal.

(II) *The constraint of personal significance* means that no liberty can count as a basic liberty unless it is essential in the life of the free citizen. More pre-

cisely, for a liberty to deserve this special protection, its importance in the life of free citizens must be determined by society-wide criteria. For this reason, as mentioned above, basic liberties are context-dependent and may well vary considerably between societies. Nevertheless, Pettit believes that the compulsion to personal significance implies, in any plausible case, that the basic liberties should be neither too proximal nor too specific. Instead, they must be relatively distant and relatively general (Pettit 2008: 206). For example, the liberty to make noise and the liberty to speak to oneself are too proximal to be considered basic, even though they are both implied in the more distant liberty to speak to others. Similarly, the liberty to comment on whether the weather has improved and the liberty to speak to a few named interlocutors are too specific to be considered basic, although they are both implied in the more general liberty to speak to others on more or less any subject. For a liberty to have personal significance in the life of the free citizen, it must be both relatively distal and relatively general. But (*i*) not every liberty that is relatively distal and relatively general will satisfy the constraint of personal significance, and (*ii*) not every liberty that has such personal significance will count as a basic liberty. There are some other conditions that must be met. They are implied in the constraint of equal co-enjoyment.

(III) *The constraint of equal co-enjoyment* states that a choice-type cannot constitute a basic liberty unless it is available to the same extent and simultaneously to all those who are considered citizens of a given society. As we will see, this rules out any choice-type that is composed of agent-particular, mutually competitive, or collectively self-defeating or counterproductive options.

First, an option is agent-particular when it refers to a particular person, A, by name, such as the option to pursue friendship with A, or the option to get A to make up A's mind (Pettit 2008: 211). Only A can make up A's mind and only a limited, albeit contingent, number of people can be known and considered by A to be possible friends. This clearly shows why agent-particular options (as opposed to agent-neutral or at least agent-relative options) cannot be equally co-enjoyed by all members of society.

Second, an option is mutually competitive if it is restricted to the extent that one person's access to the option causes the frustration of another person (Pettit 2008: 213 quoting Hart). In other words, an option is competitive if it cannot be exercised by all at the same time due to scarcity. An example of such an option is the possibility of withdrawing money from a bank or leaving a classroom through a certain door. If too many people do this at will, the option will disappear. Consequently, choice-types that consist of competitive options (as opposed to anti-competitive ones) do not conform to the constraint of equal co-enjoyment that republicans impose on candidates for basic liberties.

Third, an option is collectively self-defeating or counterproductive if there is no point in exercising it when too many others do. Think of speaking to a large

group, for example (Pettit 2008: 216 quoting Hart). If too many people spoke at the same time, no one would be heard. Note that unlike in the previous examples of competitive options, in this case the option does not disappear if too many people choose to do it. In this case, everyone could speak to the assembly at the same time, but there would be no point in doing it. Therefore, collectively self-defeating options (as opposed to non-self-defeating options) constitute choice-types that make them unsuitable as candidates for basic liberties.

In summary, we have seen that for a liberty to comply with the constraints of personal significance and equal co-enjoyment, the options it protects must not be (a) too proximal or too specific, (b) agent-particular, competitive, or collectively self-defeating. At this point, it is important to add that the problem of competitive options and the problem of collectively self-defeating options can be circumvented if we first introduce some rules of coordination to redefine and channel the relevant choices and then secondly, to protect these rule-dependent choices in the manner of a basic liberty (Pettit 2008: 214, 219). For example, banking rules can enable people to have regulated or coordinated access to their money, thereby eliminating the aforementioned competition problem of unrestricted liberty to withdraw one's money from a bank. It is easy to imagine how a coordination rule based on the principle of "first come, first served" could eliminate the problem of collective self-defeat associated with the rule-independent liberty to speak to a large group at will. By introducing coordination rules that eliminate these problems, the corresponding choices will be somewhat more limited than they would have been without such rules. However, this also makes the liberties in question pass the barrier of candidacy for basic liberties, which consequently increases the possibility of extending any candidate set of basic liberties, as required by the constraint of feasible extension, in a manner that fully respects Hart's abovementioned criticism of the idea that basic liberties can be restricted in favour of a greater number of individual liberties. This is because rule-dependent basic liberties do not limit their choice-types for the sake of the other liberties. Instead, they do it so that the corresponding choice-types may receive the special protection of a basic liberty.

Following the theory of basic liberties described above, it can be deciphered that internal domination is a gradual concept with manifestations in the form of degrees. Three reasons support this conclusion.

First, a person is dominated to a greater or lesser extent depending on how many of his or her basic liberties are restricted by arbitrary interference from another individual, private entity, or public authority within the state. For example, individuals who are restricted in the exercise of both their freedom of assembly and freedom of speech are dominated to a greater extent than individuals who are restricted in the exercise of one of these two freedoms, while they are free to exercise the other.

Second, a person is more or less dominated, depending on how many options from the relevant set of choices are unavailable as a result of such interference. People who are not allowed to joke about or criticise any member of the family of their head of state, for example, are more strongly dominated than people who are not allowed to joke about or criticise their head of state alone.

Third, we must distinguish three ways in which an option to X is instead available to someone: 1) when the individual enjoys the (real or legal) *opportunity* to X, 2) when he or she enjoys the *action* of X-ing, or 3) when he or she enjoys the *benefits* associated with X-ing (Pettit 2008). This, again, allows us to consider that someone is dominated to a greater or lesser extent, depending on how many of these ways in which an option may be said to be available to him or her are affected by arbitrary interference from within the state. While it would be highly implausible to say, as Pettit (2008: 210) rightly observes, that some choice-type involving X is a matter of basic liberty if no adequate protection is given to the opportunity to X, not every basic liberty aims to protect the enjoyment of an action or even the benefits thereof. But when they do, we can say that those who are affected in the very opportunity to X are more strongly dominated than people affected in their enjoyment of the action to X, and that the latter are more strongly dominated than people affected in their enjoyment of (all or part of) the benefits of X-ing.

We have now reached the end of the discussion of basic liberties in a constitutional state. But republicans recognise that basic liberties are not sufficient to guarantee individual freedom as non-domination, even in a mixed constitution. This is expressed in the republican adage mentioned above, according to which an individual can only be truly free as a citizen of a free state (Skinner 2010). Thus, apart from the basic liberties that contribute directly to the free civic status of an individual within the state's borders, republicans have also established a set of liberties that aim to guarantee the freedom of the individual through state freedom. This set of liberties is the subject of the next section.

3 SOVEREIGN LIBERTIES IN INTERNATIONAL LAW

As explained in the introduction, sovereign liberties operate on the global and international stage, where they establish the freedom of states as corporate agents. If basic liberties are linked to the freedom of the person, sovereign liberties are intended to protect the freedom of the free people. Since state freedom is a necessary condition for individual freedom, sovereign liberties are required to assure individual freedom, albeit indirectly, by guaranteeing state freedom as the external (global) dimension of individual freedom. It seems, however, that they should fulfil this guaranteed function alone, without the support of a coercive legal system. This is in contrast to basic liberties, which as we have seen,

require the institutional background of a mixed constitution to achieve their goal of protecting the internal (domestic) dimension of individual freedom.

The theorization of sovereign liberties arises as a result of the emergence of new actors on the world stage, which creates new occasions for exerting influence in the globalized world.[15] In an increasingly interconnected world[16] countless political actors have the opportunity to interfere in the lives of people in societies beyond their own.[17] In fact, they can exercise their power by a variety of means. While brute imposition of one agent's power over others is still the predominant source of arbitrary interference, the means of interference range from lobbying and persuasion at one end of the spectrum, to consumer and trade boycotts at the other.[18] In response to this shift in global politics,[19] republican theorists have shifted their focus to the international dimension of freedom as non-domination, thus intertwining democratic theory with international law.[20] The republican shift of emphasis to the international dimension of freedom also triggered the theorization of an international analogue of the basic liberties under the name 'sovereign liberties'.

While basic liberties are enacted through a system of domestic laws, typically as constitutional provisions or provisions of a "Bill of Rights", sovereign liberties are enshrined by international law, either explicitly through international treaties or implicitly through international custom. Sovereign liberties include those (sets of) choices in which states, and especially representative states, should be protected in order to be free, non-dominated states (Pettit 2014, 2016). As Skinner (2010: 99-100) pointed out, a state can be dominated in two different ways. First, when the power of the state falls under the control of a body other than the sovereign body of citizens, regardless of whether the usurper is a mon-

15 For example, the growing number of international non-governmental organisations (INGOs) has dramatically increased in recent decades: From 200 INGOs in 1980 (Boli & Thomas 1999) to an estimated 40,000 INGOs in 2013 (Ben-Ari 2013).

16 A classic example of a networked world dates back to 1973. 1973's oil crisis had a variety of effects on the various economies of the world, effects that even reached the citizens themselves, who had to reduce the number of days they used gasoline powered vehicles, for example. An example for the present day is the COVID-19 pandemic crisis.

17 As just one example, we can reflect on the influence that China exerted on Myanmar through Association of Southeast Asian Nations to make that country accept humanitarian aid after cyclone Nargis struck in 2008.

18 On the international stage, a new and different form of boycott has become common - the so-called "name and shame".

19 See Laborde and Ronzoni 2015 and Martí 2010, 2015, and 2017.

20 There has been a recent proliferation of literature intertwining democracy and international law, see for instance: Weiler 2020; Christiano 2006; Archibugi & Koenig-Archibugi 2003; Zürn 2018. Archibugi & Marchetti, 2012a; Besson & Martí 2018; Bohman 1999, Bohman 2001, Bohman 2007, Bohman 2010; De Búrca 2008, De Búrca 2010; Habermas 2001; Held 2010; Lafont 2010; Martí 2010; Peters 2009; Pettit 2010a, Pettit 2010b, Pettit 2015, Pettit 2016; among many others.

arch, an oligarchy, or a ruling class. Such internal domination of a state does not affect representative states, which are our focus here. Second, a state can be dominated when it becomes dependent on the will of another state, whether as a result of conquest, colonization, or any other process that leads to the will of its citizens to be circumvented as a source of law. Sovereign liberties are intended to prevent this external domination of the state and its people. Indeed, their purpose is to protect states from arbitrary interference or non-deliberative control by other states (and international organizations) and to help protect individual peoples and perhaps even provide them with the resources needed to exercise and enjoy their sovereign liberties (Pettit 2016: 58). While Pettit contrasts freedom as non-domination with freedom as non-interference on the domestic level, he contrasts non-domination with what he calls the Westphalian principle of non-intervention on the international level. He argues that it is not enough for states to be free from foreign intervention at a given point in time. Rather, they must not be arbitrarily beholden to other states or international agencies on a structural level (Thomas 2015). This includes both actual and potential domination of a state by other states or international agencies.

According to Pettit, there is no fixed list of sovereign liberties for every moment and every state, just as there is no such list of basic liberties. Like basic liberties, sovereign liberties are contextual, since they represent a series of choices guaranteed to states according to appropriate rules established by international cooperation. The sovereign liberties will therefore not be uniform for all states since they take into account their institutional position and their institutional power[21] in the international order in the area of their sovereign control. As with basic liberties, however, Pettit (2014: 163) argues that there are three 'clear candidates' for sovereign liberties: (a) liberty of speech, (b) liberty of expression, and (c) liberty of association. While the first two are explained above, the latter means, for example, that the state enjoys the liberty to form a common entity with other states, regardless of whether they form an international organization or not. It seems easy to think of other examples that are no less 'clear candidates', and the question remains as to whether it is possible to imagine a sovereign state without such sovereign liberties: the liberty to exist and to protect its existence, the liberty to exercise jurisdiction on the territory of the state and over its entire population, the liberty to develop its cultural, political and economic life, the liberty to establish relations with other states, to conclude treaties, etc.

Nevertheless, Pettit has also laid down some conceptual constraints regarding the types of choices and sets thereof that count as eligible candidates, and which must then be defined in international agreements and protected in international practice as sovereign liberties. These constraints are: (I) co-exercisabil-

21 For a classic account of state power, see Keohane & Nye 1973. For a novel account of power, see Slaughter 2017.

ity, (II) co-satisfaction, and (III) the constraint of normative individualism.[22] As we will now see, the first refers to single liberties, while the other two refer to the entire set of sovereign liberties.

(I) *The constraint of co-exercisability* means that singular choices cannot count as sovereign liberties of a state unless the state can exercise those choices, regardless of how many other states are exercising them at the same time (Pettit 2014: 62). An example that meets the condition of co-exercisability is the freedom to establish relations with other states, since it can be exercised by several states without it being impossible for other states to exercise the freedom at the same time as well. An example of non-co-exercisable liberty, on the other hand, is the unrestricted use of land or waters. This choice-type is problematic and cannot be secured as a sovereign liberty given that the natural scarcity of land and waters prevents two or more states from having exclusive jurisdiction in the same area.[23] However, as we have shown above in connection with the types of choice composed of competitive options, the problem can be circumvented by introducing appropriate coordination rules that make a delimited version of the choice co-exercisable (think, for example, of the rules of international law regarding the use of territorial waters and international waters).

(II) *The constraint of co-satisfaction* means that a state must be able to achieve satisfactory results in the exercise of any single choice in the set of choices, regardless of how many other states exercise that choice or any other choice in the set simultaneously. Therefore, the set of sovereign liberties must not contain choices that harm others, expose others to domination, or are counterproductive in their effects, as in wars of aggression, to give the most blatant example. In fact, if states had the liberty to wage such wars, the exercise of that liberty would jeopardize their satisfaction in many co-exercisable choices. An opposite example, that is, one that meets the constraint of co-satisfaction, is the liberty of states to exercise legitimate defence, (the right to self-defence). Any state can derive satisfaction from legitimate defence, regardless of how many other states pursue their own legitimate defence or how many other states simultaneously exercise their sovereign liberties.

Even though it may seem that the constraints of co-exercisability and co-satisfaction have no equivalent among the conceptual constraints of basic liberties (i.e., feasible extension, personal significance, and equal co-enjoyment), in the way Pettit (2014: 164) presents them both constraints are part of the constraint of equal co-enjoyment, which in his more recent work is simply structured differently from what we saw in the previous section.[24]

22 The latter clearly results from the normative individualism we mentioned in the introductory section above.

23 For a similar example regarding basic liberties, see Pettit 2014: 200.

24 This also applies to the equal co-enjoyment constraint that Pettit imposes on the basic liberties. See Pettit 2014.

(III) *The constraint of normative individualism* says, as we have seen, that nothing is good or desirable if it is not good for the individual. If we apply this to the sovereign liberties of a state, it follows that they must not violate the basic liberties of the citizens of the state.[25] Under this constraint, therefore, no state should be granted discretionary powers that would restrict the scope of people's basic liberties, such as freedom of speech, freedom of association, or the ability to determine their religion, to name but three examples that Pettit also frequently cites. At first glance, this constraint has no parallel in the conceptual restrictions imposed on basic liberties. I will note, however, that it mimics the constraint of feasible extension in that it excludes from the list of candidates for the set of sovereign liberties all kinds of choices that conflict with a basic liberty. This is also the point at which the similarity between these two constraints seems to end. In fact, one could hardly conclude that normative individualism demands the most comprehensive set of sovereign liberties possible, although Pettit explicitly says that "every representative state and people should enjoy all [...] those sovereign liberties that are compatible with the enjoyment of similar liberties by other representative states and peoples" (Pettit 2014: 163).

In summary, sovereign liberties are intended to protect the freedom of the free state and its people from arbitrary interference by, for example, another state or an international institution. They are enshrined in international law and practice, either explicitly through international treaties or implicitly through international custom. Although there is no fixed list of sovereign liberties for every moment and every state, Pettit lists some conceptual limitations regarding the types of choices and sets of choices that can be considered candidates for sovereign liberties. These limitations are referred to as (a) co-exercisability, (b) co-satisfaction, and (c) normative individualism. While the former two correspond to the constraint of equal co-enjoyment, which we discussed in the case of basic liberties, the latter corresponds in part to the constraint of the feasible extension. This analysis confirms Pettit's (2015: 48) assertion that sovereign liberties 'mimic' basic liberties. However, we must also note that there is a conceptual restriction on the candidates for basic liberties—namely, personal significance—which bears no parallel to such restrictions on the candidates for sovereign liberties.

4 THE UNFINISHED BUSINESS OF SOVEREIGN LIBERTIES

The previous section shows the extent to which sovereign liberties of states mimic the basic liberties of individuals, and where the similarities between the two types of liberties end. The central problem is that Pettit's normative theory

25 Pettit 2015: 49. Notice, however, that Pettit has never presented this constraint on sovereign liberties under this name.

of freedom cannot achieve its goal of protecting the individual from every kind of domination rooted outside the state if sovereign liberties are understood in his way.

To explain why Pettit's aim is unachievable, let me start by considering a situation in which a representative state is being dominated by a non-representative state or a transnational agency. Think, for example, of the weight of both the economic and diplomatic sanctions that China has imposed on Taiwan. Assume, moreover, for the sake of argument, that China is a non-representative state and that, in contrast, Taiwan is a full-blown democracy. In this case, it is clear that China's sanctions on Taiwan constitutes arbitrary interference with and non-deliberative control of many of Taiwan's options, including some that are protected by what Pettit's theory identifies as Taiwan's sovereign liberties. As we have seen above, sovereign liberties are meant to protect the freedom of the free state and its people. In other words, they protect the freedom of the individuals living in representative states controlled by the people.[26] This does not mean that unrepresentative states and their peoples do not have sovereign liberties, but these are not within our interest here since the sovereign liberties of non-representative states do not serve the republican ideal of individual freedom (Pettit 2014: 175, 207-9). Remember that a free polity is valuable to republicans because it enables the form of self-government that is necessary (though not sufficient) to secure individual freedom as non-domination (Laborde & Ronzoni 2015). Similarly, a non-dominated state is a state that is not dominated in its relevant sovereign liberties and enjoys sovereignty in relation to other states and international bodies. Barring some exceptions,[27] republican scholars generally assume that the protection of the basic and sovereign liberties ultimately depends on the state because the state is the only agent capable of preventing domination both internally and externally. But as our example shows, the addition of sovereign liberties to the basic liberties cannot always shield individuals against external domination.

Here I offer two reasons why sovereign liberties, as conceived, are inadequate to protect states and their people from certain kinds of external domination. These two reasons arise from (*a*) state-to-state relations in international law and (*b*) the circumstances of global domination.

The first reason can be described in terms of state-to-state relations. It has to do with the fact that both dimensions of individual freedom (internal and external to the state) depend not only on the anchoring of basic and sovereign liberties in the respective legal systems, but also on the resources for their realisation and effective protection. However, while the domestic legal systems of

26 Representative states must take two measures: work effectively and be controlled by their peoples. See Pettit 2010a: 38-39. See also Pettit 2014 and Pettit 2015.

27 See Bohman (2001, 2004 and 2007) or Martí (2010, 2015 and 2017), for example.

representative states provide such resources and protection in relation to basic liberties (Pettit 2016: 14), international law and practice, at least in the cases mentioned above, fail to provide the resources and protection necessary for the realisation of the sovereign liberties of representative states. Pettit (2014: 172) addresses the first problem directly, but offers a solution that, in my opinion, is unsatisfactory because it assumes that the state is the best equipped political institution to fight domination. In fact, Pettit advocates a system of protection based on multilateral agreements, which he considers a 'realistic' alternative to the 'utopian' proposals for a kind of global institutional framework.[28] And for non-powerful representative states, he proposes forming a 'coalition of the weak', with which they should be able to protect their sovereign liberties without being at the mercy of and favoured by the stronger, perhaps non-representative states (Pettit 2014: 172).

Moreover, while 'basic' liberties are clearly basic and fundamental as they are characterised, 'sovereign' liberties are not really sovereign. By definition, one's sovereignty implies the primacy of one's will over the will of others in a given area. Sovereign liberties should therefore characterise those choices where the will of the state in question is protected from the interference of other states and international organisations. According to Pettit, however, sovereign liberties owe their existence to international agreements and international practice, i.e., they owe their existence to the will of other states and international organisations. It is strange, to say the least, that a liberty that is called 'sovereign' depends on the will of other actors.

I see two objections to Pettit's view. On the one hand, as our example intends to show, there is no guarantee that a coalition of the weak representative states could actually protect Taiwan from Chinese domination in Taiwan's sovereign liberties. On the other hand, there is also no guarantee that a coalition of states will refrain from abusing its power and becoming a dominator itself.

The second reason has to do with *the circumstances of global domination,* which can lead to a factual inability for the state in question to protect its citizens from external domination. The *circumstances of global domination* is an idea adapted from Waldron's discussion of the 'circumstances of politics' (hereafter CP), which is itself an adaptation of Rawls's discussion of the 'circumstances of justice' (CJ):

> The circumstances of justice are those aspects of the human condition, such as moderate scarcity [CJ1] and the limited altruism of individuals [CJ2], which make justice as a virtue and a practice both possible and necessary (Rawls 1971: 126-130). We may say, along similar lines, that the felt need among the members of a certain group for a common framework or decision or course of action on some matter [CP1], even in

28 See Pettit 2014: 209-10. Estlund (2014: 115) warns, however, that in this sense the most realistic of all normative theories would naturally recommend or demand that people and institutions should be exactly as they already are.

the face of disagreement about what that framework or decision or course of action should be [CP2], are the circumstances of politics (Waldron 1999: 102; emphasis removed).

While the circumstances of justice and those of politics come in pairs, there are three circumstances that give rise to global domination: (1) a globalized world,[29] (2) an unequal distribution of power among various global actors, and (3) the coexistence of non-dominating democratic actors and dominators.

Unlike the problem of state-to-state relations in international law, the circumstances of global domination are not addressed by Pettit, at least not explicitly. As noted above, there are situations in which the state, no matter how representative, cannot avoid being dominated because domination is exacerbated by globalization and requires a global response. Consider, for example, climate change.[30] A state or a group of states is *de facto* unable to combat climate change on its own. But climate change is not the only example of this kind of domination, which 'pass[es] right through'[31] state borders. Think of technology, as another example. Technology leads us to a reality that is not factual but virtual. Of course, not every tool or platform developed through or based on technology is bad.[32] However, technologies based on algorithms, such as those used by tech-giants like Amazon, Apple, Google, Facebook, or Microsoft, have the ability to influence and manipulate our choices and violate our rights to privacy as well as our civil and political freedoms. The power imbalance that exists between these technology giants and states is a potential source of domination, but they

29 Globalization poses a challenge to freedom as non-domination. Whatever definition of globalization one has in mind, it is clear that globalization has changed the geography of international relations. It is causing a social reorganization of actors and relationships that challenges the traditional international legal relationships between states and international organizations, international non-governmental organizations, standard-setters, and other hybrid regulatory bodies, among others. Globalization enables traditional and novel non-traditional actors to interact and produce decisions, rules, or norms. Most decisions and rules created by global actors have some impact on our lives, though they are mainly created without any participation or control by the people. Other decisions are made by traditional actors, such as states, but their impact goes beyond their borders and interferes in the lives of people who are not their citizens.

30 Climate change is decidedly one of the more pressing issues affecting our lives. It affects the weather in the places where we live, the scheduling of crop seasons and spoils crops from time to time, it affects sea levels, benefiting areas that are 'gaining land' like Siberia and hurting people who live on islands that are increasingly submerged, as is the case of the Tuvalu Islands. Although there is no agreement on the circumstances causing climate change, we can attribute it - at least in part - to the actions of humanity causing increased deforestation and generating greenhouse gasses such as carbon dioxide and methane in increasing quantities through the production and use of carbon-based energy. Climate change is a complex natural phenomenon, but it is caused or at least accelerated by our collective behaviour. It cannot be attributed to a single actor and a single actor, such as a state, cannot prevent the domination that it inflicts on its citizens.

31 For the use of this expression, see Buckinx, Trejo-Mathys & Waligore (2015: 3).

32 For example, those initiatives built on blockchain or to promote technology for people's participation, such as CrowdLaw. See https://crowd.law/.

also have greater power to manipulate people, as the Facebook - Cambridge Analytica scandal involving data from Facebook being used to influence the 2016 US elections, has shown. Facebook, Google, or Amazon, may have access to large amounts of personal information, ranging from search engine queries to consumer preferences. The extent to which these companies can exercise power over individuals by manipulating, replacing, or misrepresenting their options is highly problematic. Moreover, their power is not limited to some representative state nor to some regulated territory. It is global, i.e., non-territorial, and as such is beyond the abilities of any state to control it and protect their citizens against it.[33] Indeed, sovereign liberties as conceived by Pettit, do not seem sufficient for this task.

To conclude, states exercising sovereign liberties can certainly protect their citizens from some types of domination. Nevertheless, the scope of this protection is relatively limited. Sovereign liberties, as they are construed, can counteract the kind of domination that can be prevented through associative state schemes, such as those that counteract superpower games.[34] But as with the conflicts between Taiwan and China or the USA and Facebook depicted above, there are other important sources of domination outside the protective shield of the sovereign liberties, especially if we assume that states are no longer capable of protecting themselves and their citizens against the domination of more powerful agents. In this sense, a global institutional framework in the form of a cosmopolitan global democracy seems necessary to effectively protect the basic liberties of all human beings from domination.

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33 For instance, the European Union has fined Google several times for abuse of its market power. Nevertheless, Google is still one of the most valuable companies in the world. This shows that although these companies are threatened with some sanctions, this has little impact on their favorable position of power and wealth in society (see European Commission 2017, 2018 and 2019).

34 See Brams 1985.

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Synopsis

Andrew Halpin

On kno-rights and no-rights

SLOV. | *O odsotnosti zahtevka in kramerjevski odsotnosti zahtevka.* S tem člankom se avtor pridružuje razpravi o odsotnosti zahtevka, ki je sprva potekala z Matthewem Kramerjem, pred kratkim pa se ji je pridružil še Mark McBride, ki se je postavil v bran Kramerja. Moje nestrinjanje s Kramerjem se osredinja na njegovo trditev, da razmerje med zahtevkom in odsotnostjo zahtevka vključuje logične dualnosti in ne protislovij, kot meni Hohfeld. To stališče je povezano s Kramerjevim pogledom, da morata biti odsotnost zahtevka in svoboda kot korelativa napolnjena z enako vsebino. McBride je napadel mojo zavrnitev Kramerjeve uporabe dualnosti kot napačno in oviro za razumevanje Hohfeldovega analitičnega okvira, vključno z vlogo korelativnosti. Tukaj zavračam McBridejeva prizadevanja, da bi tehnično rešil Kramerjevo uporabo dualnosti in upravičil to uporabo kot bistveno za razumljivo razlago celotnega Hohfeldovega okvira. Trdim, da je predstavitev zahtevka in odsotnosti zahtevka kot dualnih pojmov še vedno napačna, Hohfeldov okvir pa je s to predpostavko neuporaben. Znotraj tega argumenta opozarjam na različna koncepta hohfeldovske odsotnosti zahtevka in kramerjevske odsotnosti zahtevka; postavljam pod vprašaj zapletene korake, ki jih je predstavil McBride in s katerimi naj bi vzpostavil test, ki dokazuje dualnost kramerjevske odsotnosti zahtevka; in ob upoštevanju tega, da gre pri kramerjevski odsotnosti zahtevka ter dveh drugiih pojmih odsotnosti zahtevka za ločene položaje na deontičnem šesterokotniku, pokažem neskladnost kramerjevkse odsotnosti zahtevka z okvirom Hohfeldovih korelativov.

Ključne besede: Hohfeld (Wesley Newcomb), odsotnost zahtevka, logične dualnosti, korelativnost, deontična opozicijska geometrija, nepravičnost

ENG. | This article joins a debate over no-right previously conducted with Matthew Kramer and more recently joined by Mark McBride, in defence of Kramer. My disagreement with Kramer centres on his assertion that the relationship between claim-right and no-right involves logical duals rather than contradictories, as Hohfeld proposed. That position is tied to Kramer's view that no-right and liberty must have the same content as correlatives. McBride has attacked my rejection of Kramer's use of duals as being erroneous and an impediment to understanding the Hohfeldian analytical framework, including the role of correlativity. I reject here McBride's efforts to technically rescue Kramer's use

of duals and to vindicate that use as being essential for an intelligible explanation of the complete Hohfeldian framework. I argue that the representation of claim-right and no-right as duals remains erroneous, making the Hohfeldian framework unworkable. Within that argument, I draw attention to the distinct concepts of Hohfeldian no-right and Kramerian kno-right; question the complicated steps introduced by McBride to establish a test demonstrating the duality of kno-right; and, taking kno-right and two instances of no-rights as distinct positions on a deontic hexagon, demonstrate the inability of kno-right to operate within a framework of Hohfeldian correlatives.

Keywords: Hohfeld (Wesley Newcomb), no-right, logical duals, correlativity, deontic oppositional geometry, rightlessness

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Synopsis

Álvaro Núñez Vaquero

Constitutive rules of precedent
A non-prescriptivist account of *stare decisis*

SLOV. | *Konstitutivna pravila o precedensu: Nepreskriptivistični pogled na* stare decisis. Namen prispevka je zavrniti tezo, da je precedenčni sistem vzpostavljen s preskriptivno normo. Avtor svojo trditev podkrepi z dvema vrstama razlogovanja. Prvič, trdi, da precedenčni sistemi nujno zahtevajo konstitutivne norme in ne preskriptivnih norm. Drugič, vsak precedenčni sistem obsega vsaj dve, če ne celo tri, konstitutivna pravila o precedensu. Eno daje pooblastilo za ustvarjanje precedensa, drugo pa pogojuje veljavnost sodne odločbe z dejstvom, da sledi precedensu. Nazadnje lahko obstaja tudi tretje pravilo, ki daje pooblastilo za zagotovitev upoštevanja precedensa in za razveljavitev drugačnih odločitev.

Ključne besede: pravilo o precedensu, preskriptivna norma, konstitutivna norma, pristojnost, uporabljivost

ENG. | The purpose of this paper is to reject the thesis that a system of precedent is established with a prescriptive norm. This claim is supported by two lines of reasoning. First, it is claimed that systems of precedent necessarily require constitutive norms and not prescriptive norms. Second, any system of precedent comprises at least two, if not three, constitutive rules of precedent. While one confers the power to set a precedent, another conditions the validity of a judicial decision to the fact that it follows the precedent. Finally, there may also be a third rule that confers the power to ensure that precedent is followed and to annul divergent decisions.

Keywords: rule of precedent, prescriptive norm, constitutive norm, competence, applicability

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Synopsis

Claudina Orunesu

Conventionality control and international judicial supremacy: Some reflections on the Inter-American system of human rights

SLOV. | *Nadzor konvencionalnosti in vrhovnost mednarodnega pravosodja. Nekaj pomisli o Medameriškem sistemu varstva* človekovih *pravic.* Na podlagi Ameriške konvencije o človekovih pravicah ima Medameriško sodišče pristojnost nad vsemi zadevami, ki so mu predložene v zvez z razlago in uporabo določb Ameriške konvencije. V tem normativnem okviru je Sodišče leta 2006 vzpostavilo t. im. doktrino konvencijskega nadzora. Pri tem se ni omejilo na stališče, da morajo nacionalni sodniki presojati skladnost domače zakonodaje z besedilom konvencije, temveč je trdilo, da morajo pri tem upoštevati tudi razlago konvencije, ki jo poda Sodišče kot njen poslednji razlagalec. Tovrstno razumevanje konvencijskega nadzora, ki vključuje tudi posebej močno pojmovanje vrhovnosti mednarodnega pravosodja, predstavlja ustaljeno doktrino tega mednarodnega sodišča. Vendar pa so se v zadnjem času pojavili določeni ugovori zoper to doktrino in zoper način, na katerega jo Medameriško sodišče izvršuje. Avtorica te razprave pokaže, da doktrina konvencijskega nadzora v sedanji obliki, ki vrhovnost pripisuje tako konvencijskemu pravu kot razlagalnim kriterijem, ki jih vzpostavlja Sodišče, lahko vodi do paradoksalnih posledic in vzbuja dvom v vlogo Sodišča v sodnih postopkih povezanih s Konvencijo. Ob tem nekaj alternativnih oblik doktrine konvencijskega nadzora avtorica preuči tudi v luči nedavne kritične odločitev Argentinskega Vrhovnega sodišča.

Ključne besede: medameriško sodišče za človekove pravice, konvencijski nadzor, vrhovnost pravosodja, pravno razlaganje, sodniški dialog

ENG. | According to the American Convention on Human Rights, the Inter-American Court is the competent body to "comprise all cases concerning the interpretation and application of the provisions of [the] Convention that are submitted to it". In this normative framework, in 2006 the Inter-American Court introduced the so-called conventionality control doctrine. In doing so, it has not restricted itself to maintaining that municipal judges must control the compatibility of domestic laws with the text of the American Convention, but claimed that they must also take into account "the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention". This view of conventionality control, that also involves a particularly strong notion of international judicial supremacy, constitutes a

consolidated doctrine of the international tribunal. However, certain objections seem to be arising around the doctrine and the particular style with which the Inter-American Court exercises it. This paper aims to show that the basis of the doctrine of conventionality control in its current configuration, i.e., the supremacy of both conventional law and the interpretative criteria fixed by the Inter-American Court, may lead to paradoxical consequences and raises doubts concerning the role the Inter-American Court plays today in the adjudication process regarding the Convention. Finally, considering a recent challenging decision of Argentina's Supreme Court, some reformulations of the conventionality control doctrine will be explored.

Keywords: Inter-American Court of Human Rights, conventionality control, judicial supremacy, legal interpretation, judicial dialogue

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Synopsis

Marisa Iglesias Vila

The conventionality control and the Fontevecchia case: Is the margin of appreciation the panacea?

SLOV. | *Kontrola konvencionalnosti in zadeva Fontevecchia: ali je polje proste presoje zdravilo za vse?* Avtorica komentira nekatere trditve, ki jih je Claudina Orunesu postavila v članku "Nadzor konvencionalnosti in mednarodna sodna prevlada". Orunesu kritično analizira, kako Medameriško sodišče za človekove pravice utemeljuje in razvija svoje načelo kontrole konvencionalnosti. V podporo svoji trditvi, da bi moralo Medameriško sodišče za človekove pravice združiti zahtevo po notranji kontroli konvencionalnosti z evropsko doktrino nacionalnega polja proste presoje, se opira na sodbo Vrhovnega sodišča Argentine v zadevi *Fontevecchia*. Ob strinjanju z odločitvijo v zadevi *Fontevecchia* se avtorica loti kritičnega pregleda predloga Claudine Orunesu, ob čemer trdi, da bi razumna doktrina polja proste presoje porodila dvom v obrazložitev argentinskega vrhovnega sodišča v tej zadevi. Namesto predpostavke kontradiktorne utemeljitve, ki se osredinja na demokratične pomisleke, tako predlaga, da se k medameriškemu institucionalnemu okviru približamo v smislu sodelovanja in sistema. Ko sledimo logiki sodelovanja, je preložitev na nacionalne organe na splošno upravičeno, če so domače institucije za človekove pravice ustreznejše za odločanje kot mednarodno sodišče. Vendar pa je moč argumenta o boljšem položaju pogojena z zanesljivostjo države kot sodelujočega akterja v medameriškem sistemu. In ta zanesljivost je posledično pogojena s tem, da država dokaže, da je sposobna izpolnjevati svoje dolžnosti sodelovanja v okviru konvencije. Avtorica se osredinja na tri take odgovornosti sodelovanja: dolžnost nepristranskosti, dolžnost sprejeti kulturo upravičevanja in dolžnost sprejeti konvencijski vidik.

Ključne besede: medameriško sodišče za človekove pravice, zadeva *Fontevecchia*, sistemska legitimnost, polje proste presoje, sodelovanje, kultura upravičevanja

ENG. | In the paper I comment on some of Claudina Orunesu's claims in her article "Conventionality control and international judicial supremacy". Orunesu offers a critical analysis of how the Inter-American Court of Human Rights justifies and develops its conventionality control principle. She draws on the Argentine Supreme Court judgment in the Fontevecchia case to support her claim that the I/A Court should combine the requirement of an internal conventional-

ity control with the European doctrine of the national margin of appreciation. Taking on board the Fontevecchia holding, I engage in a critical review of her proposal by arguing that a reasonable margin of appreciation doctrine would lead to questioning the reasoning of the Argentine Supreme Court in this case. Instead of assuming an adversarial rationale that put the focus on democratic concerns, I suggest approaching the Inter-American institutional framework in cooperative and systemic terms. Once we follow a cooperative logic, deference to national authorities is generally justified when domestic institutions are better situated than an international court for decision-making on human rights. However, the strength of the better situated argument is conditioned on the state's reliability as a cooperative actor in the Inter-American system. And this reliability is in turn conditioned on the state's demonstrating its capacity to meet its cooperative duties within the framework of the Convention. In the paper I focus on three such cooperative responsibilities: the duty of impartiality, the duty to adopt a culture of justification, and the duty to embrace a conventional perspective.

Keywords: Inter-American Court of Human Rights, Fontevecchia case, systemic legitimacy, margin of appreciation, cooperation, culture of justification

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Synopsis

Ángeles Ródenas

The secret life of concepts (Or on the art of winnowing concepts)

SLOV. | *Skrivno življenje pojmov.* Namen tega prispevka je kritično preučiti Redondovo opredelitev teorije pravnih pojmov normativnega pravnega pozitivizma in predstaviti nekatere možne strategije za obrambo drugih dveh teorij pravnih pojmov, ki jih Redondo kritizira: Dworkinov interpretativizem in Rossov redukcionizem.

Ključne besede: Redondo (Maria Cristina), normativni pravni pozitivizem, nauk o pravnih pojmih, Ross (Alf), Dworkin (Ronald), institucionalni pojmi, nujne značilnosti pojmov, pojmovna jurisprudenca, pravne institucije

ENG. | This paper aims to critically examine Redondo's characterization of normative legal positivism's theory of legal concepts, as well as to set forth some potential strategies for defending the two other theories of legal concepts that Redondo criticizes: Dworkinian interpretivism and Rossian reductionism.

Keywords: Redondo (Maria Cristina), normative legal positivism, theory of legal concepts, Ross (Alf), Dworkin (Ronald), institutional concepts, necessary properties of concepts, conceptual jurisprudence, legal institutions

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Synopsis

Eoin Daly

Contesting the idea of disagreement as the circumstance of politics

SLOV. | *Izpodbijanje ideje o nesoglasju kot okoliščini politike.* Številni politični in pravni filozofi so prepričani, da je nesoglasje del »političnih okoliščin«, celo tako zelo, da bi lahko rekli, da je nesoglasje *opredelitvena okoliščina* politike. To pomeni, da je nesoglasje razumljeno kot glavni problem politike, s katerim se v glavnem ukvarja ustavno oblikovanje. Nesoglasje je hkrati nerešljivo ter je konstitutivno in značilno za politiko kot tako. In večinoma liberalni ter republikanski teoretiki prerekajo le predmet ali obseg nesoglasja, pri čemer Rawls poudarja nesoglasje o vprašanjih *dobrega* sredi domnevnega soglasja o vprašanjih pravice ali pravičnosti, vendar z Bellamyjem in Waldronom, ki trdita, da se nesoglasje razširi na vprašanja pravice in dobrega, in da je treba ustave oblikovati temu primerno. Taki okviri nesoglasja pa so podlaga za vprašanja institucionalne zasnove, predvsem problema sodne presoje in njenega odnosa do demokratične legitimnosti. Namen tega prispevka je ugovarjati temu prevladujočemu razumevanju nesoglasja *kot takega* kot opredelitvene okoliščine politike in torej kot osrednjega problema ustavnega oblikovanja. Avtor ta argument razvija zlasti s sklicevanjem na dva filozofa – Jean-Jacquesa Rousseauja in Pierra Bourdieuja. Izhajajoč iz Bourdieuja trdi, da ostenzivno nesoglasje – kot je izraženo v nasprotujočih si trditvah ali zahtevkih glede pravice ali dobrega – ni nujno podano v trdilni obliki, temveč ga lahko razumemo kot družbeno *performativno* ter kot izvajanje simbolne in družbene moči. Nesoglasje kot tako torej ni predhodnik političnega in družbenega reda, temveč ga ta konstituira in oblikuje. Po drugi strani pa avtor trdi, da je mogoče Rousseaujeve ustavne projekte razumeti kot odraz podobnega vpogleda. V nasprotju z Rawlsovim liberalizmom temeljni problem političnega reda za Rousseauja sploh ni propozicijski, glede nestrinjanja o pravici ali dobremu. Izhodišče političnega reda ni iskanje dobrega (ali pravice), temveč problem in potreba po priznanju kot družbenega konteksta, znotraj katerega se uveljavljajo zahteve po pravici in dobrem. Osrednji izziv politike je torej, kako je mogoče konstituirati skupen simbolni prostor, v katerem lahko politična komunikacija in politični diskurz prevzameta transparentne in nedominacijske oblike. Avtor sklene s primeri, kako lahko ustavno oblikovanje pojasni ta problem.

Ključne besede: nesoglasje, Rawls (John), Rousseau (Jean Jacques), ustavna zasnova

ENG. | Many political and legal philosophers believe that disagreement forms part of the "circumstances of politics", even to a point where we might say that disagreement is *the definitive circumstance* of politics. That is to say, disagreement is understood as a central problem of politics, with which the enterprise of constitutional design is centrally concerned. Disagreement is both insoluble and is constitutive and characteristic of politics as such. And, for the most part, liberal and republican theorists dispute only the subject or extent of disagreement, with Rawls emphasizing disagreement as to questions of the *good* amidst a presumed consensus on questions of right or of justice, but with Bellamy and Waldron arguing that disagreement extends to questions of right as well as good, and that constitutions should be designed accordingly. In turn, such framings of disagreement underlie questions of institutional design, most notably the problem of judicial review and its relation to democratic legitimacy. The purpose of this paper is to challenge this dominant understanding of disagreement *as such* as being a definitive circumstance of politics, and therefore, as a central problem of constitutional design. I make this argument with reference to two thinkers in particular, Jean-Jacques Rousseau and Pierre Bourdieu. Drawing on Bourdieu, I will argue that ostensible disagreement – as expressed in competing assertions or claims as to the right or the good – need not necessarily be framed in *propositional* terms, but can rather be understood as socially *performative* and as exercises of symbolic and social power. Thus, disagreement as such is not antecedent to political and social order but is rather constituted and formatted by it. In turn, I will argue that Rousseau's constitutional projects can be understood as reflecting a similar insight. In contrast to Rawlsian liberalism, the fundamental problem of political order, for Rousseau, is not a propositional one at all, concerning disagreement as to the right or the good. The starting point of political order is not the search for the good (or the right), but rather, the problem of, and the need for recognition, as the social context within which claims of right and good are asserted. A central challenge of politics, then, is how it is possible to constitute a shared symbolic universe in which political communication and political discourse can assume transparent and non-dominating forms. I will conclude by offering examples as to how constitutional design can account for this problem.

Keywords: disagreement, Rawls (John), Rousseau (Jean Jacques), constitutional design

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Synopsis

Camila Vergara

Towards material anti-oligarchic constitutionalism

SLOV. | *K materialnemu protioligarhičnemu konstitucionalizmu.* Ustavne demokracije so dopuščale vzorce kopičenja bogastva na vrhu, kar je vodilo v akutno neenakost in nevarno oligarhizacijo oblasti. Poleg tega teoretična orodja, ki jih ponuja liberalni konstitucionalizem, niso ustrezna za prepoznavanje sistemske korupcije in strukturnih oblik prevlade, ki jih omogoča pravo ali njegova odsotnost. Kot alternativa je v članku predlagan materialno metodološki pristop k preučevanju ustav. V prvem razdelku avtorica ponuja kritično analizo intelektualnih temeljev liberalnega konstitucionalizma, pri čemer obravnava pravico do lastnine, političnega predstavništva in delitve oblasti. V drugem razdelku predstavlja intelektualne temelje plebejskega konstitucionalizma v delih Machiavellija, Condorceta in Marxa. Nazadnje predlaga materialni pristop k ocenjevanju ustav, ugotavlja pomanjkljivosti sodobnih pravnih okvirov za uresničevanje socialnih pravic, pa tudi nove poti za institucionalne protioligarhične inovacije.

Ključne besede: neenakost, liberalizem, socialne pravice, sistemska korupcija, Condorcet (Nicolas), Machiavelli (Niccolò), Marx (Karl)

ENG. | Constitutional democracies have allowed for patterns of accumulation of wealth at the top, leading to acute inequality and dangerous oligarchization of power. Moreover, the theoretical tools that liberal constitutionalism offers are inadequate to recognize systemic corruption and structural forms of domination that are enabled by law or its absence. As an alternative, the article proposes a material methodological approach to the study of constitutions. In the first section, it offers a critical analysis of the intellectual foundations of liberal constitutionalism, engaging with the right to property, political representation, and separation of powers. In the second section, it presents the intellectual foundations of plebeian constitutionalism in the works of Machiavelli, Condorcet, and Marx. Finally, it proposes a material approach to assessing constitutions, identifying the shortcomings of contemporary legal frameworks to materialize social rights, as well as new avenues for institutional anti-oligarchic innovation.

Keywords: inequality, liberalism, social rights, systemic corruption, Condorcet (Nicolas), Machiavelli (Niccolò), Marx (Karl)

Summary: 1 Critical interpretation of liberal constitutionalism – 2 Intellectual foundations of material constitutionalism – 3 Towards a new material approach to constitutions – 4 Conclusion

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Synopsis

Ana Cannilla

Political constitutionalism in the age of populism

SLOV. | *Politični konstitucionalizem v dobi populizma.* Avtorica preučuje odnos med populizmom in političnim konstitucionalizmom. Ob tem trdi, da čeprav je politični konstitucionalizem v nasprotju z bogatim naborom izkušenj, označenih z izrazom »populizem«, in je boljši od njega, bi bilo dobro, da bi se politični konstitucionalisti odmaknili od trditve, da je ustava v celoti politična. Prvič, avtorica trdi, da je izraz »populizem« zaradi normativne dvoumnosti neprimeren za namene ustavne teorije. Sama zagovarja poziv k jasnejšemu izražanju v ustavnem razpravljanju. Drugič, trdi, da bi moral politični konstitucionalizem opustiti ali bistveno prilagoditi svojo zavezanost temu, kar v članku imenuje *ustavna protipravnost* (ta je opredeljena kot zamisel, da je in bi morala biti ustava popolnoma prilagodljiva). Ponujeni razlogi za ta predlog se razlikujejo od tistih, ki jih navaja pravni konstitucionalizem, in namesto tega temeljijo na demokratični avtoriteti, ki jo politični konstitucionalisti zagovarjajo za večinske institucije. Politični konstitucionalizem, ugotavlja avtorica, bi moral priznati nekatere normativne prednosti prava tudi izidom ustavnosodnega odločanja. Ta poteza naredi politični konstitucionalizem bolj dosleden in, kar je pomembno, bolj varen pred obtožbami, da hrani različne vrste ustavnih neredov.

Ključne besede: populizem, konstitucionalizem, ustavna kriza, politični konstitucionalizem, neliberalizem

ENG. | This article examines the relationship between populism and political constitutionalism. It claims that while political constitutionalism is at odds with, and better than, the wide range of experiences labelled under the term 'populism', political constitutionalists would do well to distance themselves from the claim that the constitution is political "all the way down". First, the article argues that the normative ambiguity of the term 'populism' makes it ill-fated for the purposes of constitutional theory and a call for clearer language for constitutional discussion is defended. Second, it argues that political constitutionalism should abandon, or significantly adjust, its commitment to what the article calls *constitutional lawlessness* and is defined as the idea that the constitution is and ought to be entirely malleable. The reasons offered for this proposal differ from those advanced by legal constitutionalism and instead hang on the democratic authority that political constitutionalists vindicate for majoritarian institutions.

Political constitutionalism, the article concludes, should grant some of the normative advantages of the law to the outcomes of constitutional decision-making processes. The move makes political constitutionalism more consistent in its own right and, importantly, safer from the charge that it feeds different sorts of constitutional disorder.

Keywords: populism, constitutionalism, constitutional crisis, political constitutionalism, illiberalism

Summary: 1 Introduction – 2 Populist constitutionalism – 3 Calling a spade a spade – 4 From moral disagreement to constitutional lawlessness – 5 Winners in the constitution – 6 Conclusion

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Synopsis

M. Victoria Kristan

Sovereign schliberties

Where Pettit's international protection of individual freedom falls short

SLOV. | *Suverene svofoščine: Kjer Pettitova mednarodna zaščita osebne svobode omahne*. Razlikovanje med temeljnimi svoboščinami in suverenimi svoboščinami je danes temelj najvidnejših republikanskih teorij demokracije in njihovega pospeševanja svobode kot odsotnosti dominacije. Oba sklopa svoboščin naj bi delovala skupaj, da bi zagotovila posameznikovo svobodo na vseh ravneh upravljanja, tako doma kot tudi globalno. Temeljne svoboščine spadajo v državno sfero upravljanja, kjer pripomorejo k svobodnemu in enakopravnemu državljanskemu statusu posameznika in so uztrezno povezane z zaščito posameznika s sistemom državnih zakonov in norm. Suverene svoboščine pa delujejo v mednarodni sferi, kjer konstituirajo »državno svobodo« kot zunanjo (globalno) razsežnost individualne svobode. V skladu z republikanskim pregovorom: »Ni svobodnega posameznika brez svobodne države« ta zunanja razsežnost svobode posameznika pomeni odsotnost mednarodne dominacije držav s strani drugih držav ali mednarodno aktivnih agencij in organov, tako kot notranja (domača) razsežnost svobode posameznika med drugim pomeni odsotnost posamične dominacije drugih posameznikov ali agentov. Vendar pa avtorica trdi, da suverene svoboščine, kot so zasnovane, državam in njihovim ljudem ne nudijo primerne zaščite pred tistimi vrstami zunanje dominacije, ki izhajajo iz odnosov med državami v mednarodnem pravu in okoliščin globalne dominacije. Ker tako ne služijo v celoti svojemu namenu, jih avtorica preimenuje v »svofoščine«.

Ključne besede: demokratična teorija, republikanizem, svoboda, nadvlada (mednarodna razsežnost), osnovne svoboščine, suverene svoboščine, Pettit (Philip)

ENG. | Distinguishing between basic liberties and sovereign liberties is today a cornerstone of the most prominent republican theories of democracy and their promotion of freedom as non-domination. The two sets of liberties are intended to function together to guarantee individual freedom at all levels of governance, both domestically and globally. Basic liberties belong to the national sphere of governance, where they contribute to the free and equal civic status of the individual and are correlatively linked to the protection of the in-

dividual by a system of state laws and norms. Sovereign liberties, on the other hand, operate in the international sphere where they constitute 'state freedom' as an external (global) dimension of individual freedom. According to the republican adage "No free individual without a free state", this external dimension of individual freedom implies the absence of international domination of states by other states or internationally active agencies and bodies, just as the internal (domestic) dimension of individual freedom implies, among other things, the absence of individual domination by other individuals or agents. However, the author of this essay argues that sovereign liberties, as conceived, are inadequate to protect states and their people from certain kinds of external domination, namely, those arising from state-to-state relations in international law and the circumstances of global domination.

Keywords: democratic theory, republicanism, freedom, domination (international dimension), basic liberties, sovereign liberties, Pettit (Philip)

Summary: 1 The relationship between basic liberty and sovereign liberty in republican thought – 2 Basic liberties in a constitutional state – 3 Sovereign liberties in international law – 4 The unfinished business of sovereign liberties

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