Legal reasoning under dialogic and procedural turns

El razonamiento jurídico bajo giros dialógicos y procedimentales

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Abstract: This article zeroes in on the traits of legal reasoning under the innovations associated with dialogical constitutionalism and procedural turns in adjudication. A critical reconstruction of concepts is followed upon two different crossed oppositions for each development: First, regarding the proposals associated with the dialogical turn, stock is taken of "power" and "voice"-related justifications, as well as formal and informal venues for deliberation. Second, the discussion of a procedural turn in legal reasoning is structured upon the distinction of "system" and "case"-based reasoning, as well as "exclusionary" and "merits-based" reasons. As a result, an explanatory priority is accorded to standards of review which incorporate reasons stemming from deliberative procedures, reinforcing the possibility of democratic control by those subject to decisions. This article is mainly analytical and reconstructive, integrating diverse debates under a common frame. Its main innovation is the proposal of a novel matrix of criteria to compare the diversity of debates related to a dialogic and a procedural turn, within legal reasoning itself. Finally, the different innovations are meant less as an alternative, and more as a supplement to the substantive discussion implied in democratic decision-making.
Keywords: dialogic constitutionalism; procedural turn; power and voice; exclusionary reasons; legal standards.

Resumen: Este artículo se propone identificar los rasgos de la argumentación jurídica bajo las innovaciones asociadas al constitucionalismo dialógico y a los giros

procedimentales en la jurisdicción. Se sigue una reconstrucción crítica de conceptos a partir de dos oposiciones cruzadas diferentes para ambos desarrollos: Primero, con respecto a las propuestas asociadas al giro dialógico, se ofrece un balance de cómo sus justificaciones se relacionan con el "poder" y la "voz", así como a espacios formales e informales de deliberación. Segundo, la discusión de un giro procedimental en el razonamiento jurídico se estructura a partir de la distinción entre razonamientos basados en el "sistema" y en el "caso", así como entre las razones "excluyentes" y "de fondo". Como resultado, se reconoce una prioridad explicativa a los estándares de escrutinio que incorporan razones derivadas de procedimientos deliberativos, reforzando la posibilidad de control democrático por parte de aquellos sujetos a las decisiones. Este artículo es principalmente analítico y reconstructivo, integrando diversos debates bajo un marco común. Su originalidad reside principalmente en la propuesta de una matriz novedosa de criterios con los cuales comparar la diversidad de los debates relacionados con un giro dialógico y otro procedimental, en el razonamiento jurídico mismo. Por último, las distintas innovaciones se plantean menos como alternativas y más como complementos a la discusión material que supone una toma de decisiones democrática.
Palabras clave: constitucionalismo dialógico; giro procedimental; poder y voz; razones excluyentes; estándares jurídicos.

Sumario: I. *Introduction*. II. *Dialogic turns and institutional innovations*. III. *Procedural turns and law-applying operations*. IV. *Conclusion*. V. *References*.

I. Introduction

We experience a time of deep disagreements regarding the practices of constitutional democracy. Those disagreements and contestations are not confined to debates on legal thought (the focus of this article), but they are also echoed at the level of political and state reform (the motivation for this article). Our current discussion is framed by the question "Is Constitutional Democracy Under Pressure?",[1] at a point in which constitutional democracies witness to great expectations,[2] but also great pressures stemming from a combination of staggering polarization among constituencies and, complementarily, a centralization of political power through

[1] Special Workshop convened by Imer Flores at the IVR World Congress 2024, Seoul, South Korea.

[2] See, e.g., Ewe (2024), who characterizes 2024 in terms of the "ultimate election year".

judicial capture.[3] Indeed, among other notable developments, as of August 2024, the ongoing debate on a constitutional amendment in Mexico looms large, including its proposal of enacting judicial elections across the federal judiciary (Cámara de Diputados, 2024), and denouncing "the erosion of credibility in their acts and the demise of legitimacy in their decisions" (Cámara de Diputados, 2024, p. 1).

It is in this context that the reciprocal justification of constitutionalism and democracy must be revisited. How is it possible to reconcile democracy with judicial[4] review? My main claim is that a version of the *procedural turn* in legal reasoning has an explanatory priority in this conundrum. However, this should not be taken to mean that the other innovations, techniques, and proposals to be discussed are without merits. On the contrary, most of them are highly salutary, some even urgent, contributions.

The reason to privilege merits-based legal reasoning incorporating a procedural turn —under certain conditions and limitations— is that it buttresses an irreducible expectation, namely, that authoritative decisions are contestable and justifiable to each potentially affected individual, considering their basic needs and interests, as well as the functioning of constitutional democracies. The historical struggles and achievements of rights-based constitutionalism should not be sacrificed in the altar of deference.[5] Thus, expressed in the boldest terms possible: Without a procedural merits-based review, any reconciliation of democracy and judicial review is unlikely to redeem the egalitarian promise of justifiable and endorsable decisions regarding those affected, beyond power disparities.

Our aims require a synthesis of debates across diverse disciplines. For this daunting task, my methodological postulate will be the critical reconstruction of concepts. I will reorganize the differ-

[3] See Castillo-Ortiz & Roznai (2024, pp. 6 and ff) with further references, Gardbaum (2024, p. 3).

[4] On *non-judicial review*, see *below*, sec. II.2.B.

[5] See Lafont (2020b, pp. 98 and ff) on *politically* blind deference.

ent proposals and discussions along opposite argumentative pairs, and these opposite pairs form poles, or *axes*.[6] The perspectives to be considered are diverse, no doubt, but they relate to a common set of exemplars, experiences, and expectations. Hence, it is their engagement with persistent questions of democratic constitutionalism which makes them comparable and manageable through reconstruction.

II. Dialogic turns and institutional innovations

Theories which ascribe to a dialogic turn in constitutionalism tend to take an oppositional stance to *judicial supremacy*.[7] This will be one of our guiding points in this section. After gathering the two axes which will structure our discussion, the next subsections will take stock of *notwithstanding* clauses and varieties of *non-judicial review* (II.2), parliamentary human rights committees (II.3), and open and direct democratic innovations (II.4). The last subsection will draw a preliminary balance (II.5).

1. *Two axes: power and voice, formal and informal*

A. *Power and Voice*

Our first axis is composed by *power* and *voice*, two fundamental interests underpinning the institutional arrangements in constitutional democracies. Constitutionalism may well be characterized as a joint, intergenerational project of setting reasonable limits to political power.[8] And democracy is based on people being co-creators,

[6] Thus, this method may also be called "geometric", see Roth-Isigkeit (2018, pp. 221 and ff).

[7] See Bateup (2006); Tushnet (2009); Gardbaum (2010); Gargarella (2016, pp. 120-121); Jhaveri (2019, p. 812); Giuffré (2023a, p. 143); cf. Friedman (1993); Benhabib (2020, pp. 511-512). See further Bello Hutt (2017). The further question on whether (and if so, how) supremacy is accorded to the legislative or other departments may be left open for our purposes.

[8] See Waluchow & Kyritsis (2023).

and not just coerced or subjected, in the exercise of political power.[9] Rainer Forst thus reminds us of the foundational role of the question of power, as "the first question of justice",[10] all the while he discusses a "basic structure of justification among free and equal persons" as "the first demand of justice". Comparably, Cohen (1999, p. 412) describes deliberation and direct citizen participation as the "two fundamental democratic values". And Dworkin (2011, p. 5) held that "an equal voice and an equal stake in the result" distinguished the role of the citizen in a genuine partnership democracy as opposed to a merely statistical one.

A central locus is the critique of *judicial supremacy*; a commonality in cognate debates on political or popular constitutionalism, dialogic constitutionalism, and democratic innovations. Our cue will be taken from Waldron (2006) who seminally defined *judicial supremacy* in the following terms:

> a situation in which (1) the courts settle important issues for the whole political system, (2) those settlements are treated as absolutely binding on all other actors in the political system, and (3) the courts do not defer to the positions taken on these matters in other branches (not even to the extent to which they defer to their own past decisions under a limited principle of stare decisis). (p. 1354)

These conditions express well the targets which relevant bodies of scholarship aim to change, even under different conceptualizations.[11] One may note that condition 1 refers to *power* in concrete issues, condition 2 refers to *power* in the general system, and condition 3 entwines *power* and *voice* in the general political system. In the following subsections, I will mention some of the most salient proposals which may be related to a dialogic turn in constitu-

[9] See Habermas (1996, p. 33). See also Frost (2023) on "political voice" with a view to transnational "vertical" and "horizontal" dimensions.

[10] Forst (2015 *in fine*); cf. Giuffré (2023b); Gargarella (2022, p. 180 and ff).

[11] For further discussion see Bello Hutt (2017).

tionalism, remarking, where appropriate, their connotations in terms of Waldron's conditions, power, and voice.

B. *Formal and informal deliberation*

Our second axis is conformed by *formal* and *informal* venues for deliberation. One of the most influential contributions by Habermas (1996), in *Between Facts and Norms*, was to flesh out the idea of formal and informal settings of deliberation in his "two-track" or "feedback-loop" model of democracy.[12] Incorporating insights stemming from his first major work, *Structural Transformation of the Public Sphere*,[13] Habermas (1996) noted that democratic will-formation and communicative power were not only and not primarily created in the formal institutions of the state, but rather in "an open and inclusive network of overlapping, subcultural publics having fluid temporal, social, and substantive boundaries" (p. 307).

In a recent overview, Giuffré (2023b) notes that this Habermasian understanding aims at an *inclusive* dialogue (as opposed to *interjudicial*, *transjudicial*, or *interinstitutional* varieties), in going beyond the institutions of the state and involving society itself, a goal which may also be found in posterior concrete proposals for more participative institutional innovations. In this regard, and also considering the institutional innovations be noted in a following subsection (II.4), the crucial questions are whether these are meant to be either *supplements* or *alternatives* to extant arrangements,[14] and, relatedly, whether they are meant to either *bypass* or *empower* the control of all subjected.[15]

[12] For discussion, see Cohen (1999); Lafont (2020a, pp. 24, 171 and ff); Landemore (2021).
[13] Habermas (1962/1991). On their continuities, see Kempf (2024, pp. 47 and ff).
[14] See Cohen in Mansbridge et al (2022, pp. 2-3); Lafont (2023, pp. 354 and ff).
[15] See Lafont (2020b, p. 103).

2. *Formal, power to power: notwithstanding clauses and non-judicial review*

A. *Notwithstanding clauses*

A widespread point of reference to frame the debate is the "new commonwealth model" of constitutionalism,[16] whose most distinctive feature, marking it apart from "legislative" or "judicial supremacy" is having "a formal legislative power to have the final word on what the law of the land is by ordinary majority vote".[17] Pride of place is given to the example of the *notwithstanding* clause in §33(1) of the Canadian Charter which enshrines the possibility of enacting a law by parliament "notwithstanding a provision included in section 2 or sections 7 to 15", for up to five years. Although this clause has found limited use, it provides a safety valve to safeguard parliamentary enactments even against judicial review.[18] Likewise, it has provided inspiration for dialogue-seeking theories of constitutionalism,[19] and for transplanting comparable override clauses meant to nuance or replace strong-form judicial review.[20]

Under idealized conditions, *notwithstanding* and override clauses would enlarge the scope of voice for those affected, while tackling Waldron's conditions (1) and (2) of judicial supremacy. The legislative is put in a position to decide on the content of law within the terms of the notwithstanding clause fostering an inter-branch dialogue. Arguably, however, condition (3), on judicial deference, is rendered redundant.

[16] See Gardbaum (2010); Jhaveri (2019); Rodríguez Peñaranda (2023, p. 267).

[17] Gardbaum (2010, p. 169).

[18] For discussion, see Tushnet (1995); Jhaveri (2019); Moreso (2022, p. 8); Rodríguez Peñaranda (2023, p. 270); Law & Tushnet (2023).

[19] See Gargarella (2013, p. 4), on how reforms and practices such as the notwithstanding clause are "precisely those which led us to discuss constitutional dialogue".

[20] See, e.g., in the context of Israel, Dodek (2016).

B. *Non-judicial review*

Although controversial as an *alternative* arrangement, analytically, it is possible to distinguish judicial review from constitutional review. Habermas (1996) thus discussed "whether the legislature could not also scrutinize its decisions, exercising a quasi-judicial review of its own" (p. 241).[21] For Tushnet (2003), more sanguinely, "non-judicial institutions around the world are involved in the process of constitutional review [...] with seemingly decent performance" (pp. 453-454). In much the same vein, Zurn (2002) carefully distinguishes constitutional review from "the judicial institutionalization of such review" (p. 479). More recently, Fukuda (2023) proposes an "institution-independent" concept of constitutional review, centered upon a *second-order* reasoning (i.e., incorporating reasons for review, as opposed to a *first-order* decision on the merits) and standards of political independence (p. 402), which may therefore be entrusted to the judiciary, the executive, the legislative, a "co-equal" arrangement, or independent organs. Fukuda draws examples from Finland, Japan, and the Netherlands.

It bears noting that, while Japan and Finland enshrine a constitutional review in both judicial and legislative institutions, only the Netherlands has a constitutional prohibition on judicial review, which grants discussing the latter model as it appears as an *alternative*, as opposed to a *supplement* to judicial review.

Indeed, the Netherlands has been highlighted as a case study in non-judicial review given that, as put by De Visser (2022), constitutional scrutiny carried by the Council of State or other advisory committees and agencies *ex ante*, i.e., before legislative enactment, is all the more emphasized in such a context (pp. 228 and ff). Two provisions attenuate the limitation of judicial review in the Netherlands, namely: the obligation of constitutionally conform-

[21] Ultimately, Habermas recognized the plausibility of a "second level of appeal" in the legislative, nevertheless rejecting the executive's role as a "guardian of the constitution", explicating the differentiation of constitutional courts as independent bodies for this task. Cf. Zurn (2002, pp. 521 and ff).

ing interpretation as well as the direct constitutional incorporation of international legal obligations contracted by the state (including conventionally conforming interpretation).[22] As a result, the legitimacy of the Netherlands' model seems quite situated and path dependent. The "long-term issue"[23] is that, while *ex ante* constitutional review is prevalent, this is rendered moot in lieu of an *ex post* and concrete constitutionality review of the sort deployed by courts, a situation which may come to exacerbate a failure to consider the intersection of inequalities and vulnerability.[24]

3. *Formal, voice to voice: parliamentary human rights committees*

Arguably, leading cases where the quality of parliamentary deliberation was considered in review[25] have converged with calls for the development of independent committees for the scrutiny of human rights within national parliaments (parliamentary human rights committees). The Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/38/25, "Contribution of parliaments to the work of the Human Rights Council and its universal periodic review" (UN Human Rights Council, 2018) envisages an important set of draft principles to reinforce or create independent oversight mechanisms and committees within national parliaments,[26] furthering the "procedural embedding" of human rights issues and inclusive, structured deliberation within legislative deliberation.[27]

[22] See De Visser (2022, p. 228).

[23] Fukuda (2023, p. 447): "the long-term issue in the Netherlands: the lack of ex post review in concrete cases".

[24] A converging discussion, considering also the application of the procedural standard of review at the European Court of Human Rights (ECtHR), can be found in Aldao & Clérico (2021).

[25] See below, sec III.4.

[26] For discussion, see Roberts Lyer (2019).

[27] On the characteristics of legislative balancing, see Sieckmann (2019); Oliver-Lalana (2023).

Much in this vein, the Council of Europe has emitted a handbook, "National parliaments as guarantors of human rights in Europe",[28] with recommendations ranging from the creation of independent human rights scrutiny committees with a broad mandate, requiring "the executive to attach a detailed human rights memorandum to every piece of proposed legislation", and having parliamentarians "choose to prioritise for detailed scrutiny those legislative proposals that they consider to have the most significant implications for human rights and the rule of law". These serve in large part to make good upon the incentives provided by the ECtHR of assessing the quality of discourse and deliberation at the legislative seat.[29] As put by Zurn (2002), "a form of constitutional self-review of statutes within legislatures themselves would significantly reduce the collisions between a constitutional court and the legislature" (p. 534).

This mechanism would especially address Waldron's conditions (1) and (3), transforming the relationship between the three branches into a matter of principled or joint inter-branch constitutional interpretation.

4. *Informal to formal: open and direct democratic innovations*

A practice which has become entrenched and consolidated after the beginning of the discussion of dialogic constitutionalism is *consultation and free, prior, informed consent*, especially in topics related to indigenous rights, property, and land. Other things held constant, consultation effectively gives *voice* to the affected in ways which were previously impossible.[30]

[28] Council of Europe (2018).

[29] See Spano (2018, pp. 488 and ff); Saul (2021, p. 289).

[30] For discussion, see Rodríguez-Peñaranda (2023); cf. Gargarella (2013) who called attention to how the practice of such mechanisms would have to take seriously a greater and more horizontal participation which would go beyond the logic of inter-institutional "checks and balances" (pp. 24, 26-27).

From a different angle, María Luisa Rodríguez-Peñaranda (2023) demonstrates the synergy of dialogic constitutionalism with citizen-wide political rights of standing (in the form of *Acción pública de inconstitucionalidad)* in Colombia, which "may be filed by citizens with few formalities, without representation by an attorney, and without having to demonstrate a specific legal interest in the subject matter of the claim" (Cepeda-Espinosa, 2004, p. 555).[31]

Going from extant practices into proposals a persistent point of reference for deliberative institutional innovations are citizen forums, or "mini-publics", which straddle the formal and informal sites of communicative power. In a nutshell, mini-publics include "Deliberative Polls, Consensus Conferences, Citizens' Juries, Planning Cells," and they are guided by the search for "groups small enough to be genuinely deliberative, and representative enough to be genuinely democratic" (Goodin & Dryzek, 2006, p. 220), oftentimes through randomized means. While promising in their own right, randomly selected mini-publics are not immune from capture by private or economic power or from being used to bypass instead of empowering the subjected citizens.[32] Thus, discussing Gargarella's conceptualization, Lafont (2023) forcefully notes that mini-publics are liable to exclude all subjected by resort to the "mirror" and the "filter" presuppositions:

> if one assumes that a few randomly chosen ones may adequately represent the citizenship in virtue of their ascriptive features (the mirror), and that it is only them who may deliberate under adequate epistemic conditions (the filter), then excluding the rest of the citizenship from debate on political decision-making affecting them seems neither problematic nor antidemocratic. (p. 356)

In a related vein, while recommending a supplementation of judicial review with a composite institutional arrangement involving

[31] See further Roa Roa (2023); cf. Jiménez Ramírez (2024, pp. 69-70).

[32] See Hutton Ferris (2023).

"civic constitutional fora", Christopher Zurn (2011) has discussed proposals for constitutional review by juries through three desiderata: (1) political independence, (2) legal systematicity, and (3) democratic sensitivity. Zurn notes that such proposals tend to explicitly disavow the functions of judicial lawmaking or doctrinal elaboration, given that, "(e)ven if sortition models political equality better than electoral representation", lawmaking would fall short of "the ideal that citizens should be subject only to constitutional law they can understand themselves as the collective author" (Zurn, 2011, p. 85).

Finally, it bears remarking that democracy is impacted by digitalization and its new spaces for social interaction, but democratic institutions may also utilize digitalization's new tools.[33] In this vein, Helene Landemore has identified "cryptocurrency-based online communities" as "aligned with the spirit of open democracy".[34] In this sense, decentralized autonomous organizations (DAOs) have garnered special attention due to their new forms of interaction and their potential economic salience, which some of its advocates aim to harness in order to counteract the political power vested in transnational platforms and corporations.[35]

5. *Preliminary Balance*

The promotion of new constellations of *power* and *voice* in formal institutions, or new institutions to straddle the two tracks of democracy, is matter of sustained interest to redeem the expectation that private and public autonomy coincide, i.e., to make people co-authors to the laws and powers to which they are subjected. Such proposals call for attention to exemplary practices which, as formulated by Ferrara (2014), articulate "new normative standards and political values – as a way of promoting the public priority of certain ends

[33] On both aspects of digitalization, see Burchardt (2023).

[34] Landemore in Mansbridge *et al.* (2022, p. 8). See also Landemore (2021).

[35] For a critical overview, see Garon (2022, pp. 175 and ff); see also the *political voice* deficit diagnosis in Frost (2023); Landemore (2020, pp. 210 and ff).

through good reasons that set the political imagination in motion" (p. 212).

At the same time, two types of control are required. One is concerned with the political possibility of participating in will-formation and the control of representatives, the other is concerned with the legal possibility of contesting and requesting justification for each exercise of political power, answering to the human rights of each individual as well as to the preconditions of democratic practices.

III. Procedural turns and law-applying operations

After gathering the two axes which will structure our discussion, the next subsections will take stock of system-based and exclusionary strategies identified simply as "red lines" (III.2), case-based and exclusionary strategies identified as "bespoke tests" (III.3), and a contributive conception of procedurally oriented review (II.4).

1. *Two axes: system and case, exclusionary and merits-based reasons*

A. *System and case*

Our first axis is conformed by *system-based* and *case-based* approaches.[36] What we call a system-based approach emphasizes validity and criteria of pedigree or membership; the case-based approach will tend to emphasize the applicability of suitable legal standards.[37] While system and case feed into each other,[38] it remains true that different pragmatics stem from a system-based

[36] On the system and the case, see Habermas (1996, pp. 243 and ff); see further on cases Di Martino (2021, pp. 968-971); Etxabe (2023, pp. 1025 and ff).

[37] See especially the distinction of application-based, criteria-based, and efficacy-based conceptions of the legal system in Sieckmann (2012, pp. 203 and ff). See also the distinction of validity and applicability in Carpentier (2018).

[38] On the relation among discourses of justification and discourses of application, see Habermas (1996, pp. 439 and ff); Alexy (1996, pp. 1031 and ff).

and a case-based perspective. The former tends to look at a macro perspective, considering future application and political relations, especially inter-branch and inter-authority relations. In a case-based approach, the concrete circumstances of (hard) cases and *balancing problems* require a priority relation,[39] and it is this perspective which requires to, at a certain step, "dislodge powerful assumptions" (Etxabe, 2023, p. 1026) across institutional sites, in order to look at the merits as informed by all applicable norms, arguments and relevant information.

This distinction has acquired heightened importance as the case and the individual is the focus of our requirements of respect for our rights, and eventually the protection for the conditions of legitimacy and democracy.[40] Only the concrete circumstances of an issue call us to recognize how inequalities and disadvantages only intersect but build upon each other, creating a serious claim to bracket systemic presumptions.[41] Similarly, it is the case at hand and the invoked legalities by the parties which express the entanglements which are potentially applicable insofar as they inform the legal positions of persons subject to multiple sources of law,[42] to afterwards consider and justify how exclusionary reasons may or not apply.

B. *Exclusionary and merits-based reasons*

Our second axis is formed by *exclusionary* and *merits-based* reasons. While first-order and merits-based reasons are mostly parallel, exclusionary reasons conform a subset of reasons which occupy a *second-order* and which are usually non-merits-based.[43]

This way, merits-based reasons will be taken to refer to the solution of problems concerning human rights, collective goods,

[39] On *balancing problems*, see Sieckmann (2012, p. 38) and Atienza (2023, pp. 369-370).

[40] See a recent account in Etxabe (2024, pp. 1025 and ff); Cohen-Eliya & Porat (2013, Chapter 6).

[41] See Aldao & Clérico (2021).

[42] See Klabbers (2023, pp. 32 and ff).

[43] See Raz (1975, p. 487).

or basic needs and interests as considered in *first-order* reasoning. In contrast, exclusionary reasons differ from the merits of the concrete issue at hand. They refer, e.g., to authority, legitimacy, democracy, subsidiarity, the separation of powers. And they establish, at a second order, a presumption that deliberation has already been carried out and that a decision has authoritative bindingness, i.e., it should prevail.[44] In this conceptualization, the exclusionary pieces of second-order reasons admit of degrees in terms of scope,[45] but also weight or strength.[46]

2. *Exclusionary and system-based reasons: red lines*

A first strategy would consist in drawing "red lines". These "red lines" would aim to exclude subject matters, as a whole or in some core, from judicial review. To explain this operation, we may gather the misgivings expressed by Habermas (1999) regarding the limits of adjudication: "Once a judge is allowed to move in the unrestrained space of reasons that such a "general practical discourse" offers, a "red line" that marks the division of powers between courts and legislation becomes blurred" (p. 447).[47] A comparable idea has also been identified in a different context, where Armin von Bogdandy & Spieker (2019) speak of "red lines", either as "negatively determining what is not allowed, without positively determining how it should be instead" or, regarding, fundamental rights, concentrating "on their 'essence'" (p. 423).

Abstracting from the above, we may note an exclusionary logic is already at work in some domains where determinate subject matters are seemingly marked as off-limits from judicial review. This approach is typically treated as providing definitive, exclusionary

[44] For discussion, see Sieckmann (2012, pp. 8 and ff); Arnardóttir (2017); Wang (2017); Fukuda (2023).

[45] Raz (1975, p. 487); see further Moreso (2024).

[46] See Sieckmann (2012, pp. 169 and ff); Wang (2017).

[47] In turn, Alexy (2010, p. 179) undercuts any recourse to an "unrestrained space of reasons" by emphasizing the compatibility of "a *prima facie* priority of authoritative reasons" with law *qua* special case of general practical discourse.

reasons and it is primarily "systemic", in the sense of opposed to case based.

For example, economic policy is held to be essentially a matter for democratic decision-making and Mexican constitutional doctrine has enshrined a limited judicial review in the subject, ever since the earliest decisions which adopted proportionality analysis.[48] However, as economic policy entwines materially with fundamental rights and democratic preconditions, this has meant a defeasible presumption for a limited review.[49]

One of the conceptions of fundamental rights casts them (or a subset) as deontological in the sense of limiting legal reasoning, especially adjudication.[50] Where the constituent assembly or relevant authorities already decided on a (nigh) absolute protection of a fundamental right, the matter is, allegedly, never to balance, but always to apply said right. Apart from some core cases of absolute rights (e.g. the prohibition of torture), we find the impossibility of determining completely the scope of application of a right in the abstract to render superfluous a consideration of its concrete interferences and collisions. Given the unavoidability of considering the authoritative decisions along with merits reasons and the concrete circumstances of their collision with other norms, recent proposals tend to plea for a reconciliation of both ideas through bespoke, multi-pronged tests, categorizations, or standards (which will henceforth be treated as coextensive).

3. *Exclusionary and case-based reasons: bespoke tests*

A second approach at the level of legal reasoning may be characterized in terms of fostering "bespoke tests" which guide (and,

[48] See Cossío Díaz (2006, p. 320); Roa Jacobo (2020, pp. 35 and ff).

[49] The shift from a limited into a full review might be especially visible under the circumstances of the *PSPP* judgment of the German Federal Constitutional Court. See Baroncelli & Mooij (2022).

[50] See Sieckmann (2012, pp. 139-140, 149 and ff); Barak (2012, pp. 493 and ff); Greene (2018); Tamir (2023).

to a degree, constrain) deliberation.[51] Freedom of expression is a paradigm right with its own multipart critical questions and categories, and similar relevance has been accorded to the standards of review related to the evaluation of suspect classifications in the right to equality and non-discrimination.[52] Comparable multiprong standards are ubiquitous in personal and subject-matter jurisdiction in the USA, a structural feature that leads Bloom (2009) to conclude that jurisdiction "focuses adjudicative energy, encourages judicial caution, constrains jurisdictional discretion, and eases structural tension—even if we know it false" (p. 1030).

Indeed, for many, categorical reasoning enshrines deference to legislatively enacted statutes or administrative agencies, as adjudicators would engage less actively in open-ended practical reasoning and the further development of law. Furthermore, the relevant tests would incorporate a series of priority rules in order to properly pay heed to typically important considerations in each concrete case.

While reliance on such tests promises to guide or constrain courts, these standards tend to run on "distinctions of degree" (Holmes, 1894, p. 7) and general clauses such as reasonableness, interest analysis, and other "pockets of pliability and places where firm rules bend" (Bloom, 2009, p. 1030). It is important to note, though, that this flexibility is oftentimes explicitly justified in both law-making and law-applying operations. Conversely, Barak (2012) admonishes: "Categorization tends to be less transparent. The reasons underlying the categorical choice are typically not made explicit" (p. 488). However, the application of categorizations which may lead to balancing can be understood as a further way to introduce order or structure into deliberation, as put by Sieckmann (2012): "There may be reasons to exclude arguments from consideration at earlier or later stages of the balancing. But at some point each argument must have been taken into account" (p. 169, fn 17).

[51] On this formulation, see Tamir (2023); cf. Schlag (1985).

[52] See Greene (2018, pp. 40-47); Barak (2012, pp. 506-513).

A more fundamental risk remains, however, in that such standards may be interpreted and defined to strictly bind adjudicators to narrow down their deliberations into a previously fixed subset of reasons, which may lead courts to exclude or ignore the otherwise legally relevant arguments and information, triggering questions on the legitimacy of such a decision by an authority.[53]

The question immediately arises as to how these legal provisions may be drafted or interpreted in more nuanced, less exclusionary terms. In this vein, Tamir (2023) has recently proposed a continuum which enables lawmakers to innovate in adjudication methodologies (e.g., combining a more robust legitimacy stage or categorizations with proportionality analysis), functioning as a "speeding up mechanism that tries to quicken the process of induction from experience to the creation of doctrinal rules or categories" (p. 240).

4. *Merits-based and system to case-based reasons: reasoning-process review*

Although sometimes presented as part of dialogic approaches, one may note that discussion of a "procedural turn" focuses our attention straightaway on legal reasoning, adjudication and review. In Europe, the procedural turn tends to refer to the evolving dynamics among the European Court of Human Rights and national institutions;[54] elsewhere, the procedural turn may tend to refer to the domestic setting,[55] but it may also encompass international law.[56] These evolutions across contexts are of a piece in that they build second-order concerns from democratic legitimacy and the separation of powers, horizontally or vertically (subsidiarity-based), into legal reasoning itself.

As an encompassing characterization of the *procedural turn*, we may point generally to how the quality of deliberation (espe-

53 Green (2024); cf. Sieckmann (2012, pp. 13, 169).
54 See Arnardóttir (2017); Brems (2017); Spano (2018); Popelier (2019).
55 For a recent overview, see Gardbaum (2024).
56 See Kleinlein (2017); Takata (2022, pp. 6 and ff) with further references.

cially in legislative procedures, but also considering administrative authorities),[57] regarding a norm (or decision) has come to be considered, impacting the arguments and the outcome of judicial review. In general terms, the procedural turn is a democracy-seeking development, insofar as it not only demarcates the separation of powers but also enshrines or incentivizes a proper deliberation which embeds the substantive standards and includes the affected and relevant voices.[58]

And yet, many different practices fit into this deliberately broad characterization, some of which might even turn out to be incompatible with the constitutional ideals of justifiability and democratic participation.[59] This makes a refinement necessary, which we may intimate through three distinctions:

A first distinction concerns (*a*) procedural positive obligations which are related or "read into" rights and (*b*) procedural review "stricto sensu", with a focus on how procedural elements figure "among the balance of reasons when the Court pronounces on the substantive merits and assesses the proportionality or reasonableness of a measure" (Arnardóttir, 2017, p. 14).[60]

A second distinction concerns (*a*) "pure" procedural review and (*b*) a "mixed" model (Bar-Siman-Tov, 2012; Arnardóttir, 2017; Gardbaum, 2020, p. 1448; Etxabe, 2023, p. 1015). The former would act as an *alternative* to substantive judicial review or balancing; the latter would be a *supplement* or a contributive, non-exclusive, factor to the overall balance of reasons.

A third distinction is concerned with the impact of procedural review. Arnardóttir (2017, pp. 20 and ff) thus distinguishes a function of procedural review in permitting (*a*) "complete deference" or (*b*) a "partial deference".[61]

[57] See Gerards (2017, pp. 137-138).

[58] Further on the relevant standards, see Oliver-Lalana (2023); cf Nino (1996, p. 199).

[59] Cf. Zysset (2022, pp. 228-231).

[60] Cf. Gerards (2017, pp. 127-128); Zysset (2022, p. 217); Lawson (1996, p. 318); Zurn (2002, p. 519).

[61] Cf. Spano (2018, pp. 480 and ff).

We will focus on a conception of procedural review which gathers the second term in each pair, i.e., a procedural review which looks at the process of deliberation and decision-making as a contributing factor to balancing in a broad sense, and which may eventually grant a partial or conditional deference.

It is important to note, however, that the three oppositions we have gathered may oftentimes be blurred,[62] and separating them is fraught with doctrinal difficulties. This is especially true regarding the distinction of degree among a "pure" and a "mixed" procedural review. The doctrine of "general measures" in the leading case *Animal Defenders International v The United Kingdom* (App. No. 48876/08, Grand Chamber, judgment, 22 April 2023) effectively makes the doctrine approximate an *alternative* to substantive balancing in the concrete circumstances. As put by the ECtHR, "the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case" (para. 109).[63] Nonetheless, a different approach is possible, and at least formally, this is also the tack taken by the ECtHR when disavowing that a general presumption may replace a concrete review.[64]

In duly incorporating a review on the reasoning, deliberative process undertaken for a decision, along with the possibility of each subjected individual to duly contest and receive a justification for the political decisions which affect them, the deliberative democratic ideal of *reasonable endorsement* becomes a possibility. It bears noting that Alain Zysset (2022) has presented a thoughtful argument against the claim "that the emphasis put on the domestic procedure in fact strengthens the right to justification domestically", as this is rendered moot insofar as a procedural review marginalizes "the Court's own review of proportionality" (Zysset, 2022, p. 231), which holds all the more so if a Court, as Zysset suggests, may sanc-

[62] Cf. Zysset (2022, pp. 221-222); Gerards (2017, p. 129).

[63] A rigid application of this general presumption fails to consider vulnerable and disadvantaged individuals, see Aldao & Clerico (2021); Ní Chinnéide (2024, pp. 158 and ff).

[64] See Gerards (2017, pp. 134 and ff).

tion laws enshrining particular forms of the good life.[65] In my view, this critique is quite right if we consider a procedural review tending towards a "pure", exclusive or definitive, focus on procedures as an *alternative*, or at the cost of, independent balancing (and towards a *complete* deference as opposed to a partial or defeasible presumption). Alas, we cannot simply rely on our stipulation of a conception of procedural review which embraces the second pair, as if we believed that the procedural turn will automatically tend towards a contributive and partially deferential understanding. The upshot is that significant doctrinal and institutional efforts will be required to tailor the doctrine's sensitivity to procedural democracy *and* substantive individual justification.

IV. Conclusion

After all (and leaving to a side the matter of striking the right interpretation and doctrinal safeguards), a contributive procedural review strikes me not only as normatively desirable, but also explanatorily prior regarding the rest of the proposals for building greater deference in legal reasoning or institutions providing for a more participative, dialogic, practice.

To begin with, the alternatives which aim to build democratic deference into legal reasoning itself, such as "red lines" or "bespoke tests", while worthwhile, may incorporate a stronger tendency towards authority-based justifications if they are not accompanied by an all things considered balancing which also looks at procedures. The procedural turn is thus not only a structuring supplement to balancing, but also part of its bridging to other forms of regulation and priority rules. In its absence, we have no account of how the different institutional sites conceive of their appropriate relations.

[65] Cf. Nino (1996, p. 204).

It is further relevant that the practice of legislative balancing has for a long time remained opaque and extracted from the duty that "in a culture of justification, even after authority has been assigned, the authorized body must still provide justification for all of its decisions".[66] Much like the *voice* or dialogue-enhancing institutional proposals such as the consolidation of independent parliamentary human rights committees,[67] the procedural turn looks straightaway at the balance of reasons provided in legislation. We should not presuppose a conception of reasons (concerning parliamentary debates,[68] just as much as practical reasoning)[69] which "block" deliberations or render lawmaking opaque. The same holds true for *power* in dialogical proposals, as a contributive procedural review seems part and parcel of the aim to go beyond "last word"-based dichotomies. In much the same way, a contributive procedural review is a safety-valve (among others) against capturing mechanisms meant to straddle the two tracks of democracy.

Finally, not only is it desirable to domestically embed human rights and international standards which apply anyway, but this provides a foundational block for closing the gap in the rule of law beyond the state, as international bodies rely chiefly on procedural engagement and in turn they may "reopen" deliberations which may have been cut short.[70] The idea is to overcome unilateral discussions, neither purely domestic nor purely international, and neither entirely determined by the adjudicator, but also not confined into extant power asymmetries.

66 Cohen-Eliya & Porat (2013, p. 113).

67 See *above*, sec. II.

68 See Bar-Siman-Tov (2011).

69 One may recall Raz (1986, p. 39): "Reflection on the merits of actions required by authority is not automatically prohibited by any authoritative directive, though possibly it could be prohibited by a special directive to that effect".

70 See Lafont (2020a, pp. 212 and ff).

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