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Which Kind of Discretion in Constitutional Adjudication? A Discussion of Mher Arshakyan's *The Impact of Legal Systems on Constitutional Interpretation: A Comparative Analysis: The U.S. Supreme Court and the German Federal Constitutional Court*

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A. Arshakyan's Main Thesis

In his paper *The Impact of Legal Systems on Constitutional Interpretation: A Comparative Analysis: The U.S. Supreme Court and the German Federal Constitutional Court*, Arshakyan carries out an interesting and detailed comparison between American and German constitutional courts by individualizing the properties shared by both courts and identifying the differences. On this basis, he advances the main thesis of his paper:

> [T]hat there are no major differences in the methods of constitutional interpretation in countries with varying degree of judicial review. Despite the fact that the methods of interpretation are somehow affected by the legal culture of those countries and underlying political theories, values and legal traditions there is no big gap in constitutional interpretation in practice in view of wide interpretive discretion.[1]

I will call it *the wide discretion thesis*. Arshakyan can thus be understood as claiming that, even if there are some differences in the methods of interpretation used in different legal cultures, the fact that judges enjoy a high degree of discretion leads to the conclusion that legal cultures are similar in the area of constitutional adjudication.

As stated above, Arshakyan uses the U.S. Supreme Court and the German Federal Constitutional Court to analyze the way in which the structure and functions of a legal system impact the methods and results of constitutional interpretation. Each court belongs to a different legal system with different legal cultures and degree of judicial review. This is

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[1] Mher Arshakyan, *The Impact of Legal Systems on Constitutional Interpretation: A Comparative Analysis: The U.S. Supreme Court and the German Federal Constitutional Court*, 14 GERMAN L.J. 1297(2013).

the reason why Arshakyan claims that it is necessary to clarify the historical and political peculiarities of the systems within which each court works. In the first section of his paper, Arshakyan describes some of the differences and similarities between both courts.

In sections II to V, Arshakyan engages in an analysis of the ways in which argumentation is conducted by constitutional judges in American and German courts. On the one hand, he purports to show that in the case of the United States Supreme Court, the main features of the decision-making process of the common law tradition cannot avoid judicial discretion. In this sense, Arshakyan claims that precedent and analogical reasoning cannot fully constrain the decision of judges. On the other hand, in the case of the German legal culture, Arshakyan focuses on the influence of legal positivism. He claims that legal positivism is not the only legitimate base for German constitutional adjudication. In fact, German courts accept that the interpretation of laws must reflect, within certain limits, social and political changes, a demand that is usually fulfilled by exercising the balancing method of interpretation.

Despite the similarities in the discretionary nature of the two courts' tasks, in section number V, Arshakyan points out that there are some differences in the methods of interpretation and how they are used by each court. Teleological interpretation, structural and systematic consideration, just to mention a few of the methods analyzed by Arshakyan, are present in both courts but to different degrees. Nevertheless, he affirms that "the difference between the Common Law and the Civil Law traditions regarding legal reasoning is not crucial for constitutional interpretation since both the German and the US constitutional adjudicators supply a meaning to abstract constitutional provisions by their value choices."[2]

On this basis, Arshakyan affirms that, at the end of the day, both courts converge to the extent that "in the application of precedent and balancing method the judges enjoy wide discretion and often impose their own values."[3]

I would like to present some observations regarding Arshakyan's work. First, I will point out some very specific difficulties that, it seems to me, affect the way in which Arshakyan analyzes the American and German legal cultures. Here, my commentary will be mostly methodological, but I will also advance some observations regarding Arshakyan's substantive claims. Second, I will advance a request for clarification of the arguments that Arshakyan put forward to support his wide discretion thesis.

B. On the American Legal Culture

[2] *Id*.

[3] *Id*.

In the case of American legal culture, Arshakyan focuses on three characteristics that, we can certainly agree, deserve special consideration. These are "the outstanding place given to reason, the determination of appropriate precedent for the resolution of a case and the use of analogy if the matter is not covered either by statute or precedent."[4]

After an analysis of these three features, Arshakyan concludes that "most of constitutional law in the United States is judge-made."[5] In particular, the difficulties for the identification of the *ratio decidendi*, the indeterminacy of precedents, the possibility of a new case arising that is not covered by them, and the under-determination of analogical reasoning are, according to Arshakyan, good arguments for the conclusion that, in American constitutional adjudication, judges have a high degree of discretion.

I would like to introduce some remarks regarding the detailed treatment that our author gives to the theories of precedent. He identifies "four types of precedents or theories on how to apply a precedent: (1) The Natural Model of Precedent, (2) The Rule Model of Precedent, (3) The Result Model of Precedent and (4) The Model of Principles."[6] It is not completely clear, however, how a theoretical discussion about precedent can throw light on the way in which judges, in fact, decide. Actually, Arshakyan carefully mentions several decisions in which one of these different models seems to be used by judges, but this is just the first step. The different models of precedents are clearly normative—i.e. they say how a judge should decide to comply with precedents, but they do not tell us which model judges actually follow.

Secondly, it is important to disambiguate the problem of indeterminacy of precedents that, according to Arshakyan, makes it inevitable for a judge to decide the case on the basis of her own values. Is it a problem of incompleteness or a problem of relevance? Using a distinction introduced by Alchourrón and Bulygin,[7] we can distinguish different problems that may arise when precedents aim to determine a decision. The problem of incompleteness arises when there is a combination of properties that have not yet been associated with a solution. A relevance problem arises instead when a case has a combination of properties that has been associated with a solution but, nevertheless, has other properties that seem relevant and push toward a different solution. The difference is important, because whereas in the first case there is no solution for a combination of properties, in the second case there is a solution but it is not the right one according to the interpreter of the rule. In the first case, the law is silent and it is impossible to know if the

[4] *Id*.

[5] *Id*.

[6] *Id*.

[7] *See* CARLOS E. ALCHOURRÓN & EUGENIO BULYGIN, NORMATIVE SYSTEMS (1971). The authors use the distinction to identify mainly three kinds of legal gaps.

judge followed the precedent. In the second case, the law speaks and thus the judge who changes the solution alters the law by not following it. Did the flawed rule in *Plessy v. Ferguson* fail to solve *Brown v. Board of Education*[8] or did it solve *Brown* in the wrong way? The importance of this distinction will become apparent in the last section of this article.

C. On the German Legal Culture

In regard to the German legal culture, Arshakyan focuses on the influence of legal positivism. Whereas, in a broad sense, it is clearly true that legal positivism had a relevant role in the formation of continental legal culture, I think that the conclusions that Arshakyan extracts from this historical fact are not completely warranted. It seems to me that this can be a consequence of a recurrent ambiguity that affects contemporary discussions of legal positivism. In fact, when introducing the position that Arshakyan ascribes to legal positivism, he correctly points to the works of Austin, Kelsen, Ross, Hart,[9] and others. However, when he assesses the way in which legal positivism affects how courts decides, he seems to conflate different sorts of legal positivism. In this sense, it is helpful to think in terms of Norberto Bobbio's classification of legal positivism.[10] Bobbio distinguishes between theoretical or conceptual legal positivism, methodological legal positivism, and ideological legal positivism. In a few words, conceptual legal positivism is a set of conceptual claims regarding the law, e.g., that it is the creation of an authority, that it is mostly state-made, etc. Methodological legal positivism, instead, is the point of view according to which the law can and should be described as it is. Ideological legal positivism is a normative position according to which the law, as such, must be obeyed. The thesis that Arshakyan ascribes to Hart and others can be considered to pertain to different forms of methodological (or even conceptual) legal positivism, whereas the theses on the basis of which he assesses the decision-making process of German Federal Constitutional Court pertain to some form of ideological legal positivism. That is, to a form of ideology that claims that laws must be obeyed, that the good coincides with the legal, etc. As an ideology, ideological legal positivism[11] is not interested in describing the law as it is. On the contrary it is interested in guiding the behavior of a certain group, i.e., to follow the existing law or to change it. Neither of these two goals is found in theoretical or methodological legal positivism. It would also be interesting to have an analysis of the way in which certain conceptual schemes can, or do, influence the reasoning of judges. But this task is different from the one with which Arshakyan engages.

[8] *See* Arshakyan, *supra* note 1.

[9] *See id.*

[10] NORBERTO BOBBIO, GIUSNATURALISMO E POSITIVISMO GIURIDICO 101 (2d ed. 1972).

[11] *See* Arshakyan, *supra* note 1.

Nevertheless, it is true that an ideological legal positivist judge is bound to do nothing more than a "mechanical application of legal rules" and to avoid the influence of his personal values. This is how, within the German legal culture as Arshakyan describes it, judges should decide.[12] However, this requirement is countered, according to Arshakyan, by the fact that scholarly writings play a relevant role in adjudication and the fact that natural law tradition has had its revival. Arshakyan claims that ideological legal positivism is not the only legitimate base for German constitutional adjudication. In fact, German courts accept that, within certain limits, the interpretation of laws must reflect social and political changes. The problem for an ideological legal positivist is that those limits, according to German courts, cannot be stated in rigid formulas.

The distinction between the different versions of legal positivism is important regarding the wide discretion thesis. In the case of the theoretical and the methodological versions, the fact that judges have or do not have discretion depends upon the content of their legal systems. Moreover, sometimes the thesis that judges do have discretion is associated with theoretical legal positivism.[13] On the contrary, ideological legal positivism denies that judges have discretion.

D. Kinds of Discretion

Thus, Arshakyan claims that the way in which the United States and the German legal systems are structured makes room for the conclusion that the differences between both constitutional courts fade. In fact, both courts have discretion, but despite this fact, it seems that the claim put forward by Arshakyan requires further elucidation. First, it is necessary to clarify the sense in which the term *discretion* is used. Arshakyan hints at this in some passages of his paper; for example, he claims that "both the German and the U.S. constitutional adjudicators supply a meaning to abstract constitutional provisions by their value choices."[14] But, are value choices a sufficient condition for a decision to be discretional? Indeed, several senses or forms of discretion have been individualized. Second, the nature of the thesis is not clear. Is it a conceptual, an empirical, or even a normative thesis?[15] Is Arshakyan claiming that, by virtue of the way in which judges behave, both kinds of legal systems fail to limit the degree to which decisions are discretionary? Or is he claiming that no matter how the judges behave, it is impossible for

[12] *See id.*

[13] *See* Scott Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, *in* RONALD DWORKIN 22–55 (Arthur Ripstein ed., 2007). *See also* EUGENIO BULYGIN, EL POSITIVISMO JURÍDICO (2006).

[14] Arshakyan, *supra* note 1.

[15] *See* Arshakyan, *supra* note 1.

both kinds of legal systems to afford such a limit? In the first case, his thesis would be empirical; in the second case, it would be conceptual.[16]

Let's begin with the question regarding the meaning of discretion. According to a very general notion of discretion, a discretional act is an act in which—given alternative courses of action that are mutually exclusive—the agent can choose to act according to his own evaluative criteria. But, in the context of judicial decisions, this general notion needs further clarification.[17] Following Caracciolo, it is possible to identify several ways in which a decision is discretionary:

> a) Empirical discretion: Any judge can choose to apply the law or not to. That is to say that any judge have the empirical possibility to deviate from the existing constitutional law.
> b) Authorized discretion: The situation in which the constitution gives judges the power to choose different alternatives from a limited set.
> c) Empowered discretion: The situation in which the constitution delegates to judges the choice of the content of the decision, case by case.
> d) Strong discretion: The situation in which the constitution does not provide any answer to the case that must be decided, in these cases there is no right legal decision to make. "It is well known that this situation can result from the absence of a generally applicable rule, or from what Hart called the 'open-textured' character of the law, which springs from the ambiguity of the language in which the rules are expressed."[18]
> e) Weak discretion: The situation in which a decision cannot be made in a mechanical way. Especially in constitutional matters judges must engage in a complex reasoning in order to reach the decision that the constitution requires.[19]

[16] I set aside the normative version of the thesis because I do not see elements to ascribe it to Arshakyan.

[17] RICARDO CARACCIOLO, *Discreción, respuesta correcta y función judicial*, *in* EL DERECHO DESDE LA FILOSOFÍA 251-260 (2009). An English version of this article is available at http://www.law.yale.edu/intellectuallife/sela2000.htm.

[18] *Id. See also*, HERBERT L. A. HART ET AL., THE CONCEPT OF LAW 124–47 (2d ed. 1994).

[19] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1978).

Clearly, the wide discretion thesis, if understood in sense (a), would amount to the claim that, even if American and German legal systems have the capacity to determine the correct constitutional decision, judges nevertheless will still decide on the basis of their values regardless of the "correct" decision. In this sense, their decisions are discretional. Under this reading, Arshakyan's thesis would be an empirical thesis; it would be a thesis about the behavior of judges, not a thesis about the limits of civil law or common law legal systems. Under this empirical reading, the thesis might be an interesting sociological thesis if accompanied by sociological evidence regarding the causes that prompt judges to deviate from what the constitution demands. However, a relevant point emerges from this analysis, to wit, that discretion in sense (a) presupposes that we can identify which decisions follow the constitution and which decisions infringe it.

If understood in senses (b) and (c), Arshakyan's thesis would merely focus on the content of each legal system and would be a contingent claim whose truth depends on whether the American and the German legal constitutions include such authorizing or empowering norms.

The wide discretion thesis acquires interesting conceptual content if understood in senses (d) and (e) which are the conceptions of judicial discretion elaborated by Hart and Dworkin that have been at the center of the jurisprudential debate in the last decades.

Thus, let's assume, for the sake of present argument, that in both systems the situation could be reconstructed as the question of how to follow a rule (in a broad sense). In the case of the German system, the problem is how to follow an explicit or formulated rule, whereas, in the case of the American system, the question is how to follow a rule identified through its previous instances of application. In both cases we should be able to identify which is the action that complies with the law, and on this basis we could claim that a different action would be incorrect. Now, the discretion thesis can assume two forms.

First, this thesis can assert that, in both systems, the constitution gives a determinate solution to some cases but is silent or indeterminate as to others. It is in those latter cases where judges supply constitutional provisions with their value choices because, if the constitutional provisions do not provide a clear, correct answer, the judges cannot do anything other than exercise strong discretion. In this sense, the decision is discretionary because there is no right decision to oppose it.

Second, the thesis can assert that the decision is discretional because, to find the correct constitutional answer, the court must conduct complex reasoning. The constitution actually affords a solution to the case, but its identification requires that the court engage in intricate deliberation and go through constitutional argumentation to find the correct answer. This exercise is what discretion amounts to in constitutional adjudication. It is precisely this activity that renders the decision discretionary. In this weak sense, judges have discretion even if the legal system supplies them with a correct answer.

Thus, the first step is to clarify whether in both legal systems there is a right answer. This is so because the critical, conceptual point about discretion is not knowing whether a court made one decision when it could have made another (i.e., that it had empirical discretion). The point is to know whether it is possible to claim that, in making a particular decision, a court was wrong or produced an incorrect decision—a decision that falls outside the realm of existing law. This may be too demanding for a comparative analysis because it requires elucidating what a correct answer amounts to in each legal system; but if Arshakyan is right about the similarities between both legal systems, then we are at least halfway there.