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CRITICAL-DISCURSIVE THEORY OF THE JUDICIAL PROCEDURE

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Orientador: Prof. Dr. José Delamar Volpato Dutra

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"A CRITICAL-DISCURSIVE THEORY OF THE JUDICIAL PROCEDURE"

Esta tese foi julgada adequada para obtenção do Título de "Doutor em Filosofia", e aprovada em sua forma final pelo Programa de Pós-Graduação em Filosofia.

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This work is dedicated to all those who, directly or indirectly, contribute on a daily basis for the enlightenment and emancipation of humanity.

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"After the collapse of state socialism and the end of the "global civil war", the theoretical error of the defeated party is there for all to see: it mistook the socialist project for the design–and violent implementation–of a concrete form of life. If, however, one conceives "socialism" as the set of necessary conditions for emancipated forms of life about which the participants *themselves* must first reach an understanding, then one will recognize that the democratic self-organization of a legal community constitutes the normative core of this project as well."
(Jürgen Habermas, 2002)

RESUMO

Analisa, critica, reforma e complementa a teorização de Habermas a respeito do processo judicial em *Direito e Democracia* (1992). Analisa a referência de Habermas ao processo judicial no Cap. V de *Direito e Democracia*, explicando a razão de sua ênfase aparentemente exclusiva nos elementos discursivos do processo judicial. Critica esta apresentação excessivamente otimista, mostrando que as regras processuais deixam a desejar no tocante a neutralizar as forças antidiscursivas que distorcem o andamento e resultado final das disputas judiciais. Reforma a concepção de processo judicial oferecida pela obra de Habermas, substituindo a categoria de discurso institucionalizado pela de discurso remedial. Complementa a teoria de Habermas na medida que fornece uma categoria que está em conformidade com a metodologia de sua obra, mas dá espaço à ambiguidade entre forças discursivas e antidiscursivas que permeiam o processo.

O Cap. 1 analisa a referência de Habermas ao processo judicial no Cap. V de *Direito e Democracia*, mostrando que a ênfase nos aspectos discursivos do processo servia apenas ao propósito argumentativo daquele momento do texto, isto é, servia apenas para mostrar que as forças discursivas da jurisdição já estão incorporadas às próprias regras com que se organizam os processos judiciais.

Em seguida, nos Caps. 2 e 3, submeto à crítica a possibilidade de considerar o processo judicial como uma prática inteiramente discursiva limitada apenas por constrangimentos empíricos e práticos inevitáveis (discurso institucionalizado). Mostro que há várias demandas do discurso racional (liberdade, igualdade, inteligibilidade e inclusão) que as regras do processo judicial deixam de implementar em sua inteireza na medida em que fecham os olhos para distorções estruturais e conjunturais bastante frequentes nas interações forenses.

Nos Caps. 4 e 5, introduzo e defendo o conceito de discurso remedial como mais apropriado para referir-se ao processo judicial do que o conceito de discurso institucionalizado. Explico que o discurso remedial não é exatamente um discurso, mas é seu substituto mais próximo, uma rotina administrativa que, sem deixar de ser exercício de poder administrativo, adota certos elementos discursivos para fins de legitimação de seus resultados finais. Mais importante: que deixa espaço para forças antidiscursivas que desempenham papel central na explicação de características dos processos judiciais.

Nos capítulos de 6 a 8, mostro como o conceito de discurso remedial, além de ser mais realista que o de discurso institucionalizado para referir-se ao processo judicial, permite ainda um diagnóstico de época sobre certas patologias do direito processual recente, referindo-me especificamente à diversificação da jurisdição (valorização e adoção de meios pré e extra judiciais de resolução de conflitos), à uniformização da jurisprudência (mediante formas de controle horizontal, vertical e externo da jurisdição) e à judicialização da política e ativismo judicial (que apontam para formas pós democráticas de dirigismo estatal em nome de demandas funcionais de mercado e do Estado). Desta forma, pretendo ter contribuído para a teoria crítico-discursiva do direito, adicionando a ele o que acredito ser pelo menos a via de entrada para uma teoria crítico-discursiva do processo judicial na atualidade.

Ao final, avalio meu próprio trabalho em termos de suas lacunas e insuficiências. Aponto a necessidade de ter levado em conta a história de formação da jurisdição no direito ocidental dos países de Civil Law e de Common Law. Aponto a ausência de clara apresentação dos traços principais dos ordenamentos jurídicos comparados durante o texto (brasileiro, americano e alemão), na ausência da qual o caráter meta nacional do diagnóstico tentado ficaria comprometido. Aponto ainda a falta de debate mais próximo com o vasto volume de literatura secundária sobre o processo judicial e sua incapacidade de evitar e de reverter formas reiteradas de injustiça estrutural. Todos estes problemas são apresentados como pontos de partida para futuras revisões ou desenvolvimentos deste trabalho, pelo mesmo autor ou por outros.

Palavras-chave: Jürgen Habermas, processo judicial, teoria do discurso, diagnóstico de época.

ABSTRACT

Analyzes, criticizes, reforms and complements Habermas's theorization on the judicial procedure in *Between Facts and Norms* (1992). Ch. 1 analyzes Habermas's reference to the judicial procedure in Ch. V of that work, arguing that his emphasis on the discursive features of the judicial procedure served only to the argumentative purpose of that moment of the text. Then, in Ch. 2 and 3, I submit to criticism the possibility of conceiving the judicial procedure as an entirely discursive practice limited by empirical and practical constraints alone (institutionalized discourse). In Ch. 4 and 5, I introduce and defend the concept of remedial discourse as a more appropriate way to theorize on the judicial procedure. I explain that a remedial discourse is not really a discourse, but rather its second best option, an administrative routine that, without failing to be an exercise of administrative power, incorporates some discursive features with the aim of turning its final results legitimate. Finally, from Ch. 6 to 8, I show why the concept of remedial discourse, besides being more realistic as an approach to the judicial procedure, also allows for a time diagnosis of certain pathologies of recent procedural law changes, where I reference specifically the diversification of jurisdiction, the standardization of jurisdiction, the judicialization of politics and judicial activism. Thus, I suppose to have contributed to a critical-discursive theory of law, adding to it what I believe to be the first step to a critical-discursive theory of the judicial procedure.

Keywords: Jürgen Habermas; judicial procedure; discourse theory; time diagnosis.

TABLE OF CONTENTS

Introduction

1. Referentials

The referential and departing point to my thesis is Habermas's theory of adjudication in Ch. 5 of *Between Facts and Norms*. Here he tries to solve the problem of how judicial decisions can be rational even in the face of the indeterminacy of legal rules, that gives plenty of room to judicial discretion and arbitrariness. After rejecting the insufficient solutions provided by legal hermeneutics, legal realism and legal positivism, Habermas finds refuge in Dworkin's interpretive theory of law, that presents itself as a cognitivist, deontological and reconstructive approach to both legal rights and judicial decision-making. However, to overcome Dworkin's discursive and procedural deficits without falling into Alexy's special case thesis about legal argumentation, Habermas relies on both the interpretive role of legal paradigms and the discursive features of the judicial procedure. That results in a one-sided approach to the judicial procedure as solution to discursive deficits, emphasizing only its discursive elements and becoming blind to its functional ones.

What he says in that chapter, however, must be put in context in the confluence and relationship between his social critical theory, his discourse theory and his theory of law, all of which are also important to the criticisms and developments I attempt at in this thesis. His social critical theory, for he is concerned about dynamics of domination and emancipation, especially about the relationship between communicative and administrative power in legally institutionalized democracies. His social discourse theory for his ideas about the rationalizing power of discourse and its idealized assumptions play a central role in his approach to the matters of law in general and of the judicial procedure in particular. And, finally, his theory of law for his concern with the rationality of jurisdiction is actually derivative of his wider conception of law as social communicative medium, coordinating between facticity and validity and between lifeworld and systems.

2. Themes

One of the two dominant themes of my entire thesis is the extent to which the judicial procedure is discursive or not. As I said above, Habermas's approach to the issue emphasized the discursive elements of the judicial procedures. But that I see as insufficient. By underlining the extent to which procedural rules aim at implementing a discursive logic,

Habermas left aside many aspects and situations where court procedures either fail to prevent discursive distortions or work to satisfy functional ends and demands. In this thesis I took to myself the task of finding out what an approach that corrected that would look like and be capable of.

The other dominant theme of my thesis is whether the recent tendencies of procedural law are contributing to make the judicial procedure more or less discursive. Once the approach to the judicial procedures goes beyond its characterization as institutionalized discourse (where discursive idealizations are only limited by temporal, social and material constraints), embracing a conception of the judicial procedure as a struggle between discursive and functional forces (as it will be with my concept of remedial discourse), one can hardly not ask oneself whether some of the recent tendencies in procedural law are strengthening the discursive or the functional side of the struggle. In my thesis such concern takes the form of an attempt at providing something like a time diagnosis to procedural law.

3. Problems

The thesis finds its rationale in the realization of some problems with Habermas's approach to the issue of the judicial procedure, the main of which is that Habermas's approach fell short of being a full critical theory. For two reasons. First because it fell short of being a full theory. Habermas did not provide so much of a theory of the judicial procedure, but more of a reference to how the discursive nature of the judicial procedure succeeded at closing the discursive deficit of Dworkin's theory of adjudication. Second because it fell short of being fully critical. The necessary balance, interconnection and tension between idealization and realism, between the reconstruction of the normative self-comprehension of the judicial procedure and the critique of its empirical limitations and functional demands, is highly absent. The thesis is mainly an attempt at correcting that problem.

One second problem is that Habermas only examined whether the rules of procedural law have discursive goals, but not whether they succeed at preventing the many discursive distortions to which courtroom practices are constantly vulnerable to. Since the rationality of jurisdiction greatly depends on the discursive logic not only being aimed at, but coming as close as possible to be fully realized in the course of the judicial procedure, this change of evaluative method seems much necessary and welcome to further Habermas's own research interests.

A third problem is that Habermas's concept of institutionalized discourses only makes room for empirical constraints, not for functional ones. Judicial procedures are not discourses limited only by the needs of its temporal, social and material determinations, but fields of conflict between discursive and functional forces, where functional demands of celerity, efficiency, uniformity, predictability, stability and control play as much of a role as do the normative demands of communication, correctness and appropriateness. A more nuanced concept is necessary, one that collects the conflicting forces into one single idea.

Finally, a fourth problem is that the concept of institutionalized discourses does not allow for a time diagnosis of procedural law. When one realizes that some changes have become pervasive and influential in the procedural law of many Western countries, one must recur to a critical theory of the judicial procedure in order to determine whether such changes are making the judicial procedure more or less discursive. This thesis also aims at providing this king of diagnosis.

4. Hypotheses

- Habermas's approach to the judicial procedure has to be further developed into a full critical theory, by acknowledging both its discursive and functional aspects and making it possible to provide a time diagnosis of procedural law.
- Once one checks whether the rules of procedural law succeed at preventing discursive distortions, one finds that the judicial procedure is a struggle of discursive and functional forces not fully captured with the concept of institutionalized discourse.
- It is necessary to introduce a concept of discourse that makes room for functional constraints, replacing the concept of institutionalized discourse with one of remedial discourse: an administrative routine that only incorporates some discursive features for purposes of legitimation of its outcomes.
- With the help of the concept of remedial discourses, it is possible to reach and provide a time diagnosis of procedural law that shows that the diversification of jurisdiction, the uniformization of jurisprudence, the rise of judicial activism and the judicialization of politics are actual pathologies of procedural law, that is, tendencies that strengthen the functional side of the struggle of forces in remedial discourse.

5. Objectives

- Develop Habermas's approach to the judicial procedure into a full critical theory, acknowledging both its discursive and functional aspects in a wider explanation of its nature
- Change the treatment to procedural rules from looking only at the discursive ends they aim at to looking at their ability to prevent discursive distortions caused by functional demands
- Introduce the concept of remedial discourse in order to collect the conflicting forces in struggle within the judicial procedure
- Provide a time diagnosis of procedural law capable of determining whether the recent changes in procedural law are making the judicial procedure more or less discursive

6. Methods

Method to criticizing Habermas's approach (Ch. 1-3): First I explain Habermas's argument in Ch. 5 of *Between Facts and Norms*, in order to highlight that his one-sided conclusion about the judicial procedure is due to his intent to close the discursive deficit of Dworkin's theory of adjudication. Then I change the evaluation of the rules of procedural law by looking at their ability to prevent discursive distortions, coming to the conclusion that much too often they fail to protect the ideals of freedom, equality, intelligibility and inclusion against the assault of social distortions and functional demands.

Method to developing Habermas's approach (Ch. 4-5): This is the point where I replace the concept of institutionalized discourse (a discourse with empirical limitations, constrained by its temporal, social and material determinations) with the concept of remedial discourse (an administrative routine with discursive features aimed at legitimizing its outcomes, a field of conflict between discursive and functional forces), allegedly with gain in cognitive and critical power and in agreement with the very ends and concerns of Habermas's critical social theory.

Method to giving a time diagnosis of procedural law (Ch. 6-8): Lastly, I use the concept of remedial discourse to evaluate four recent tendencies in Western procedural law: Diversification of jurisdiction, uniformization of jurisprudence, judicial activism and judicialization of politics, diagnosing that they are pathologies insofar as they strengthen the functional side of the judicial procedure's balance of forces.

CHAPTER 1 – Habermas's Reference to the Judicial Procedure

1.1. Introduction

In chapters 2 and 3, I show that Habermas's reference to the judicial procedure in Ch. 5 of FN, if taken as a full examination of the issue, would have many deficits and flaws. In this chapter 1, I argue that Habermas did no full examination of the judicial procedure, only a brief reference to it, used as a final link in his argument on adjudication. In order to demonstrate it, I cover, topic by topic, the entire argument of Ch. 5 of FN, leaving to the end my conclusions on how the one-sided picture of the judicial procedure found there is influenced by what it needed to do for Habermas's purposes. Here are the topics I cover:

(2) After showing in Ch. 3 and 4 of FN how a discourse theory could replace contractarianism with great advantage in the justification of rights and of the principles of the constitutional state, Habermas must now descend from that abstract level, conducted from the point of view of philosophy, and deal with concrete legal orders from the point of view of legal theory, which entails a concentration on adjudication.

(3) This shifts how the tension between facticity and validity must be formulated. For the problems of the new enterprise, the tension must be seen as one between certainty and legitimacy, translated as consistency and correction. Judicial decisions must be not only consistent with existing law but also correct or rationally acceptable. But legal rules are indeterminate and demand complementation.

(4) Hermeneutics, realism, and positivism are aware of that, but their solutions to the problem succumb to the perils of contextualism and decisionism. Hermeneutics relies on a shared ethical background both unattainable and suspicious in pluralistic societies. Realism gives too much room for the judge's personal convictions and preferences, with no respect for the normativity of law and no explanation for the stabilization of expectations. Positivism insulates itself in the attempt of giving a value-free description of legal systems and leaves the judicial decision-making open to the judge's discretion.

(5) Dworkin, on the other side, relies on a deontological theory of basic rights, conceives the legal order as a system of rules, principles, and policies and dissolves the tension between history and justice by means of a constructive interpretation, justifying the decision of

individual cases on the coherence to a rationally reconstructed version of the existing law, which, however, requires a highly idealized judge.

(6) In view of the CLS's criticism to Dworkin's idealized view on decision-making and the unity of a legal order, Habermas recurs to how integrity connects adjudication with the normative self-understanding of modern legal orders and to Günther's distinction between justification and application, changing the meaning of legal certainty and relieving Hercules of his hyper complex task by appealing to legal paradigms.

(7) Habermas then moves to criticisms on the monological character of Hercules's decision-making. He explains the privilege Dworkin places on the judge's perspective is incoherent with his idea of integrity and compromises the legitimacy of legal paradigms. He accepts Michelman's proposal of plurality and Fiss's proposal of professional standards of interpretation, as long as they escape the criticism of being professional self-legitimation by being rationally reconstructed from the point of view of a theory of legal argumentation.

(8) While on legal argumentation, Habermas takes Alexy's theory, which conceives of legal discourse as a special case of moral discourse. Habermas examines four objections to the special case thesis (the strategic character of forensic action, the indeterminacy of legal discourse, the deficit of validity of legal decisions, and the conditions for rationally reconstructing the existing law), making the conclusion that it is not sustainable either in Alexy's or in Günther's version.

(9) Since legal discourses must be seen from the start as regulated by the principle of democracy and connected to democratic lawmaking, rather than subordinated to morality and reproducing moral discourses with additional restrictions, the tension typical of adjudication, between correction and consistency, must be complemented by a tension, typical of judicial procedures, between the logics of argumentation and the factual need for regulation. Habermas then proceeds to explain how procedural rules can be seen as clearing the way to discourses of application of law in temporal, social, and material dimensions.

In this chapter I cover each of these steps of Habermas's argument with a respective topic, followed by (10) a summary of the conclusions we can draw from Habermas's reference to the judicial procedure in Ch. 5 of FN, with a view to my next two chapters.

1.2. The shift to legal theory

Habermas opens Ch. 5 of FN by characterizing that chapter and the next as a "shift" both in the level of abstraction and in the point of view of his account.

Regarding the level of abstraction, Habermas considers himself to be shifting from the abstract justification of the system of rights and the principles of the constitutional state (higher level of abstraction, dominant in Ch. 3 and 4 of FN) to the concrete realization of rights and political principles (lower level of abstraction, dominant in Ch. 5 and 6 of FN). He only explains the reason why such a shift is necessary in terms rather vague and inconclusive. He says that "constitutional rights and principles, while indeed defined *in abstracto*, can only be found in historical constitutions and political systems" (FN 194). The idea appears to be that rights and principles can be defined *in abstracto*, but can only be fully realized in concrete legal orders, and that this should be seen as reason for a rational reconstruction of the self-understanding of modern legal orders (FN 82) to move from the higher to the lower level of abstraction and to prove itself plausible also in view of the legal system in the narrow sense (FN 195).

This reason sounds acceptable. After all, an account of rights and principles that could not prove itself plausible at the level of the concrete legal orders, only level at which they become fully realized, would be theoretically incomplete and practically impotent. However, what that reason makes the reader to expect to find next is an explanation of how and why general rights and principles take the form of particular rights and principles in concrete legal orders. That would be a theory of particular constitutions and legislations. Habermas indeed waves with something like that by introducing the issue of legal paradigms. But, beside defining the concept of a legal paradigm and announcing he will occupy himself with them only in Ch. 9, where he intends to explain the liberal and the social paradigm and to "sharpen the contours of a third [procedural] legal paradigm" (FN 195), Habermas does not proceed speaking of paradigms. He says, instead, he will, before speaking of them, extend the approach he had taken so far. By that he appears to mean he will lead forward the rational reconstruction of the self-understanding of modern legal orders - only now from another point of view.

Regarding the point of view, Habermas considers himself to be shifting from the standpoint of philosophy to that of legal theory proper. Giving his efforts in Ch. 3 and 4 of FN a new description, he says the issues he had occupied himself with (the system of rights and the principles of the constitutional state) are all too familiar to the tradition of natural law theory, and his account could be seen as a reexamination of the subjects proper to that tradition by replacing a contractarian with a discourse-theoretical account (FN 194). Now, however, he intends to speak of "law" in a sense much more specific than that used in the former two chapters. This concrete meaning of "law" he dubs as *the legal system in the narrow sense*, a reflexive structure where law makes and applies law as law, and the disciplinary standpoint that studies law in this sense he calls "legal theory proper".

Habermas distinguishes between a legal system in the broad and in the narrow sense. In the broad sense, it encompasses "the totality of interactions regulated by legal norms", while in the narrow sense it focuses on "all interactions that are not only oriented to law, but are also geared to produce new law and reproduce law as law" (FN 195). This is a reign of actions made possible by the self-application of "secondary rules that constitute and confer the official powers to make, apply and implement law". The reference to Luhmann appears to mean that the legal system in the broad sense is the proper subject of legal sociology. On the other side, the legal system in the narrow sense is explicitly said to be the proper subject of legal theory. This points out to an important feature of Habermas's account of law: although he is speaking about the "legal system", that expression means a system of interactions. As the legal system in the narrow sense is clearly a subset of the legal system in the broad sense, that would make legal theory to be something like a legal (normative) sociology with a narrow subject, a legal (normative) sociology, as it were, of the self-application of law within the production and reproduction of law itself. That is very revealing for some of the arguments that follow. Every theory of law to be examined by Habermas (hermeneutics, realism, positivism, Dworkin's law as integrity) will be taken as if it were speaking of how judges and citizens ought to act, even when their original self-understanding is described as far from such pragmatic intentions.

Still on the subject of what Habermas means with this shift in his account, I would like to stress relations Habermas draws between legal theory and some of its neighbor disciplines. Habermas says legal theory

"moves within the compass of particular legal orders", that it "cannot afford to ignore those aspects that result from the internal connection between law and political power" (in both aspects, he says, "unlike philosophy"). That legal theory "privileges the judge's perspective" (like doctrinal jurisprudence) – something that I will comment in full detail right after –, but differs of doctrinal jurisprudence "in that it claims to achieve a theory of the legal order as a whole". And he says, finally, legal theory, while taking in consideration the perspective of other participants, "remains first of all a theory of adjudication and legal discourse" (all the last quoted excerpts are in FN 196-7). Although many aspects of this description of the legal theoretical approach is subject to much controversy, in this demarcation of similarities and differences I would like to discuss two points: the privilege to the judge's point of view and the emphasis on adjudication.

Habermas speaks of the choice for the judge's perspective as being a methodological commitment (FN 197), justified in view of "the functional status the judiciary has inside the legal system in the narrow sense". Apparently, the reason is that "all legal communications refer to actionable claims", that is, every time someone says p is true in a legal system what she means is, were p the subject of a judicial dispute, the judge in charge ought to declare p to be true and ought to decide the case in favor of whom p said to be right. In other words, to say something is legally true is to say it ought to (and probably would) hold in a court of law. This observation, that can barely disguise its strong legal realist accent, is put forward as a rational reconstruction of the privilege to the judge's point of view in legal theory. But it only makes sense when we consider law to be a system of action, as showed above. If law was taken to be a symbolic system, with no necessary connection to the actions of certain officials like judges, one could say, without contradiction, that p is true in certain legal system but p would not hold in any court of law of such system. If, on the other side, law is taken to be a system of action, then, that disconnection between what is true and what would hold in court loses plausibility.

Lastly, the emphasis on adjudication. Certainly, Habermas says the emphasis is on adjudication and the legal discourse. But, as the latter will later be reached by means of the first one, I will, for now, comment the emphasis on adjudication. Because here the first step of the argument meets its closure: Habermas had spoken about rights and principles, that get fully realized only in concrete legal orders, speaking

of which requires to assume the point of view of legal theory, that has a methodological commitment to the judge's perspective, reason why the issue of how rights and principles get realized in concrete legal orders must be preceded by the other issue of how judges ought to decide cases. As a result, the tension between facticity and validity – the guiding concept throughout FN – must be adjusted once again to this new level of exam.

1.3. Tension under a new form

As I explained in the Introduction, Habermas builds his whole argument in FN around the idea of a tension between facticity and validity. The particular term representing either side of the tension shifts according to the problem at issue. For, as the tension is integral to the very nature of law, each pressing issue concerning law is not but another manifestation of the same tension, or as least so might be represented. In the case of Ch. 5, the shift from philosophy to legal theory and from the foundations of law to adjudication require finding the new form of the tension capable of capturing the crucial problem now addressed. Habermas says that it is "a tension between the principle of legal certainty and the claim to a legitimate application of the law, that is, to render correct or right decisions" (FN 197). This section is dedicated to explain this new version of the tension.

Habermas looks back to Ch. 1 of FN and his explanation of how law prompts obedience. The modern individual, motivationally weak but rationally demanding, needs the law to be both coercive and legitimate. By being coercive, law obtains general efficacy and stabilizes individuals' expectations concerning each other's behavior. That he refers to as *certainty*. On the other hand, in order to be obeyed by post-conventional rational individuals, legal norms have to be such that, by means of rational procedures of making and applying law, they deserve to be obeyed. That Habermas refers as *legitimacy*. Now, at the level of legal theory and adjudication, Habermas says, that requirement of certainty translates into one of *consistency*, while that requirement of legitimacy translates into one of *correction* (FN 198-9). A brief but clear explanation of these translations can be given as follow.

Taking *certainty* no more as a social fact, but as a principle requiring the production and maintenance of that fact, Habermas claims that such principle "demands decisions that can be consistently rendered within the framework of the existing legal order" (FN 198). The choice

for the term *consistency* shows that he has in mind not a *thick* coherence, as it would be with implication, derivation, or development, but rather a *thin* coherence, a kind of compatibility, non-contradiction, or co-possibility. Judicial decisions must be legally acceptable in light of the existing law. Besides, as the "institutional history of law forms the background of every present-day practice of decision-making", Habermas's *consistency* means too that judicial decisions must belong to the same line of history than past decisions on the same subject. They must be consistent with both present law and past decisions.

On the other hand, Habermas explains, "the claim to legitimacy requires decisions that are (…) supposed to be rationally grounded in the matter at issue so that all participants can accept them as rational decisions" (FN 198). So, when he speaks of correct decisions, he doesn't rely on a purely procedural conception of correction, one where it would suffice for decisions to be taken in a rational procedure of application and consistent with norms also made in a rational procedure of legislation. Rather, they must be "rationally grounded in the matter at issue", that is, *correct* in a substantive sense. Albeit maybe exaggerating Habermas's claim, I would say that here he speaks of decisions that would be considered good or correct independently of the law regulating the case, the ones the participants would accept solely on the basis of their merit as solutions for the problem at issue.

Now, it is clear that the existing law and past decisions do not always provide the best solution for the problem at issue, which builds a potentially constant conflict between consistency and correction. Consistency with unjust laws or poorly made past decisions is likely to generate incorrect decisions, as well as consistency with laws and decisions that did not anticipate the distinctive features of the present case. On the other hand, making the correct decision in light of the problem at issue is often an invitation to neglect existing law and past decisions entirely, compromising not only the rule of law and the separation of powers but also the certainty of law. If anything, the certainty of judicial decision-making means that with existing law and past decisions one can – if not predict – justify judicial decisions. Casuistic legislation is not the right way to render correct decisions.

Making decisions at the same time consistent and correct is the challenge peculiar to adjudication. This new version of the tension is capital for understanding how Habermas addresses next the "alternatives for treating this central question" (FN 199), that is, hermeneutics,

realism, and positivism, as well as Dworkin's theory of law. In each case, Habermas is less interested in how such theories define and treat their task than in whether they provide a good solution for the consistency-correction puzzle. Habermas's approach to law, despite shifting now to adjudication, brings therewith conclusions attained in previous chapters. Therefore, if he is at this point about to compare competing theories of adjudication, he believes to know in advance that any explanation of judicial decision-making that turns certainty or legitimacy either too weak or simply impossible must be discarded as bad legal theory. That is his key of reading of each alternative.

1.4. Three failed alternatives

Habermas begins by dismissing old-fashion formalism as an unacceptable approach to adjudication. He speaks of it as "the conventional model", that would conceive a legal decision in terms of subsuming a case under the pertinent rule. In contrast, Habermas welcomes that hermeneutics brought back "the Aristotelian insight that no rule is able to regulate its own application" (FN 199). The reason why the conventional model fails is that it regards norm and case as separated and independent unities, but their relationship is actually circular. On a constitutive level, a case becomes such only when referred to a norm, while a norm attains concrete meaning only in relation to a case; on a selective level, a norm turns only some aspects of factual situations relevant for a legal decision, while a case instantiate only some of the possible semantic contents of a formal norm.

In view of that, hermeneutics postulates that something logically anterior to both the norm and the case allows the judge to realize their interconnection. That element is an ethical background, a constellation of values and meanings shared by the members of a particular form of life (FN 199-200). Whenever the relationship between norm and case turns problematic, a judge can recur to some principles, which embody those shared values and meanings and then render the decision at issue justified from the point of view of the legal tradition where it has been made. However, in pluralistic societies, that have not one, but several dissenting, competing, and conflicting ethical forms of life, any appeal to a shared background of values and meaning runs the risk of being either merely utopian or plainly ideological (FN 200). Legal realism rejects that and pursues other kind of solution.

Like hermeneutics, legal realism claims the choice of alternatives of interpretation and application is made on the basis of extralegal elements. For legal realism those are not shared values and meanings, but rather personal preferences and convictions of each judge (FN 200). Various factors of a judge's biography interfere with her judgment and, once known, make it possible to predict her decisions, regardless of the law. That dissolves the distinction between law and politics, for now a judge is conceived of as using her position to make new law and to pursue certain values instead of others. Legal realist go as far as recommending a utilitarian use of that power. However, Habermas adverts, that not only disregards the internal logics of normative statements but also would render the law so uncertain that it would not be able to function to stabilize expectations (FN 201).

Legal positivism is addressed in two parts: its conception of law and its theory of decision-making. As for its conception of law, in contrast to legal realists, legal positivists respect the normativity of norms and the systematicity of law (FN 201-2). They use this inner normative logics of law to dismiss attempts of connecting law to empirical prediction and social engineering. They conceive law as a self-sufficient system, self-legitimated on the basis of a basic norm or rule of recognition (FN 202). As for its theory of decision-making, the focus on norms and the privilege to certainty over legitimacy (in the sense that it makes it certain that nothing but positive norms is taken as part of the legal system) leads it to a decisionist account where judges are allowed to recur to discretionary extralegal elements (FN 202-3). It not only renounces to any legitimacy other than sheer legality, but also gives no certainty concerning the outcome of judicial decision-making.

These three failed alternatives somehow show what a good solution must do. Like hermeneutics (and unlike formalism), a good solution must appeal to a preunderstanding to deal with the circular relationship between norms and cases. Like legal realism (and unlike hermeneutics), a good solution must not rely on ethical backgrounds rendered problematic in pluralist societies. Like legal positivism (and unlike legal realism), a good solution must respect the normativity of law and explain its capacity of stabilizing expectations. However, unlike legal positivism, a good solution must take principles that legitimate law and make them into guidelines that avoid judicial decisionism.

1.5. Dworkin's theory of law

Habermas presents Dworkin's proposal as a solution to the consistency-correction puzzle that avoids the deficits of the former ones. His deontological conception of rights leads, unlike legal realism, to the conclusion that rule-bound decisions that preserve legal certainty are possible and necessary (FN 203). His legitimation of law and decisions on the basis of principles that allow for a one right answer to each case avoids the self-legitimation and decisionism of legal positivism (FN 203). Finally, Dworkin has the judge to recur to preunderstanding, but, unlike hermeneutics, not by applying authoritative values and meanings, but rather by critically appropriating an institutional legal history that reveals traces of practical reason, the most important of which are the contents stemming from the principle of equal respect and equal concern for each person (FN 203).

Habermas compares this principle to Kant's principle of right and Rawls's first principle of justice in that it claims that each person has a right to equal liberties (FN 203). But Habermas points out that Dworkin takes that principle as necessary and previous to any agreement or construction, enjoying the status of a natural right, or, in the more discourse-theoretical terms as Habermas puts it, "an explanation of the deontological character of basic rights in general" (FN 204). Dworkin conceives political rights as trumps of the individuals against collective goals, imposing strong, although not absolute, limits on the cost-beneficial analysis of the latter (FN 204). These basic rights entail that even in hard cases, where legal rules are inconclusive, legal principles make it necessary to have one, and only one, right answer to be found.

In his "Excursus on the moral content of law", Habermas intends both to clarify that moral contents change meaning when absorbed into law and to dispel the impression that Dworkin's emphasis on moral contents is a moralization of law (FN 204). Beginning with primary rules, Habermas seconds Peter in classifying them in (a) repressive and restorative precepts and prohibitions and (b) prices and transfers (FN 204-5). As for the former, one can interpret the degrees of penalties and the division of criminal and civil matters as a doctrinal weighting of moral content (FN 205). As for the latter, that are directed in a morally neutral way to addresses assumed as strategic agents, their validity does not have strong moral connotations. But, unlike Dworkin, Habermas finds policies morally relevant, because the ends they aim at are usually morally grounded (FN 205).

Habermas then speaks of procedural norms, first of those that apply to quasi-public bodies (universities, unions, agencies etc.) and next of those applying to the political will-formation of lawgivers and the public sphere. As for the former, they occupy a middle position between morally laden and non-moralized norms, having both kinds of contents (FN 206). As for the latter, they are the primary abode for morality in law, but that does not mean either subordination or confusion between law and morality. There is an overlapping of moral and legal content without blurring the limits between their codes, for morality and law are "irreversibly differentiated at the post-conventional level of justification" (FN 206). According to Habermas, the moral contents Dworkin speaks about are principles and rights that, from the point of view of discourse theory, result from the application of the discourse principle to the legal code, absorbed into law in the process of legislation (FN 206-7).

Back to presenting Dworkin's theory, Habermas underlines three steps: a criticism on neutrality, a criticism on autonomy, and the idea of constructive interpretation (FN 207). As for the first criticism, Habermas takes it as refusing that law can be legitimated by mere legality (FN 207). Habermas distinguishes between unity of code and plurality of reasons: while law recurs only to reasons translated into legal form, without ever breaking the unity of its code, those reasons are often extralegal, coming from morality and politics (FN 207). Dworkin, he explains, uses precedents well-known in his legal tradition to demonstrate that, before hard cases, judges interpret the existing law in the light of arguments of principle and policy, incorporated to law through legislation, although principles have primacy over policies and are the only arguments capable to connect the decision of an individual case to the normative substance of a legal order as a whole (FN 207-8).

As for the criticism on autonomy, Dworkin draws on a distinction between rules and principles, based in two aspects: on the one hand, despite having both a deontological status, the conditions of application of rules are very specific, while those of principles are unspecified and require interpretation; on the other hand, collisions between rules demand one of them either to become an exception of the other or to be declared invalid, while those between principles give contextual priority to one of them without affecting the legal validity of other one (FN 208-9). Now, because positivists see law as a one-dimensional system containing only rules, but not principles, they not only cannot recognize

other legal parameters for decision-making when rules are indeterminate but also regard any collision of norms as one between rules, leaving its solution to judicial discretion (FN 209).

Finally, as for constructive interpretation, Habermas compares it with methods in history of science in that it has internal and external aspects. The internal aspect lays in the process of interpreting past arguments in the light of present evidence, distinguishing mistakes and learnings, dead ends and provisory solutions. In the case of law, that means interpreting past decisions critically, in the light of present moral and political arguments (FN 210). The external aspect, though, is that it depends on an interpretation of what law is and intends (a paradigm). In that sense, *Law's Empire* would be proposing a critical-hermeneutical procedure that recurs to a conception of law as a system that consists of rules and principles and "secures via discursive adjudication the integrity of relations of mutual recognition that guarantee equal concern and respect to each citizen" (FN 210-11).

Habermas moves to showing how Dworkin solves the tension between consistency and correction. In short, the key lays in justifying "the individual decision by its coherence with a rationally reconstructed history of existing law" (FN 211). This "coherence", weaker than analytical truth but stronger than freedom of contradiction, is stablished by substantive arguments that can produce a rationally motivated agreement among participants in a argumentation (FN 211). The rational reconstruction is possible by recurring to principles. Principles are legal arguments protected against the regular dynamics of enactment and derogation because of their recognizable deontological character (Habermas criticizes Dworkin's attempt to equate them with "moral facts") and allow one to go beyond internal justification and ground the very premises of a legal argument (FN 211).

That rational reconstruction of existing law to the point where it can be considered normatively justified (a constructive theory of law, not of justice), is a task so large and complex that could only be coped with by a judge endowed with superhuman intellectual capacities, whom Dworkin names Hercules (FN 212). His superhuman knowledge covers both all the principles and policies capable of justifying law and all the arguments tying together the history of decisions. Besides, he must be capable of weighting correctly every possible collision of principles and correcting the mistakes that a less than entirely rational legal order is expected to have (FN 212). On top of that, his constructive

interpretation must allow precisely one right answer to each case at issue (FN 213). Only then Hercules would have been able to solve the tension and reconcile history with justice (FN 213).

1.6. Dworkin's idealizations and Günther's proposals

These idealizations generated controversy: are such demands a necessary regulative idea or a pernicious false ideal for adjudication? The CLS movement, that inherited the legal realist denial to rights, consistent decisions, and rational decision-making, denounces Dworkin as a new version of judicial rationalism. As flesh-and-blood judges fall short of Hercules, recurring to this figure would endorse decisions "that are in fact determined by interest positions, political attitudes, ideological biases, or other external factors" (FN 214). But Dworkin could respond that, even if judges do decide like that, it does not result from the structure of law, but from their failure to develop the best theory possible or from an institutional history resistant to rational reconstruction (FN 214).

But the dependence on traces of reason in legal history doesn't mean contextualism. For Habermas, Dworkin's idea of integrity is a point of reference for critical hermeneutics in every modern legal order because it relies on the ideal of persons associated under law recognizing each other as free and equal. When they accept to be governed by principles, they grant themselves a system of rights that secure private and public autonomy (FN 215). So Dworkin could object that constructive interpretation cannot be proved a false ideal by mere contrast with actual judicial decision-making, for it is a regulative idea emerging from a level *prior* to adjudication, fitting adjudication in the larger picture of the normative self-understanding of constitutional legal orders and the obligation of citizens to maintain integrity by following principles and respecting everyone's equal liberties (FN 215-6).

If now the criticism deems impossible the rational reconstruction of a legal order because it contains contradictory principles and policies (as in Kennedy's example about the principles of freedom of contract and of good-faith in American contract law), Dworkin could respond that it overlooks the difference between principles that collide in certain case and principles that contradict each other (FN 216). For Habermas, Günther's distinction between discourses of justification and discourses of application adds further precision to Dworkin's point (FN 217). Discourses of justification aim to verify if a norm is *valid* prima facie

(that is, impartially justified), while those of application aim to verify if a norm is *appropriate* to an individual case after all things considered (regarding all aspects of the situation and all possible other norms pertinent to it) (FN 217).

Therefore, the type of conflict a rational legal order could not have is a contradiction of rules, with very specific conditions of application, overlapping each other in a direct way. But conflicts between principles that point in different directions in abstract (level of justification), that collide in concrete in a particular case (level of application), but that, in view of a more complete interpretation of the factual situation, can be weighted and arranged in such way that one has primacy over the other, makes perfect methodological sense (FN 218). That criticism thus confuses "validity" with "appropriateness", assuming, for example, that the principles of freedom of contract and of good-faith, only because are both valid, are both always appropriate at the same time to decide any contract law case a judge take in her hands. But, for each type of case, one of them outweighs the other and becomes the only appropriate principle to decide the issue.

If such is the case, however, the meanings and relations of norms change constantly depending on the case at issue, causing the double problem of preventing certainty and overburdening the judge (FN 219). Relying once again on Günther to solve both problems, Habermas faces the first one by revising the meaning of certainty, from a certainty of outcome (that only a system of rules can provide) to a procedure-dependent certainty that decisions will be based on relevant reasons, instead of arbitrary ones (FN 220). Next, he faces the second one by appealing to paradigmatic understandings of law, like the bourgeois formal law and the welfare-state materialized law, that relieve Hercules of his hyper complex task by providing him with previously interpreted norms and previously ranked conflicts on which the judge can fall back and which, as legal paradigms are shared by lawyers and citizens, turn the outcome of a procedure relatively predictable (FN 220-1).

1.7. Dworkin's monologism and the change to argumentation

If the criticism to Dworkin's idealizations led to the distinction between discourses of justification and application, the revision of the meaning of coherence and certainty, and the explication of the role of legal paradigms, the criticism to the monologism of Hercules's decision-making and the use of Michelman and Fiss's suggestions of how to deal

with it are key to Habermas's shift from legal interpretation to legal argumentation. After showing that monologism thwarts both the meaning of integrity and the legitimacy of legal paradigms, Habermas reinterprets plurality and the use of professional standards of interpretation in a way that requires rational reconstruction by means of a theory of legal argumentation.

Habermas underlines that Dworkin, on how to perform his constructive interpretation, oscillates between privileging the citizens' or the judge's perspective, finally preferring the latter (FN 222). For Habermas, that contradicts the role both of law as a medium of social integration and of argumentation (the practice of assuming each other's perspective) in the maintenance of the integrity of relations of mutual recognition (FN 223). Besides, if legal paradigms are necessary, they avoid becoming closed ideologies by conveying preunderstandings shared by experts and citizens alike, so that judges perform constructive interpretation as common undertake supported by public communication (FN 223-4). As Michelman remarks, Hercules, the ultimate appellate judge, seems to ignore the main institutional characteristic of the appellate bench, namely, plurality (FN 224).

Fiss's suggestion to overcome monologism involves Hercules perceiving himself as member of a community of legal experts and submitting his constructive interpretation to the professional standards of the activity. According to Habermas, what Fiss has in mind are the principles and maxims of interpretation that judges recognize as legitimate and necessary to secure impartiality and objectivity to their decision-making (FN 224). Such principles and maxims, however, in order not to be perceived merely as an ideology of professional self-legitimation, would have to be rationally reconstructed, from the internal point of view of the participants, as standards of rational argumentation. That's why this suggestion can only be fully realized by transiting to a theory of legal argumentation that focuses on interpretation as a cooperative procedure of theory formation (FN 225).

The theory of legal argumentation Habermas speaks of is not logic-semantic. This kind of theory could only provide the type of arguments a participant must use, but not make it clear how and why some legal arguments ought to be accepted as valid. Habermas sustains that only a pragmatic theory of argumentation can translate the ideal demands Dworkin puts over Hercules into demands of a cooperative procedure of theory formation (FN 225-6). The rightness of an argument

must be understood as rational acceptability in an argumentation, privileging a procedural conception of rationality. De facto agreements, that have both a factual (their dependence on arguments and information available at the time) and an ideal component (the projected closeness of the theory fulfilling their claim to the one right answer), are moments of a learning progress produced by means of a constantly renewing and self-revising process of argumentation (FN 227-8).

Whenever a speaker proposes an argument, she must assume from the beginning the constitutive features of an ideal situation of speech where the argument can be appreciated without distortion and accepted without coercion. (FN 228). That situation involves an interchange of perspectives among the speakers that widens their initial worldview from the first person singular to the first person plural. Now, in discourses of application, this is even more necessary, because they focus not only in the general point of view of the community (represented by the judge) but also in the particular point of view of the affected (represented by the parties), their interests and worldviews, perspectives that must be constantly and carefully articulated with and transformed into each other (FN 229). So the revised conception of coherence requires the pragmatic turn to argumentation.

1.8 Legal argumentation and moral argumentation

Instead of the strategy of ascending, like Aarnio, from concrete legal issues to the theory of legal discourse, Habermas examines the opposite strategy, that of descending, like Alexy, from rational discourse in general to legal arguments in particular (FN 229). Alexy begins by establishing general conditions of rational discourse, the "rules of reason", in the temporal, social, and material dimensions. He situates discourse in the ideal level where time is unlimited, participation is unrestricted, and expression, criticism, and acceptance are uncoerced (FN 229-30). He introduces as well a version of Kant's universalization principle into the necessary presuppositions of every practical discourse, which is a way of incorporating from the start Dworkin's basic norm of equal concern and respect (FN 230).

For Habermas, whoever agrees with Dworkin's deontological understanding of law and follows the considerations on argumentation of Aarnio, Alexy, and Günther is led to agree with two theses. First, that legal discourse cannot operate self-sufficiently but must remain open especially to moral, ethical, and pragmatic reasons incorporated into law

in the legislation process. Second, that the rightness of legal decisions is measured by their fulfilling communicative conditions that make impartial judgments possible (FN 230). That makes it tempting to model legal argumentation after discourse ethics. Despite the heuristic and normative priority of moral arguments in legal discourse, many sensible objections can be made to the thesis that legal argumentation is a special case of moral argumentation. Habermas comments on four of them.

First, that parties in forensic action are not engaged in the cooperative search for truth, but rather strategically oriented to their success. Habermas sustains, however, that the important issue is that, whatever their motives, their contributions are to be evaluated and interpreted as facilitating the search for an impartial judgment, at least *from the perspective of the judge*, the only one constitutive for grounding the decision (FN 231).

Second, that the presuppositions and procedures of argumentation are not selective enough to allow for only one right answer. Habermas, commenting on how this accusation of indeterminacy affects legal discourse in particular, echoes what he said earlier on the revised meaning of certainty and explains that the legal canons incorporated by legal discourse merely specify conditions for impartial judgments, not for generating determinate outcomes (FN 231).

Third, that Alexy himself admits that, as the rightness of legal decisions are tied to the existing law, they could only be fully rational insofar as the legislation were too. That's a problem, because legal decisions will then be usually objectionable as less than valid. For Habermas this can be solved if, like Dworkin, one conceives of the rightness of legal decision as coherence to *a rationally reconstructed version* of the existing law (FN 232).

Finally, fourth, that conceiving, like Günther, of legal discourse as a special case of moral discourses of application, presupposing the validity of the norms and caring only about appropriateness, is misled because, first, on reconstructing existing law one cannot avoid matters of justification and, second, because the rational reconstruction of law can only be successful as long as employing a range of reasons wider than moral ones only (FN 232).

1.9. Principle of democracy and rules of judicial procedure

Habermas begins the last topic of Ch. 5 by insisting that legal discourse is not a special case of moral discourses. Bringing up again (as in CH. 3 of FN) the difference between the principle of morality and the principle of democracy as two branches of the discourse principle, he intends to underline not only that legal discourses must be understood as connected from the beginning to democratic lawmaking, but also that, similarly to what happens with legislation procedures, the procedures of application of law are embedded in law itself, in the form of various bodies of secondary rules (FN 233-4). These rules both attempt to make the application of law as discursive as possible and to compensate for the fact that the demanding conditions of discourse can only be met approximately (FN 234).

Habermas goes back to the topic of how the tension between facticity and validity manifests itself in adjudication, using now the wider concept of administration of justice, in order to encompass both adjudication and its reflexive regulation in law, that is, the judicial procedure. Differently from earlier, when he said the tension in adjudication developed from the one between certainty and legitimacy in law (FN 197-8), now he says it develops from the one between positivity and legitimacy (FN 234). At the level of content, it is a tension between *consistency* and *correction* concerning the decision-making. At the pragmatic level, it is a tension between the logic of *argumentation* and the factual need for *regulation* concerning the judicial procedure (FN 234). Then he moves to showing how rules for court procedures clear the way for discourses of application of law.

Drawing on a sociological outlook, Habermas examines procedural rules according to their effect on the temporal, social, and material dimensions of the judicial procedure. In the temporal dimension, he only points out that some rules settle deadlines for decisions to be made in a timely manner (FN 235). In the social dimension, he underlines how procedural rules stablish between prosecution and defense, or plaintiff and defendant, both a symmetry that enables the judge to be the impartial third (observing or collecting evidence) and an agonistic competition, making some room for strategic action, designed to bring about as much evidence as possible to make the most informed decision (FN 235). He admits that the discursive structure characterizing a cooperative search for the truth is not fully present, but a functional second best scenario seems to be in action.

But his interest lays mostly in the material dimension. Procedural rules make the pre-hearings routines stablish the legal issue at hand in the most specific way possible, create a special step in the process for the production of evidence (relying on the artificial methodological separation between matters of fact and matters of law) and then liberate judges to make their decision based on their free convincement. It frees the legal discourse used in grounding the decision from the constriction of procedural rules, protecting the logics of argumentation (FN 236-7). The rules of appeal provide additional guarantees not only for the correction of the individual decision, but also for the harmonization and further development of the existing law as a whole (FN 237).

1.10. Legacy of Ch. 5 for a theory of the judicial procedure

As conclusion to this chapter, I indicate what a Habermasian discourse theory of the judicial procedure, a task yet to be done, could take from Ch. 5. First, I emphasize that Habermas does not provide a full treatment of the judicial procedure. Much on the contrary. While law is submitted throughout the book to an examination that profits both from a socio-historical explanation and characterization (the type of investigation the legal form emerges from) and from a rational reconstruction of the philosophical and legal debate concerning its nature and elements, the judicial procedure not only makes its appearance in the course of an argument on adjudication but is also explored only to the extent and in the aspects more instrumental for such argument. Speaking of a Habermasian conception of judicial procedure would then be but an exaggeration. What exists is a brief reference to it.

Since it responds to the demands of the argument on adjudication, this reference privileges the discursive features of the judicial procedure, treating the non-discursive ones either as inexistent or as necessary limits in the institutional realization of discourse. The rational reconstruction of the procedural rules from the point of view of a theory of legal argumentation is, so to speak, selective and biased pro discourse. We must always keep in mind that Dworkin's solution requires each decision to be coherent with a rationally reconstructed version of the existing law, a task so demanding that, in order to become collaborative rather than monological needs professional standards of legal interpretation and legal rules that render judicial procedures grounded on a theory of legal argumentation. Habermas's brief reference to the judicial procedure is part of that effort.

Third, this is why the selective and biased picture of the judicial procedure provided by Ch. 5 should not be taken without much criticism and revision as departing point for a Habermasian theory of the judicial procedure. This would result in transforming a rationally reconstructed approach on adjudication and on some legal rules of the procedural system into Habermas's final say about the totality of a much more complex phenomenon, namely, the web of social interchanges in the course of forensic action. Habermas's straightforward equation between judicial procedure and legal discourse is understandable in the context of his argument on how legal discourse orientates procedural rules and makes it possible to carry on the demanding idealizations of the application of law. But it must not be regarded as all we should take into account for a full Habermasian treatment of the judicial procedure.

Lastly, fourth, a criticism and revision of that selective and biased picture should, instead, proceed in two steps. The first, with which I deal in my chapters 2 to 3, is evaluating whether Habermas's reference could be considered satisfactory as a rational reconstruction of the rules of the typical late modern judicial procedure from the point of view of discourse theory itself. I argue that, even assuming the distinctive character of the legal discourse and the inevitable deficits of institutional realization, the judicial process cannot be reconciled with the idea of discourse without much revision and suspicion. In particular, I carry on Habermas's attempt of reconciling the idea of discourse with different levels and types of institutionalization and, in this spirit, I introduce new concepts to cope with the nature of judicial discourse. I present the judicial procedure as a substitutive discourse, coercion-fueled, decision-oriented, third-supervised, linguistically two-dimensional etc.

The second, with which I deal in my chapters 4 to 5, is indicating what additional elements would have to be present in a Habermasian account of the typical late modern judicial procedure in order to satisfy the requirements of a critical theory, as defined in Ch. 2. Here I argue that a critical-theoretical full treatment of the judicial procedure would have to be rooted both in a socio-historical account of the judicial institution and its various types, dimensions, and transformations and in a rational reconstruction, from the point of view of a discourse theory, of the theory of procedural law itself. Besides, the relationship of the judicial procedure with the functional systems, the less than fully rationalized lifeworlds, the constitutional rights and principles etc. would also have to be part of such critical theory.

CHAPTER 2 – Shift of account to the judicial procedure

2.1. Introduction

This chapter is dedicated to present what makes my treatment of procedural rules, in the next two chapters, different from the one found in Ch. 5 of Habermas's *Between Facts and Norms*. Without this methodological clarification, many issues on which I touch later on, like the material inequality between the parties, the distorting influence of bias and prejudice, the intransparency of legal language etc., would appear baffling and out of place. There is, as I am about to make clear, a change in purpose and concern that asks for careful presentation and explanation. With that in mind, I discriminate four aspects where our accounts take different directions: the relevant background dichotomy; the purpose of procedural rules; the relevant type of procedural rules; and the appropriate pattern to interpret or assess procedural rules.

In the case of Habermas's account, we have, then:

a) First, the background dichotomy he concerns with is between argumentation and regulation. He wants to sustain that, while trials are regulated by procedural law, the latter does not interfere with the argumentative logic of application discourses, but only institutionalizes temporal, social and substantive conditions for such discourses.

b) Accordingly, as I will show in more detail in the next topic of this chapter, the purpose he attributes to procedural rules is to institutionalize an application discourse without interfering with its inner argumentative logic.

c) That makes it easier to understand why the type of procedural rules he concentrates on is the organizational type, especially rules setting time, roles and issues for trials. In addition to dealing with the three dimensions of trials relevant for the concept of institutionalization, these rules exemplify better than any other how procedural law gives court proceedings form and order without putting limitations on the content and dynamics of their issues.

d) Also predictably enough, the pattern Habermas employs to interpret procedural rules is end-focused, presenting each of them as a means to some end of an institutional application discourse, as I will explain and summarize in tabulated form also in the next topic.

On the other hand, in my account of procedural rules, we have:

a) The background dichotomy I concern with is not between argumentation and regulation, but between discursive and anti-discursive aspects in court proceedings. That introduces as early as this a regard, typical to the exam of the outer tension of law by the end of the book, to how much the normative self-understanding of law matches the empirical reality of its everyday reproduction.

b) Hence, the purpose I attribute to procedural rules is not to institutionalize an application discourse without interfering with its argumentative logic, but to make the discursive aspects of trials prevail over their anti-discursive counterparts, that is, to protect the inner argumentative logic of discourse against outer anti-discursive threats.

c) As for the type of procedural rules examined, what I explained in the last two items would naturally take my interest away from organizational rules and towards corrective and compensatory rules, that is, those that neutralize or compensate the distorting effects of internal and external coercions on the argumentative exchanges.

d) Finally, the pattern I use to assess (more often than interpret) procedural rules is not end-focused, connecting means in procedural law with ends of an institutional application discourse, but practice-focused, checking how successful they manage to be in excluding or compensating systematically distorted communicative practices.

After introducing, in the next topic, Habermas's account of procedural rules in the end of Ch. 5 of *Between Facts and Norms* and showing, with attention to excerpts from the text, that his account has the four characteristics I listed above, I will explain in detail, in the other topics of this chapter, each of the four contrasting characteristics of my account and their respective justifications.

2.2. Habermas's account to procedural rules

In Ch. 5 of *Between Facts and Norms*, Habermas argues that, despite being positive and coercive, the rules of procedural law are not constraints to argumentation, but instead institutionalizations of it in the temporal, social, and substantive dimensions. It reinforces his claim that the tension between positivity and legitimacy, typical to law in general (FN 29-30), manifests itself in judicial decision-making not only as a tension between correctness and consistency at the level of content, but also as a tension between argumentation and regulation at the pragmatic level (FN 234):

> Rules of court procedure institutionalize judicial decision making in such a way that the judgment and its justification can be considered the outcome of an argumentation game governed by a special program. (...) Procedural law does not regulate normative-legal discourse as such but secures, in the temporal, social, and substantive dimensions, the institutional framework that clears the way for [freigesetzte] processes of communication governed by the logic of application discourses. I will illustrate [erläutern] this by referring to the German Code of Civil Procedure and Code of Criminal Procedure (FN 234-5).

So, as for the tension between argumentation and regulation, he explains that the procedural law does not interfere with the inner logic of application discourses, but simply implements conditions that "clear the way for" free argumentative exchanges. In order to prove his point, he gives right after an *Erläuterung* (illustration), that is, a brief account of some rules of German procedural law as institutionalizations of an application discourse.

The first instance of his *Erläuterung*, concerned with the temporal dimension of institutionalization, is very direct:

> Although there is no legally stipulated limit of the length of trials, various deadlines (especially for the two stages of appeal, Berufung and Revision) ensure that disputed questions are finally resolved in a timely manner [nicht-dilatorisch behandelt und rechtskräftig entschieden werden] (FN 235).

Is this excerpt Habermas argues that: (1) Celerity of final decision is an end of an institutional application discourse; (2) imposing time-limits to certain measures and stages of the judicial procedure ensures celerity of final decision; (3) this relationship of a means in procedural law (the imposition of time-limits) and an end in an application discourse (celerity of final decision) characterizes the procedural imposition of time-limits as an institutionalization of an application discourse in the temporal dimension.

Habermas then proceeds to speak of the social dimension:

> Furthermore, the distribution of social roles in the procedure sets up a symmetry between the

> prosecution and the defense (in criminal trials) or between plaintiff and defendant (in civil trials). This enables the court to play the role of an impartial third party during the hearing in different ways: either actively interrogating or neutrally observing (FN 235).

The judicial dichotomy between prosecution and defense, or between plaintiff and defendant, is argued to set up symmetry and, in view of that, to enable impartiality, one of the main general conditions for rational discourses. Soon after Habermas will comment on the strategic quality of this agonistic display and the cognitive value of the parties' competing contributions. For now, however, Habermas emphasizes that the establishment of a judicial dichotomy succeeds in creating a symmetry between the parties that is conducive to impartiality from the judge's (or court's) part.

Here the assessment with a means-end pattern recurs, even if in a more indirect fashion. Habermas argues that: (1) impartiality is an end of an institutional application discourse; (2) the procedural dichotomy sets up a symmetry between both sides that enables the judge to play the role of an impartial third party; (3) this relationship of means in procedural law (dichotomy, symmetry) and an end in an application discourse (impartiality) characterizes the parties' dichotomy and symmetry as an institutionalization of an application discourse in the social dimension.

Now, as announced earlier, Habermas comments on the strategic quality of the parties' agonistic interaction and on the cognitive value of their competing contributions:

> In the taking of evidence, the burdens of proof on the trial participants are more or less unambiguously regulated. The trials procedure itself is set up agonistically - more so in civil than in criminal procedures - as a contest between parties pursuing their own interests. (...) Similar to Anglo-American jury trials, however, the opportunity for strategic action is also organized in such a way that as many of the relevant facts as possible can be brought up. The court uses these as its basis for assessing evidence and reaching the legal judgment incumbent on it (FN 235).

The subject varies in comparison to the last quoted passage. First, now Habermas is not speaking of the distribution of roles per se, but rather of how these roles impact on the evidence collection. Second, here dichotomy gains the agonistic tone of competition, that is, a strategic pursuit of the party's own interests in a zero-sum game (they can't both win). Third, their competition is organized and exploited to make the parties bring up all the relevant facts on the case and, thus, increase relevant empirical information, with a view to the cognitive accuracy of the final decision. So this time it is not about dichotomy helping to increase impartiality, but rather about competition being exploited to increase cognitive accuracy.

Habermas commented on the same subject some pages earlier, offering Alexy's response to one of Neumann's criticisms in *Juristische Argumentationslehre* (1986, p. 85):

> The specific constraints governing the forensic action of parties in court seemingly prohibit one from using standards of rational discourse to assess courtroom proceedings in any way. The parties are not committed to the cooperative search for truth, and they can pursue their interest in a favorable outcome through "the clever strategy of advancing arguments likely to win consensus". By way of plausible reply, one can say that each participant in a trial, whatever her motives, contributes to a discourse that from the judge's perspective facilitates the search for an impartial judgment. This latter perspective alone, however, is constitutive for grounding the decision (FN 231).

As for the social dimension, Habermas's explanation in FN 235 is similar to Alexy's response to Neumann's criticism in *Theorie der juristischen Argumentation* (1990), paraphrased in FN 231, except for a couple of differences. While Alexy speaks of the final decision being impartial despite the parties' strategic action, Habermas speaks of it being impartial because of (taking advantage of something created by) the strategic action. While Alexy, following the lines of Neumann's criticism, attributes the strategic action solely to the parties' motives as self-interested actors, Habermas points out also the procedural law's distribution of roles in trials as responsible for that effect and, more importantly, as intended to produce it.

The important thing is that the means-end pattern repeats itself again. Habermas argues that: (1) relevant empirical information and cognitive accuracy are ends of an institutional application discourse; (2) the procedural agon increases empirical information about the relevant facts of the case and contributes to the cognitive accuracy of the final decision; and (3) this relationship of a means in procedural law (the parties' agon) and ends in the application discourse (relevant empirical information, cognitive accuracy) characterizes the procedural agon as an institutionalization of an application discourse in the social dimension.

Now Habermas takes his *Erläuterung* to the institutionalization of discourse in the substantive dimension. Here he focuses on four elements of judicial procedures: the definition of the object of dispute in the pre-hearings stage; the determination of facts and the securing of evidence in the hearings stage; the normative assessment of the proven facts and grounding of the final decision in the post-hearings stage; and the review of the outcome in the appeal stage. That's how he begins:

> The point of the entire procedure is evident once one examines the substantive constraints imposed on the trial proceedings. These institutionally carve out [dienen nämlich der institutionellen Ausgrenzung, "serve namely the institutional exclusion/isolation of"] an internal space for the free exchange [Prozessieren, "processing"] of arguments in an application discourse. The procedures that must be observed prior to the opening of the main proceedings define the object of dispute, so that the trial can concentrate on clearly demarcated issues (FN 235-6).

So, in the case of the pre-hearings stage, Habermas argues that: (1) the concentration on clearly demarcated issues is an end of an institutional application discourse; (2) the definition of the object of dispute prior to the main proceedings enables the trial to concentrate on clearly demarcated issues; and (3) this relationship of a means in procedural law (definition of the object of dispute) and an end in an application discourse (concentration on clearly demarcated issues) characterizes the pre-hearings stage as an institutionalization of an application discourse in the substantive dimension.

Then he proceeds to the hearings stage:

> The taking of evidence in face-to-face interaction, which operates under the presupposition of a methodical separation between questions of fact and questions of law, serves to determine the facts and secure the evidence (FN 236).

So here he argues that: (1) the determination of facts and the securing of evidence are ends of an institutional application discourse; (2) the separation between questions of fact and those of law helps to determine the facts and to secure the evidence; and (3) this relationship of a means in procedural law (separation between questions of fact and those of law) and an end in an application discourse (determination of facts and securing of evidence) characterizes the hearings stage as an institutionalization of an application discourse in the substantive dimension.

Subsequently, he explains himself more extensively in respect to the post-hearings stage:

> Interestingly enough, in both criminal and civil trials, the court subsequently assesses evidence and renders its judgment "internally", not in a separate procedure. It is only insofar as the court must set forth the "grounds" for its judgment before the participants and the public that procedural law touches on substantive aspects of the legal discourse in which the facts considered "proven" or "true" are normatively assessed. The court's formal justification consists in the facts of the case and the reasons for the decision (FN 236).

Now, as for the post-hearings stage, however implicit the text makes the means-end pattern, Habermas argues that: (1) the grounding of decisions on both the facts of the case and legal reasons is an end of an institutional application discourse; (2) the legal assessment of the facts, in a stage internal to the same procedure, only after the facts are proven facilitate the grounding of decisions on both the facts of the case and legal reasons; and (3) this relationship of a means in procedural law (legal assessment of facts as third, final moment) and an end in an application discourse (grounding of decisions on facts and legal reasons) characterizes the post-hearings stage as an institutionalization of an application discourse in the substantive dimension.

Finally, he comments more briefly on the appeal stage:

> Hence rules of procedure standardize neither the admissible arguments nor the course of argumentation, but they do secure the space for legal discourses that become objects of the procedure only in the outcome. The outcome can be submitted through review through channels of appeal (FN 236).

Here again, the means-end pattern is not evident. But Habermas means that: (1) The review of the outcome of the decision-making is an end of an institutional application discourse; (2) the availability of channels of appeals (procedures and courts of appeal) enable the review of the outcome of judicial procedures; and (3) this relationship between a means in procedural law (channels of appeal) and an end in an application discourse (review of the outcome) characterizes the appeal stage as an institutionalization of an application discourse in the substantive dimension.

Thus, representing all instances provided in the *Erläuterung* under a tabulated form, we have:

Dimension	**Stage of the trial**	**Means in procedural law**	**End of application discourse**
Temporal	All, esp. appeal	Imposition of time limits	Celerity of final decision
Social	All	Dichotomy of the parties	Symmetry and impartiality
	Collection of evidence	Agonistic interaction of the parties	Empirical information and cognitive accuracy
Substantive	Pre-hearings stage	Definition of the object of dispute	Concentration on clearly demarcated issues
	Hearings stage	Separation between questions of fact and questions of law	Determination of facts and securing of evidence
	Post-hearings stage	Legal assessment posterior to the proof of facts	Grounding of decision on proven facts and legal

			reasons
	Appeal stage	Channels of appeal	Review of the outcome

After demonstrating that Habermas's account (a) concerns itself with the tension between argumentation and regulation, (b) gives procedural rules the purpose of institutionalization without interference, (c) concentrates on organizational rules, and (d) interprets procedural rules as means to ends, now I can introduce the characteristics of my different account on procedural rules.

2.3. Shift of the relevant background dichotomy

The first characteristic of my account of procedural rules that contrasts with Habermas's is the relevant background dichotomy. Habermas, as I said and repeated already, is concerned with the tension between argumentation and regulation and intends to reconcile both by showing that the rules of procedural law manage to institutionalize the application discourse in the temporal, social and substantive dimensions (regulation) without interfering in its inner logic (argumentation). He is, therefore, interested in how procedural rules negatively contribute to argumentation by making room for it and not meddling in its communicative dynamics. It has to do with how, in the relationship between discourse and law, law keeps itself from distorting discourse.

I, on the other hand, am concerned with the conflict between discursive and anti-discursive aspects in trials and intend to assess procedural rules from the standpoint of how much they manage to neutralize or compensate the distorting effects of internal and external coercions on the argumentative exchanges. I am, therefore, interested in how procedural rules positively contribute to argumentation by providing it with the cognitive, social and material conditions necessary for its inner logic to prevail. Habermas may be content with procedural rules simply not jeopardizing argumentation; yet I want them to implement argumentation to the fullest. It has to do with how, in the relationship between discourse and society, law keeps society from distorting discourse.

Take two examples of successful rules: the rule granting to defendants in a criminal trial who are unable to pay for a private lawyer the right to a public defender (Pflichtverteidiger); and the rule granting to defendants that cannot be judged by a fair and impartial jury in the originally legally assigned place the right to a change of venue (*Änderung des Veranstaltungsortes*). Both rules are active measures of procedural law to implement discursive ends (equality of representation, impartiality of judgment) in two scenarios (unrepresented defendant, biased and contaminated jury) where, by means of moral learning through a long history of injustice, we know that a decision reflecting the relevant empirical facts and the best legal reasons is highly unlikely.

Such procedural rules react before situations with predictable deficit of discursivity by taking a positive measure that attempts at putting discursivity back to its fullest. Granting to a defendant in a criminal trial a public defender guarantees to the least, if not the best possible defense in the case, that the defendant will receive some kind of legal advice and the prosecutor's version of the facts and interpretation of the law won't prevail only for being unchallenged. Likewise, granting to a defendant the right to a change of venue guarantees to the least, if not the fairest and most impartial possible judgment, that the defendant will be judged by a less biased and contaminated jury and won't be found guilty only due, for example, to widespread publicity about the crime and a negative exploration of the defendant's character and motives in the news.

So what, if anything, both cases exemplify is that the relationship between procedural rules and discourse is not limited to negative contribution, that is, the former institutionalizing the latter without interfering in its inner logic, but extends itself also to positive contribution, namely, the taking of positive measures to secure closer to ideal conditions of argumentation. This second half of the relationship of law with discourse is what is missing in Habermas's *Erläuterung* and is what my account strives to emphasize and recover.

Other procedural rules (some in the form of principles) have more or less the same purpose and effect: *audi altera pars*, *nemo judex in causa propria*, *nulla poena sine lege*, right to free justice, inversion of the burden of proof, exclusion of hearsay evidence, reasonable suspicion to investigate, credible evidence to sue, reasonable doubt to condemn, fruit of the poisonous tree etc.

Many of them can be said to result from the saturation of the third group of basic rights in Habermas's important list in Ch. 3 (FN 122), namely, the "basic rights that result immediately from the actionability of rights and from the politically autonomous of individual legal protection". That Habermas himself think of procedural rules as promoting the legal protection of which the formula of that unsaturated basic right speaks can be seen in the following passage:

> The institutionalized self-reflection of law promotes individual legal protection from two points of view, that of achieving justice in the individual case and that of consistency in the application and further development of law (FN 236).

I would add to that list that the institutionalized self-reflection of law promotes individual legal protection also by imposing rules to neutralize or compensate anti-discursive factors capable of distorting the court proceeding's inner logic of argumentation. So the positive contribution of procedural rules to argumentation also belongs to the saturation of a basic right. That doesn't mean, nevertheless, that the examination of these rules pertains exclusively to the reconstruction of law with a system of rights (the subject of Ch. 3), for they are intended to neutralize and compensate situations that would impact directly on the rationality of jurisdiction (the subject of Ch. 5).

Speaking of the rationality of jurisdiction, another problem with concentrating solely on the negative contribution of procedural law to the application discourse is that it might give the wrong impression that the inner logic of legal argumentation is already sufficient to give jurisdiction its aimed rationality. If procedural rules are supposed to simply not interfere with the discursivity that pervades court proceedings, it seems like this discursivity, which exists only in an abstract and potential form within the confines of legal argumentation, can prevail by its own during trials, even against the most unfavorable conditions. To return to my first two examples, if procedural law granted to defendants neither public defenders nor changes of venue, its rules wouldn't be the ones breaking the inner logic of argumentation. Rather, in those scenarios this inner logic is already broken by outer conditions and the measures provided by procedural law are its chance of repair.

Besides, the factors that compromise the rationality of jurisdiction in those scenarios are not related to law itself. Remunerated lawyers, impoverished defendants, crime publicity in high profile cases, and biased coverage in the media news exist due to various circumstances in society, a rich and intricate interaction between, to use Habermas's words of art, the systems and the lifeworld of concrete communities. Since trials don't happen in a social vacuum, the circumstances of society take their toll on them - and not always in the most favorable direction for the free exercise of discursive rationality. That's why, in a multitude of cases impacted by distorting effects of social inputs, to "clear the way for" argumentation in court proceedings might not be enough. It's also necessary to remove or counterbalance the distorting factors, in order to make rational discourse both possible and robust.

In the map of the relationship between law and discourse, the rules of procedural law are situated not only in the intersection between argumentation and regulation; they lie in the intersection between discursive and anti-discursive aspects of trials as well. By giving emphasis to this second point, my account leans towards the exam of their positive contribution and, consequently, to how they embody historic moral learning to promote favorable conditions for rational argumentation.

2.4. The purpose of procedural rules

The second characteristic in which my account separates itself from Habermas's is the purpose it attributes to procedural rules. Since Habermas concerns himself with the tension between argumentation and regulation, he treats procedural rules as intending to institutionalize the application discourse without interfering in its inner argumentative logic. Indicative of that is how he concludes his exam of the rules of procedural law in his *Erläuterung*:

> Hence rules of procedure standardize neither the admissible arguments nor the course of argumentation, but they do secure the space for legal discourses that become objects of the procedure only in the outcome (FN 236).

I, on the other hand, look to procedural rules as intended to make the discursive aspects of trials prevail over their anti-discursive counterparts, that is, intended to neutralize and compensate external

factors capable of distorting the court proceeding's inner argumentative logic. That makes me concentrate on their positive contribution to argumentation and then assess them in terms of how well they succeed in rendering trials so discursive that their outcome can be said to really result from the best empirical information and the best legal reasons possible.

Of course, this difference doesn't mean that one of the accounts is true and the other, false. Since neither Habermas nor I are engaged in empirical discovery (to find the true purpose of procedural rules, whatever this means), but rather in rational reconstruction, what really pulls our accounts apart is what they are trying to prove regarding their background dichotomies. Habermas, concerned with the tension between argumentation and regulation, reconstructs procedural rules as non-interfering institutionalizations of an application discourse, whereas I reconstruct them as discourse-enhancing institutionalizations of an application discourse. It is not even another type of reconstruction; it is just another direction of interest within the same type.

That Habermas is in fact engaged in rational reconstruction along the *Erläutering* in the end of Ch. 5 doesn't require more than three steps of defense. First, in the opening of Ch. 3 he says that:

> Before returning in chapter 7 to this external tension between the normative claims of constitutional democracies and the facticity of their actual functioning, in this and the following chapters I want to rationally reconstruct the self-understanding of these modern legal orders (FN 82).

Which settles the extension of his task of "rationally reconstruct[ing] the self-understanding of [the] modern legal orders" from Ch. 3 to at least Ch. 6, making Ch. 5 part of that same task.

Second, the beginning of Ch. 5 he distinguishes his effort in Ch. 5 and 6 from what he had done in Ch. 3 and 4 according to the following lines:

> Before discussing the paradigm issue, however, in this and the next chapter I extend the approach I have taken so far. Up to now I have examined law from a philosophical standpoint, introducing constitutional rights and principles from the standpoint of discourse theory. I would know like

> to make this approach plausible from the perspective of legal theory proper, that is, in view of the legal system in the narrow sense (FN 195).

Which, in turn, confirms that his approach to the rationality of jurisdiction in Ch. 5 is also a way to "rationally reconstruct the self-understanding of [the] modern legal orders", now from the legal theory's standpoint and taking the legal system in the narrow sense, as "all interactions that are not only oriented to law, but are also geared to produce new law and reproduce law as law" (FN 195).

Third and last step to support that Habermas is reconstructing procedural rules is to emphasize that in the *Erläuterung* he presents some rules of procedural law not from the point of view with which lawyers deal with them in everyday legal practice, but from the point of view of his theory's concern with the tension between argumentation and regulation. The procedural rules, that are seen by the participants as both rights of actionability and legal protection and routines of the existing procedural protocol, are then translated into his theory's language as institutionalizations of an application discourse. Therefore, since it translates the meanings of these rules from the more pragmatic point of view and legal language of the participants to Habermas's more discursive point of view and social-theoretical language, it cannot but be identified as rational reconstruction. The fact that it attributes to those rules a purpose the participants would never even consider in the first place only adds to the same conclusion.

If what he does in the *Erläuterung* is in fact rational reconstruction in view of the concern with his background dichotomy (argumentation and regulation), then, so is what I do in my account, now in view of my alternative background dichotomy (discursive and anti-discursive aspects of trials). Neither Habermas nor I attribute to procedural rules any "real", empirically true purpose, but one that relates directly with our respective main concerns while rationally reconstructing such rules in a certain direction. That's what makes the purpose he gives them appropriate for his interest of reconstruction, to the same degree as is the one I give them appropriate for mine. Deciding which of them is "the true purpose" of the rules of procedural law would, then, be pointless.

2.5. The type of procedural rules examined

The third aspect in which Habermas's account and mine take different directions concerns the types of procedural rules we are most interested in. Habermas is mostly interested in the rules of an organizational type, as can be seen in this passage:

> Law must once again be applied to itself in the form of organizational norms, not just to create official powers of adjudication but set up legal discourses as components of courtroom proceedings (FN 234).

The reference to "once again" and to creating "official powers of adjudication" resumes something he said in the beginning of the chapter about the legal system in the narrow sense and Hart's concept of secondary rules:

> To institutionalize the legal system in this sense [the narrow sense] requires the self-application of law in the form of secondary rules that constitute and confer the official powers to make, apply and implement law (FN 195).

Only now Habermas refers to Hart's secondary rules of adjudication as "organizational norms" intended not only to create official powers of adjudication, but also to "set up legal discourses as components of courtroom proceedings". The organizational rules he is most interested in are "rules of court procedure", especially those setting the proper time, roles and issues of trials:

> Procedural law does not regulate normative-legal discourse as such but secures, in the temporal, social and substantive dimensions, the institutional framework that clears the way for processes of communication governed by the logic of application discourses (FN 235).

So Habermas is interested in organizational rules, especially those setting time, roles and issues of court proceedings. I, on the other hand, am interested in corrective and compensatory rules, those that neutralize or compensate anti-discursive factors capable of distorting the court proceeding's inner logic of argumentation. If I'm allowed to return once again to my former two examples, the right to a public defender and the right to a change of venue, they might as well illustrate all too clearly both subtypes (corrective and compensatory) of the procedural rules I concentrate on.

First, the right to a change of venue illustrates the corrective type of procedural rule. In this case, being the jurisdiction of the place of the crime mandatory for its trial (normative requirement) but the verdict of that jurisdiction, suspect of bias and contamination (problematic circumstance), procedural law changes the normative requirement of mandatory place for trial in order to correct the problematic circumstance of the biased and contaminated jury. The rule granting to defendants this right is corrective because it changes the general normative requirement (creating a general exception to it) in order to prevent the particular problematic circumstance from interfering in the inner argumentative logic of the application discourse.

On the other hand, the right to a public defender illustrates the compensatory type of procedural rule. In this case, being the presence of a legal counsel mandatory (normative requirement) and the defendant, financially incapable of contracting a private lawyer (problematic circumstance), procedural law neither changes the normative requirement of a legal counsel nor corrects the problematic circumstance of the defendant's inability to pay for one. Instead, it compensates said circumstance by providing the defendant with a legal counsel (compensatory measure), promised to be paid by the state (be the public defender a private lawyer designated as such for that case only, as in the American system, or a public official whose very function is this, as in the Brazilian system). The rule granting to defendants this right is compensatory because it introduces in the trial a compensatory measure in order to counterbalance the particular problematic circumstance without changing the general normative requirement.

So both corrective and compensatory procedural rules aim at preventing distortions of the logic of discourse. Only that one does that by changing the general normative requirement (creating a general exception) to correct the particular problematic circumstance and the other, by maintaining the general normative requirement yet counterbalancing the particular problematic circumstance with a compensatory measure to make it right again. Two different strategies in view of the same end, which is making the discursive aspects of trials prevail over their anti-discursive counterparts.

The examples I explored repeatedly in this chapter, of the right to a public defender and the right to a change of venue, might suggest that the point of view I propose applies only to a small number of procedural rules. Even if there are many other rules in procedural law to which the

intent to neutralize or compensate distorting factors can be reconstructively attributed, it seemingly could not be extended to the majority, let alone the totality, of those rules. However, this is not the case. I'm personally convinced that this account can be applied to a large number of procedural rules, simply because in every modern legal system at least half of the history of procedural law is the history of new rules succeeding old ones in the struggle to make the whole process more and more fair and discursive (the other half is the history of political and economic powers making the fulfillment of their interests pass as legitimate constraint of fairness and discourse).

What makes it look otherwise is that, while rules like the right to a public defender and the right to a change of venue have their ring of compensatory and corrective procedural justice still very conspicuous, other procedural rules are so incorporated in our regular expectations about trials that we can hardly see how they relate to that account. Take two rules that are at the heart of procedural law: the obligation to support one's claim with evidence and the obligation to conform one's requests to the limits of law. They are most certainly the product of historical learning with unsubstantiated affirmations and absurd requests, but this learning is embedded so deep in our social memory that those rules pass as trivial and obvious. If the reconstruction draws this meaning out of many procedural rules again, they will prove themselves suitable for this account.

Before closing the topic, however, I underline that, by having said that Habermas concentrates on organizational rules and I, on corrective and compensatory ones, I may have unintentionally suggested that organizational, corrective and compensatory rules are entries in the same taxonomy. That is not the case. Habermas's classification serves his interest of reconstruction, while my classification serves mine. Since Habermas is concerned with reconciling argumentation and regulation, organizational rules of court procedure are the type of rules he was supposed to look for in order to make his case that institutionalization doesn't interfere with argumentative logic. Likewise, since I am concerned with assessing how much the discursive aspects of trials prevail over their anti-discursive counterparts, corrective and compensatory rules are the ones that catch my attention. Once more, the concepts are only useful within the reconstruction they serve.

As part of the same wrong impression, I may have unintentionally suggested that Habermas's classification and mine were

not, as would be expected, overlapping. But, again, neither is that the case. One same procedural rule can be seen as organizational in Habermas's account and as corrective or compensatory in mine. The rules that grant to defendants public defenders and changes of venue would probably be, in Habermas's account in the Erläuterung, organizational rules that institutionalize the application discourse in the social dimension, inasmuch as they touch on the distribution of roles (who the defendant's legal counsel is, who is acceptable as jury member). It is simply a matter of what one looks into while submitting a rule to close examination and reconstructing it in the interest of the aimed reconstruction.

2.6. The pattern for interpretation or assessment of procedural rules

Finally, the last aspect in which my account of procedural rules goes apart from Habermas's is the pattern it uses to assess the rules. While Habermas limits himself to interpretation of the procedural rules and, for that matter, uses a means-end pattern that makes his account end-focused, I extend the task up to assessment of procedural rules and use, for that matter, a rule-practice pattern that makes my account practice-focused. This last topic is intended to explain that difference and how my account will try to perform what it promises.

Habermas is little interested in assessing procedural rules (except in the minimal sense I explain in the last topic of the chapter), in the sense of judging how much they succeed in what they intend to do. Since his reconstruction seeks to illustrate, with rules of procedural law, that regulation doesn't interfere with argumentation, it is natural that interpreting these rules as institutionalizations that "clear the way" for communicative processes is all he cared about and bothered to do.

I, on the other side, am not only interested in interpreting procedural rules as corrections and compensations against distorting factors, as I did earlier, by way of example, with the right to a public defendant and the right to a change of venue. I am also interested in assessing how much they succeed in making the discursive aspects of trials prevail against the anti-discursive factors and circumstances. I claim neither that every rule that should exist to achieve this end is already in force nor that the ones in force already do their job as smoothly and successful as possible. Our moral learning with the history of procedural injustice and the development of our institutional imagination for perfecting court procedures are not yet complete to the

point where such claims would be appropriate. There is always some gap to be filled: an unperceived procedural injustice, a still non-imagined corrective or compensatory measure, a negligence or resistance in putting the ones already imagined in practice etc. I consider part of a critical theory's task to reconstruct the procedural rules in a way that also indicates these gaps and contribute for them to be bridged. Not only the social theorist interested in interpretation, but also the the lawyer and laymen interested in criticism and reform should find something valuable for their purposes in a critical theory that occupies itself with the rules of procedural law. (On the suspicion of conflict between critical assessment and reconstructive approach, see the next topic of the chapter.)

To make his reconstructive interpretation of procedural rules as institutionalizations clearing the way for argumentation, Habermas used, as I tried to demonstrate schematically in topic 1, a means-end pattern. That rendered his account essentially end-focused. All along the Erläuterung he would relate a means in procedural law (a procedural rule) with an end in application discourse (a relevant institutional, discursive end) and then take it as evidence enough that such rule institutionalize the application discourse in the temporal, social or substantive dimension. That and, of course, its connection with setting time, roles or issues for court proceedings.

Although I consider this pattern to be problematic and insufficient even for the purposes of Habermas's account, here, since my account has a different purpose, I will limit myself to explain why the means-end pattern would not be appropriate for assessing procedural rules as corrections and compensations to distorting factors in trials. Two reasons stand out.

First, the fact that a rule aims at a certain end says nothing on whether it succeeds in achieving it. The rule granting the lawyers power to rule out candidates for members of the jury may have had the end of avoiding the distortion of ignorance and bias, but, despite achieving this end in some cases, is also often explored to build an ignorant and biased jury. The rule granting the parties the possibility of set up an agreement before the trial or in its first stages may have had the end of promoting celerity and favoring consensus, but, despite achieving this end in some cases, is also often explored to obtain a cheap bargain from a participant unwilling or unable to wait until the end of the trial to have some payment or indemnity. Aiming at impartiality doesn't prevent to

facilitate bias; aiming at consensus doesn't prevent to facilitate coercion. It's not just about the relevant end pursued, but also about how much the rule manages to render the trial more discursive and just.

Second, corrective and compensatory rules are not end-focused, but practice-focused. As a matter of moral learning, they don't emerge as attempts at achieving ends, but as attempts to avoid certain scenarios that we know in advance, having learned from a long history of injustice, that distort the fairness and discursivity of trials. This means, on the one hand, that they are more reactions to well-known concrete injustices than steps towards an abstract ideal of justice; but means also, in the other hand, that their success or failure is to be measured by whether the distorting scenarios are ruled out and the disturbed conditions of discursivity, restored.

That's why a practice-focused assessment is to be preferred. Instead of asking if certain procedural rule is connected with some discursive relevant end or not, my account asks if such rule succeeds in preventing the distorting scenario it was supposed to and if it doesn't contribute, somehow unintentionally, to the very injustice it emerged to address, or maybe to some other one.

Then I would be left with two alternative ways of applying my account to the rules of procedural law. One, bottom-to-top, would be more thorough and interesting, but highly impractical. It would consist in examining rule by rule in procedural law, giving preference to those present in most of the modern legal orders, and reconstructing each of them according to my account, interpreting the distortion they intend to prevent and assessing how well they succeed in this endeavor.

The other one, top-to-bottom, would be less thorough and interesting, but more feasible. In this case, I would depart from the conditions of validity of discourses in general and of legal discourses of application in special, then would see what procedural rules are intended to guarantee each of those conditions against distortions. Again, preference would be given to those procedural rules present in most of the modern legal orders.

The assessment, in this second approach, would be done collectively, that is, observing how much distortion of each condition of validity is still present and tolerated in most procedural systems of modern legal orders. That would not inform how much each rule in particular succeeds in preventing the distortion it is supposed to address,

but rather how much procedural law in general has over time conquered and been conquered by the distortion in question. That would still be a practice-focused assessment, inasmuch as it would examine how many practices that distort fairness and discursivity in trials are still considered compatible with the existing procedural rules.

Since the two most important questions to be answered in this thesis are (a) how much discursive the court procedure really is and, (b) if it is not discursive enough, whether it should still be considered an institutional discourse or something else, then, submitting procedural law as a whole to the kind of interpretation and assessment that the top-to-bottom approach provides becomes, in addition to more feasible, more useful. That's why this treatment of procedural law is precisely the one I intend to use in the next chapters of this work.

2.7. Is assessment unacceptable in a reconstructive methodology?

After speaking of the practice-focused pattern I intend to use to assess procedural law, I would like to end this chapter by addressing and dismissing the suspicion that, by proposing not only to reconstructively interpret, but also to critically assess procedural law as a whole, my account risks to take one step too far from the limits inherent to critical-theoretical reconstruction.

Fortunately, I don't need to enter into an examination of what a reconstructive approach really is and what it can or cannot do, nor need I discuss how it is related to the overcoming of practical reason, the consequences of the linguistic-pragmatic turn, the modesty of post-Hegelian philosophy etc. These are interesting and relevant issues, but, to defend the critical-theoretical legitimacy of the assessment I propose, they can, at least for the moment, be left aside. All I need is to argue that assessment is an inevitable part of the very reconstruction in question.

The rational reconstruction of procedural rules, as proposed and done by Habermas himself, is intended to show that, from the point of view of the participants, procedural rules can be accepted as legitimate regulation. That's why, against the background of Habermas's dichotomy between argumentation and regulation, to show that they can be accepted as legitimate involves proving that they institutionalize without distorting the application discourse. So, even in the apparent lack of assessment in Habermas's account, some minimal assessment of the procedural rules was present. It was necessary at least to say that, by

institutionalizing discourse without distorting it, the examined rules were, from the participants' standpoint, legitimate.

Just as much again will be seen in my account. Only this time, with the shift of the relevant background dichotomy, procedural rules will have to be proven to pass the test of neutralizing and compensating distortions in order to restore fairness and discursivity in trials. Without showing if they pass this test or not, nothing can be said about their acceptability from the participant's point of view, which means that the reconstruction would not have reached its aimed purpose. It is not that my account uses discourse as an immediate source of prescriptions (FN 4) or as informative and immediately practical (FN 5); it just takes to the end the reconstruction of procedural law according to discourse, checking how much it implements fairness and discursivity in trials.

CHAPTER 3 – Critical assessment of the judicial procedure

3.1. Introduction

In the last chapter I established that the connection between rules of procedural law and discourse was to be considered not from the point of view of whether the rules justification can be related to discursive ends, but rather of whether such rules succeed in implementing discursive practices and preventing discursive distortions. That was my main goal in shifting from discursive ends to discursive results. Only the rules that succeed in having discursive results can be considered legitimate from a discursive point of view. And the judicial procedure can be considered a genuine discourse only inasmuch as stemming from rules themselves legitimate in that sense.

Now the natural following step is to evaluate whether rules of procedural law succeed in having such discursive results. However, as I anticipated in the end of the last chapter, since the number of procedural rules in the relevant legal traditions is too high, but the number of discursive features and ends is considerably lower, I decided to invert the task and ask, not whether each procedural rule has the intended discursive results, but rather whether each of the most important procedural features and ends is achieved in judicial procedures and, if so, to what extent. In this chapter I take care of this very evaluation, which I dub as critical assessment.

Here is how I proceed in this critical assessment. First, I explain why an evaluation based on results, which naturally suggests an empirical input, can be performed without empirical research and, thus, is of the kind that philosophers can do in the comfort of their armchair. In this part I explain the method of my evaluation, especially the use of commonly known examples, hypothetical cases and less than exhaustive assessments. Then, I begin the actual evaluation of procedural rules, regarding the basic conditions of discourse (freedom, equality, intelligibility, inclusion. Finally, I formulate my critical assessment of to what extent procedural rules succeed in having discursive results. As it is clear in the end, I maintain that the discursive results of procedural law are not enough to constitute the judicial procedure as a discourse. This final conclusion paves the way for my introduction of the concept of remedial discourse in the next chapter.

3.2. Discursive results and armchair philosophy

The very idea of a results-based evaluation suggests that some sort of empirical input is to be taken into account. The opposite, that is, an evaluation of results without empirical investigation, sounds not only odd, but merely conjectural, likely inaccurate, and ultimately bogus. Since philosophy, in any of its non-naturalized versions, is generally committed to what can be known by means of concepts and arguments (one of the many reasons why critical theory, in its original meaning, always entails some sort of overcoming of philosophy), an evaluation of results attempted from the point of view of philosophy appears to be just as unfeasible and untrustworthy as the knowing of colors attempted from the point of view of a priori reason alone.

However, four points must be better examined here: (a) the kind of results relevant for my purpose are normatively and theoretically qualified (they are "discursive" results), which renders empirical research limited in the extent of what it can provide for such evaluation; (b) if the relevant information is whether procedural rules can implement discursive practices and prevent discursive distortions, this information can be obtained either factually or conjecturally, for conjectural cases are just as effective as factual ones to establish the shortcomings of a rule; (c) many shortcomings of procedural rules consist in their giving room to distorted scenarios (like the influence of economic inequality, the use of manufactured narratives etc.) whose reality and frequency in judicial procedures are common knowledge and verified enough; and (d) since the claims of each discursive feature examined is universal, the falsification thereof only requires a few counter-examples, which allows the evaluation to be less than exhaustive. I would like to take the rest of this topic to develop a little further each of this considerations.

The first one diminishes the relevance of what an empirical research could provide for the kind of evaluation I attempt here. If the results were of the factual kind, like how many lawsuits were filed last year in Brazilian judicial courts, or what is the proportion of lawsuits that end with the winning of the (formal) plaintiff compared to those ending with the winning of the (formal) defendant etc., an empirical research would be not only relevant, but indispensable. Factual results, in the sense of results that consist in easily recognizable and verifiable facts, are the kind of issue that requires an empirical investigation and can be very well served by the inputs of one.

However, when the results at issue are as normatively and theoretically qualified as they are in my investigation, the relevance of the input of an empirical research becomes less than obvious. Suppose the question of the influence of economic inequality in the chances of winning in a lawsuit. An empirical research could inform many things connected with this issue: For example, in how many lawsuits the parties had massive economic inequality between them and in how many the party in the better off position won etc. I don't say that this information, if provided, would not be relevant at all. What I do say is that this information alone is not a secure evidence of the distorting influence of economic inequality, for, since the decision of lawsuits is supposed to be taken on the basis of the better reasons, the number of lawsuits where the party in the better off position won doesn't inform us in how many of them such parties were supposed to win anyway for having the better reasons. In the lack of this information, I cannot simply assume that, were judicial outcomes economically neutral, the proportion of wins for the better off and the worse off would be around 50%. That would be an empty and artificial assumption, which would ignore the reason-based character of judicial procedures. Once this reason-based character is brought up, the relevance of the empirical input becomes uncertain at best.

Of course, one could say, not without reason, that this example proves very little. What it shows is that purely quantitative researches cannot provide qualitative data, or at least quantitative data that depend on some kind of qualitative distinction, like interpretation or evaluation. But neither is it impossible to conceive of a quantitative research capable of avoiding this kind of qualitative blindness (for example, a research of the number of times that some kind of decision known to be incorrect occurred and in how many of them the parties were massively economically unequal and the decision was made in favor of the better off etc.) nor does that example prove that the data that cannot be obtained by means of a purely quantitative research could be obtained more securely through some armchair alternative. If quantitative data without qualitative interpretation and evaluation can lead to distorted conclusions, interpretation and evaluation without quantitative data can give truth status to many of the fantasies of the abstract thinker. This is why I need to proceed to the other three additional considerations.

The second one, that conjectural cases are just as effective to point out the shortcomings of a rule as factual ones, has something to do

with the very nature of rules, considered from a discursive standpoint. Rules are made in order to deal not only with the cases known to exist, but also with an indeterminate number of cases that never happened to the moment, but are nevertheless possible and conceivable in a conjectural level. Günther made his case that, from the point of view of discourse ethics, as early as in the justification of rules, the possible cases (not concrete ones, but abstract case-types) to which they should apply are already taken into account, and these cases are not only the real ones the speakers already know and have in mind, but also many others they are capable of conjecturing on the basis of their understanding of the constants and possibilities of practical life under rules. That means that evaluating a rule, even at the level of its justification, implies considering the predictable results of its general obedience in both factual and conjectural cases of application. So evaluating rules on the basis of conjectural cases is nothing strange to their very nature, considered from a discursive standpoint.

This paves the way for the use of conjectural cases in order to evaluate the discursive results of the rules of procedural law. However, one caution must be observed: If a rule made in order to implement discursive results is proven unable to guarantee these results in a conjecturable case, the next step is not to condemn this rule just yet, but rather to firstly check how likely it is that such a case would present itself in the real world. For it is no serious failure for a rule to be incapable of dealing with a problematic scenario that is extremely unlikely. Otherwise, every rule would have to be evaluated in their capacity to remain effective even in view of a severe natural catastrophe, of the emergence of people endowed with exceptional powers, of an alien invasion of Earth etc. That is not the case. The conjectural case, in order to point out a relevant shortcoming of the rule, has to be likely to happen. And that re-opens the debate on the use of empirical research, for one could interpret “likely” as demanding statistical evidence.

That is not, nonetheless, what I take “likely to happen” to mean. Instead of the more statistic meaning of this expression, according to which something is likely to happen if there is register of that something having happened before and happening again and again in a frequency high enough, I understand that expression in the more practical meaning of verisimilar, that is, of having the appearance of something that, judged on the basis of my understanding of the constants and possibilities of practical life under rules, could actually happen. Instead

of the objective proof of statistical verification, that other meaning of "likely to happen" would require only the intersubjective proof of appearing just as verisimilar to every other speaker on the basis of their practical experience with the world. Once again: Even if the conjectural case becomes relevant only if it proves itself likely to happen, this last property is not of statistic meaning, but rather of practical one. This links my second consideration to my third one.

The third consideration is that some of the shortcomings of procedural rules have to do with scenarios (like the impact of economic inequality in the chances of winning a lawsuit and the use of manufactured narratives in the benefit of the formulated claim etc.) whose reality and frequency are common knowledge and would likely not raise any skepticism. Whether they have taken part in a lawsuit along their lives, or they have just been informed by indirect sources about how lawsuits work and go, people in modern societies, as long as they are averagely experienced, educated and informed, are no stranger to judicial procedures, as well as to their distortions and shortcomings. The reason why fictional books about trials can rely on the background information of their readers about judicial procedures and then exploiting it to the purposes of either best-selling novels (like John Grisham's ones) or high literature (like Dostoevsky's "The Brothers Karamazov", Kafka's "The Trial" and Camus's "The Stranger") is that even the common layperson not only has this sense of judicial verisimilitude but also is capable of distinguishing when a conjectural occurrence is verisimilar (otherwise, Camus's "The Stranger" would not work as denounce), metaphorical (otherwise, Dostoevsky's "The Brothers Karamazov" would not work as existential examination) or exaggerated (otherwise, Kafka's "The Trial" would not sound as absurd as it needs to) in relation to regular occurrences in real trials. There is a background common knowledge, a shared sense of judicial similitude, widespread among modern individuals regardless of their juridical formal education or their direct experience with lawsuits in real life.

Therefore, some of the scenarios that I point out as shortcomings of rules of procedural law can be recognized as not only conjectural, but rather factual, even in the absence of empirical evidence. If the second consideration claimed that conjectural cases can be used effectively to criticize courtroom rules, the third one claims that some of the cases philosophers can raise from their armchairs don't even need to remain conjectural, but can be recognized as factual on the basis of this

commonly shared background knowledge on how trials usually go. If that raises the temptation of accusing this expedient of going no further than reproducing the prejudices of common sense and folk sociology, one has to remember that, from a discursive point of view, it is in the eyes of the affected, that is, of rational and informed laymen, that any rule, including hence any rule of procedural law, must be justified. So background knowledge and common sense of verisimilitude are actually discursively relevant sources of judgment.

Finally, my fourth and last consideration is that, since the claims of the discursive features and ends are universal (that is, would only be met if realized in all the possible cases likely to happen), I don't need more than few counter-examples for each to point out the shortcomings of procedural law regarding that feature or end. This property comes from its universal character: whether in theoretical or in practical discourse, universal claims are always hard to prove and easy to disprove. For a universal claim in theoretical discourse, its verification would take the examination of each and every case in its scope of application, but its falsification wouldn't take more than one counter-example; similarly, for a universal claim in practical discourse, the proof of its effectiveness in having a particular type of results would take the examination of all of its possible applications, while the proof of its ineffectiveness can be made with no more than a few examples of its shortcomings in factual and conjectural cases. That allows the critical assessment of procedural law to be less than exhaustive (not to have to examine a huge number of cases) and, thus, to be feasible in the context of one chapter in a doctoral thesis.

The non-obvious dependence on empirical investigation of the examination of theoretically and normatively qualified results, the possibility to recur to conjectural cases or to cases that can be considered factual on the basis of shared knowledge and common sense about trials, and the lack of necessity to be exhaustive in the counterexamples exploited in the argument is what makes it possible for an armchairlike philosophical investigation to perform this critical assessment task, that is, to evaluate the discursive results of the rules of procedural law. Having dealt with this possible problematization, I would now like to clarify how exactly I proceed in that task.

3.3. Method to critical assessment of the rules of procedural law

The question of to what extent the rules of procedural law succeed in implementing discursive features and ends and preventing discursive distortions in judicial procedures, or, which is the same, of how much discursive they render judicial procedures in real life, requires to take care of three different fronts of examination. One can ask how much procedural rules manage to honor the basic conditions of discourse (freedom, equality, intelligibility, inclusion). Besides, one must be certain that any shortcomings are not due to the limitation of empirical and institutional discourses in general (otherwise, the alleged failure to be discursive would be actually a failure to be ideally discursive, which is no failure at all), but rather proper to judicial procedures in particular. In the following I explain how I make the evaluation of the implementation of each of those features and ends of discourse without demanding from empirical and institutional discourses what only ideal discourses would have, that is, without committing the fallacy of misplaced idealization.

As for the basic conditions of discourse (freedom, equality, intelligibility, inclusion), I first formulate an ideal version of their claim, in order to know what idealization they are going for; then, I formulate an empirical institutional version of their claim, taking in account both the empirical limitations of real life discourses and the institutional character of discourses governed by the democracy principle, attempting at making clear what would count as violation of that claim in judicial procedures; and, finally, I contrast each claim with a set of one or more cases, conjectural or verisimilarly true, that would exemplify shortcomings that not only the judicial procedure has but also that it could not cease to have without either being deeply transformed or changing the general conditions of late modern societies. Thus, I consider the shortcomings of procedural rule regarding to each of those basic conditions of discourse sufficiently proven.

But enough with methodological preliminaries. Now that the necessary explanations have been made, I can move to the actual critical assessment according to plan.

3.4. Judicial procedure and the basic conditions of discourse

The basic conditions of discourse are four: freedom, equality, intelligibility and inclusion. In this topic, I examine to what extent the rules of procedural law manage to implement these ends. As promised in the methodological explanation, I proceed in three steps: formulating

an ideal version of each claim; then, formulating an empirical-institutional version of it; and then looking for cases (hypothetical but credible) that function as counter-examples of the capacity of the rules of procedural law to implement that end in judicial procedures.

Freedom

As for freedom, Habermas speaks of it as the absence of any coercion either internal or external to the discourse, an idea usually also captured and expressed with the formula of the submission to no other coercion than that of the best argument. So, the complete absence of any empirical coercion (physical, familial, social, economic, political etc.), with the only presence of the transcendental coercion of the best argument, would be the ideal version of this claim.

Of course, no empirical-institutional discourse would be capable of meeting this claim in that ideal version. In order to do so, the real life discourse would have to occur outside the world, in some spaceless, timeless nowhere, where Kantian transcendental subjects would interact with each other to get to an understanding about some issue (if there was any) in their commonly shared Utopian no-world. In the real world, speakers are never completely free of pressure and coercion transmitted by a complex net of connections and relationships. This is why this claim requires an empirical-institutional version that real life discourses were capable to actually meet.

That can be found in the claim that the speakers in the interaction, submitted as they might be to various forms of coercion external and internal to the discourse, shall never be obliged or prevented to speak. There could be forms of coercion in play, as long as they don't oblige or prevent the speakers to speak where, taking only the content of the speech into account, they would have acted otherwise. It is imperative that every time the speakers speak or silence, they don't do it out of coercion. In this modest form, the claim can be met by empirical-institutional discourses in real life.

Now it is made clear what would count as a violation of that modest claim: If the rules of a certain empirical-institutional discourse allow for forms of coercion external and internal to it to interfere in the participants' speech, making them speak or silence unwillingly, then, the claim of freedom, even in its modest, deflationary version, has been violated. To make it even more concrete: If the participants are obligated to speak or not out of fear for the consequences of their speech

or out of concern that what they have to say wouldn't be taken into account, then, the claim of freedom has been violated.

It is easy to show that even this modest type of discursive freedom is often absent in judicial procedures. Take the very presence of the parties, for example. One of them, namely, the defendant, has been obviously obliged to be there against her will. By means of the service of process, she has been noticed of a lawsuit currently being filed against her in a court of law. Her being served does not allow her to choose between taking part in the process or not, since her absence would not stop the procedures, but would more likely increase her chances of loss, risking her reputation, property, freedom or even life. So her being there was far from a free choice. In some criminal cases, it was even guaranteed by her being arrested and taken into custody. If there was certainty that in every lawsuit the defendant was guilty, one could at least say that the lawsuit against her was a result of her previous freely chosen wrongdoing. But, as many defendants are actually not guilty, this possible line of argument is also unobtainable.

But at least the plaintiff decided to be there on her own, right? Well, not exactly. If the defendant violated the plaintiff's rights, then, the plaintiff's not being there, that is, not filing a lawsuit, would be tantamount to simply waive her right. It is not like the plaintiff had several alternatives to suing in order to recover what she considers to be hers and to have been taken from her. And that is just the case of most civil plaintiffs and some criminal cases with private charging. For in many other criminal cases the district attorney cannot simply choose not to file the lawsuit. Even her eventual power to drop the case is limited by conditions regarding the gravity of the offense, the evidence available, the discretion to plea bargaining etc., that make her filing the lawsuit at least highly mandatory. The same goes with other public attorneys in administrative, fiscal and other city, county, state and federal non-criminal cases. As a general rule, being in a lawsuit is not something people just choose to do. At least not healthy and busy people.

Nor has the party a real choice between getting a legal representative or not. First because, in many lawsuits in most legal systems, legal representation is simply mandatory. In this case, coercion happens out of the force of law. Second because, even when it is not mandatory, it remains highly advisable. Laypeople are almost never prepared for the intricacies and technicalities of a legal action, and the

type of objectivity, practicality and strategism needed to win in a courtroom is more likely to be achieved by a third person than by the very concerned. That is why even most lawyers avoid representing themselves in cases where they appear in one of the conflict ends. In these cases, coercion happens out of the force of self-interest. The party is not entirely free to represent herself because, from the point of view of sheer strategic rationality, it is simply a very bad idea.

In the examples above, what prevents the party to act freely is her self-interest. That remains equal for the examples I am about to give, with the addition, however, of the power of language, rules, practices, and rituals proper to the judicial environment.

A good first example would be the nature of the claim. It is often the case that the plaintiff's understanding of what was wrong with the defendant's action or omission is significantly different from what she is legally allowed to complain against her adversary. If the defendant is an adjacent neighbor and took part of the plaintiff's land with her crops, the plaintiff might see that as an act of disrespect and offence, a breach of trust and friendship, a vile contamination of a hitherto healthy relationship. But none of that comes close to a founded legal claim. She will end up filing a lawsuit for trespass to land, but it not only fails to capture the nature of the plaintiff's harm and motivation (an element of distortion), but also obliges the complainer to phrase and present her demand in a form strange to her real reasons (an element of coercion). The defendant, by its turn, might often feel the same way about the plaintiff's complaint: surprised, disappointed, offended, even harmed with what was brought up and proposed as true. But none of that can be offered as ground in her official reply. She too will more likely submit her self-presentation to the constraints of the legal form. As much can be said of many cases of divorce, distribution of property, alimony, and child custody, as well as of many cases of dissolution of membership and corporations, or domestic battery, molestation or rape. Law translates, often with much loss, the more human conflicts into more formal, reified and quantitative disputes.

One might say that, as far from the party's original complaints and motivations as they may be, the legal forms for claims don't represent a coercion more than any means to an end represents a coercion for people that want to achieve that end. Maybe a house owner wants the painting she just bought to go on the wall of her living room, and not to drill a hole in the wall, to install a screw anchor and then to

turn the screw into it, but, unless she performs this latter whole operation in advance, the painting she wants to tie the room together simply cannot be hanged. But, beside the fact that the legal format is a social construct very unlike a physical necessity, there's another difference: Contrariwise to the painting hanging example, where the means, undesired per se but instrumentally necessary, eventually lead to the desired end, the legal action is an undesired means to an end that is only a partial and distorted version of what the party really thinks the conflict is all about. It is not a matter of submitting oneself to instrumental necessity, but of transforming one's self-presentation and motivations in order to enjoy the power of the law. It verges on self-distortion and self-alienation.

The same reasoning about the format of the claim can be extended to the format of arguments and evidences in the case, as well as to the proper behavior in the courtroom. They are all in part justified by what is necessary to convey contributions in a way that they can be legally assessed and to maintain an orderly and respectful interchange environment. But it also signalizes to how much law fails to shelter without distortion the conflicts of life and tends to use formal solemnity to keep ever in the outside, ever as foreign visitors, the very people it is supposed to serve.

To finish this topic on freedom, I would like to talk about two important issues: free construction and free acceptance of the result. Although both aspects are to be more fully discussed in my topic concerning the consensus requirement, the fact that the parties in a legal procedure contribute to the final result, but see the steps of this result being made by a third person and in spite of their will, cannot be ignored in this assessment of the freedom requirement. If the plaintiff says A and the defendant says not-A, then, whatever decision the judge makes, two facts stand out: (i) the party that defended the opposite result will have to accept this decision no matter how much she disagrees with it; (ii) the party that proposed that very result, therefore, the one that agrees with it, will have to accept that result not because of her agreement with it, but because of a third person's authoritative decision. So, the judge's decision is, so to speak, agreement-independent, that is, independent that either of the parties agrees with it. As being agreement-independent is much closer to coercion than it is to freedom, this aspect, that will be addressed in further detail later on, ought to be mentioned earlier at this

point, as something that also jeopardizes the degree of freedom present in the legal procedure.

Equality

As an ideal requirement for discourses, equality demands that, among the participants of a discourse, no inequality other than having the best argument shall have importance in how the participants' contributions are taken into consideration or have impact on the final result. It asks for the neutralization of every aspect (gender, identity, orientation, race, aesthetic and sexual appeal, charisma or rhetorical skills, family, nationality, level of education, religious affiliation, political ideology, social role and rank, status and prestige, economic income and wealth, professional occupation, political power, deeds and misdeeds etc.) of what makes participants unequal to one another and focus on the sole consideration of the merits of their claims.

The very reason why this requirement is to be explicit and stressed out is how prone human beings are to be affected by extrinsic features in the course of a rational argumentation supposed to care for nothing but the truth. Compared to the actual behavior of human beings in a social environment, the level of idealization of this requirement is even higher than that of freedom. That is why no empirical realization of a discourse is actually expected to meet it completely, but is instead expected only to take measures in order for the best argument to prevail even in face of the extrinsic inequalities likely to affect judgment. An institutional discourse meets the equality requirement not when no extrinsic inequality ever exerts influence over the participants, but rather when effective measures are taken in order for the best argument to preponderate even in face of the inequalities at play. It is not so much the negative cancellation, but rather the positive counter-attack to the extrinsic inequalities that counts.

In order to meet the equality requirement, the judicial procedure developed over the centuries mainly two types of measures: formal equality of participation as the general rule, and compensations for substantive inequalities of chance as the incidental exception. Pursuant to the first type, the parties enjoy the same opportunities to speak and respond, the same time to counter-argument each other's claims, the same time to collect and present evidences and testimonies, the same opportunities to express their disagreement or complaint etc. As we shall see, this is far from sufficient to render their chances of victory

dependent only on the merits of their arguments, but, as a matter of assignment of opportunities, it clearly favors the equal treatment of the parties - which is one of the facets of the modern ideal of judicial impartiality.

This strategy of formal equality aims at counteracting the otherwise dominant tendency to give more or less weight to a person's contribution depending on her social identity and position. The fact that the intended equality is also formal makes for both an advantage and a shortcoming. The advantage is that the judge is obligated to concede this type of equality of participation to whoever finds oneself in either end of the lawsuit. Thus, any consideration about the parties' concrete necessity or desert of being treated as equal, which might interfere with the judge's appreciation and already be influenced by her biases about the people at issue, are suspended or cancelled from the start. The shortcoming, as we shall see, is that it ignores the concrete inequalities between the parties and the fact that people with different experiences and resources benefit from the same opportunities with very different degrees of success.

By virtue of the second type of measure, participants either formally assumed or materially proved to be in a worst-off position are granted compensatory protections or advantages in order for the legal procedure to achieve a more balanced equilibrium in terms of chances to win. Two long known and widely spread examples of this strategy of procedural compensation are the "in dubio pro reo" principle in criminal cases and the right to have an attorney in all legal cases.

As for the "in dubio pro reo" principle, it states that, in any criminal case under judgment, unless the charges against the defendant have exceeded the threshold of reasonable doubt, the verdict is to be given for the defendant. Although the principle involves many issues other than mere procedural equality, like the approach to the handling of uncertainty and the maximum protection of the individual's rights, it also departs from the recognition of a procedural bias, that is, of the defendant's delicate and weakly procedural situation, as well as it promotes her chances of being found not guilty even in face of such bias. In certain legal systems, the "in dubio pro reo" principle is more than simply an approach to how to handle the verdict in case of doubt, being also a hermeneutical guideline about how to interpret criminal and criminal-procedural statutes and precedents, as well as a heuristical recommendation on how to weigh and assess evidence and testimony. It

contains a choice for counteracting the spontaneous social bias pro punishment with an artificial legal bias pro freedom, but it also reveals an awareness of the unfairly unequal experience of being charged with a criminal offence.

As for the right to have an attorney, most legal systems contain some provision that guarantees, for the party that cannot afford an attorney, one to be paid by the state. In some systems this attorney is a private lawyer mandatorily assigned to that case, in others a private lawyer that offers that service, and in others a public official whose only function is to take cases like this. What every one of these systems considers unacceptable, however, is for one of the parties not to have a legal representative in view of not being able to afford one. That would result in an unfair advantage for the other side, one that does not stem from her having the best argument, but rather for her counting on resources that her adversary lack. Should hers be only interest defended with a lawyer, the complexity of the law and the intricacy of the case would suffice to substantially diminish the other side's chance of winning regardless of the merits of her claim. So guaranteeing an attorney to the party unable to afford one is, without prejudice to other reasons, a way to compensate for unfair inequality and make things more equal between the parties. It counts, therefore, as a compensation measure.

Both formal equality and compensation measures sign that the judicial procedure does make efforts to promote equality to some extent. It is, however, way less than it should in order to secure that the winning claim is the best one. There are many inequalities to which procedural law turns the blind eye. I will comment on some of them in the following paragraphs.

We must begin with the quantitative variables, like time and money. Say two parties have the same time to perform a certain procedural act. Party A has thirty days to appeal from the impugned court decision and party B, after that, has thirty days to respond. There are many ways how things might become extremely unequal between them despite their having the same time limits in their hands. If A has one lawyer, while B has two, the, even being all of the lawyers of the same competence and dedicating all of them the same time and effort to their side of the case, B has her interest twice as carefully taken care of as A. If, in addition, B has the resources to pay for better lawyers, than every hour of their representatives might count as more than one hour of

the other side's one. If, on top of that, B can pay for lawyers entirely dedicated to her case, then, each one of those thirty days have more hours dedicated to her interest than to the other party's. Say B's two highly competent lawyers dedicate 360h (6h per day each during 30 days) to B's case, while A's mediocre lawyer dedicates 10h to A's entire case. It is very difficult not to see how B's chances of winning the case are considerably higher than A's regardless of the merits of their respective claims. Nothing of what has just been described is forbidden by law and, being the matter at issue almost impossible to invigilate, little would be achieved by legally regulating how many lawyers one can have or how many hours a lawyer can dedicate to one's case. Nor is the above described impossible or rare to happen. Most account holders that sue their banks find themselves fighting with one mediocre lawyer against a highly trained, particularly experienced, totally dedicated team of legal experts looking for every contractual detail, legal loophole or favorable precedent to win the case for the most powerful of the two parties. Law not only tolerates this kind of inequality; it also barely see it as concerning in the first place.

The same applies to inequalities in money, not only because, as seen above, money can pay for more expertise and time, but also because it can make much difference in other respects. For example, most legal systems allow for three types of evidence: documentation, testimony, and technical assessment. It is quite apparent that the party in possession of more economic resources has the upper hand to provide and challenge evidences of all three types. The state and the corporations, for example, have an internal bureaucratic organization, with a team of lawyers and archivists, keeping track of their every transaction and always ready to support their every claim with proper documentation. The presentation of witnesses often depends on gaining their trust, convincing them to testify in court or paying for the expenses of their missed workday and traveling etc., all of which are easier when one is provided with the human and material resources necessary to make it happen more soundly and quickly. Technical experts cost money, and having one on one's side to support one's claim and to double check every evidence used by the other side often makes the difference between winning and losing. There is no way past the fact that money is oftentimes the most decisive variable for the kind of bureaucratic and material background preparation necessary for a party to win in a lawsuit.

Something not to be underestimated when talking of time and money is the importance of the capacity that each party must have to endure a long judicial struggle while paying for predictable and unpredictable expenses and sustaining the will to keep going until the very end, no matter how distant the finishing line or how unlikely the positive verdict might appear. Later on in this dissertation, when discussing the merits and problems of the methods of alternative dispute resolutions (especially settlement, mediation, and arbitration) from a critical-theoretical point of view, I will comment on the fact that the amount of time and money a lawsuit costs for each party plays a significant role in making these alternative seem appealing and preferable. The astonishing increase of the legal scholarship production on this subject and the increasingly more frequent provision of those alternatives in legal systems throughout the planet bear witness of how much of a universally recognized and concerning problem the money and time consuming nature of the judicial procedure currently is.

A world of difference is also to be expected as a result of variances in status, prestige, social and professional network, repeated professional partnership, and personal relationships. It is no accident that most legal systems contain provisions for a judge with previous social or personal connection with one of the parties, or a bias against one of them, or in any other personal, social or ideological situation where her impartiality is expected to be compromised, to disqualify herself and then have the case be transferred to another judge. That is the recognition from the part of the procedural law that some personal and social circumstances have distortional effects on the way lawsuits are handled. However, these provisions cannot cover but the cases where these distortions are more explicit and identifiable. But a prestigious person, for example, can influence the judgement of her complaint, by adding relevance and urgency to the case, or her testimony, by adding credibility and relevance to her version of the facts, in numerous ways. In another example, a repeated professional partnership, like that between a criminal judge and a criminal prosecutor at the same jurisdiction, can make the former take into consideration the latter's motions and pleadings with different weight, in view of the fact that each encounter between them is neither the first nor the last they will have, and answers in the present are both a product of others in the past and basis for others in the future. It is also a common strategy for lawyers to greet judges and clerks with cards, flowers, gifts and favors, to participate in their commemorations and invest into making their

social interactions as often as possible. Being sociable, showing patience, paying reverence, listening to problems, telling stories, cracking jokes etc. are all social skills highly valued among lawyers not because of some ethical concern with the quality of their professional acquaintanceship with judicial officials, but because they know of their impact on the prospect of their demands being answered more effectively, quickly, and favorably. As long as the professionals interacting in the judicial field are humans, the distortional effects of social and human connections are unlikely to disappear. And since all of the above are factors that can be unequally possessed by the parties and their representatives, they add to the list of cases where inequality might kick in as a distortional element in lawsuits.

If all of the above count as elements of positive bias, the elements of negative bias should be considered at least just as great in their ability to affect the progress and impact the result of a judicial procedure. Belonging to a minority (and oftentimes disregarded, discredited, suspicious or even despised) gender, sexual identity, sexual orientation, race, ethnicity, nationality, class, profession, religion, ideological affiliation etc. might bring about additional obstacles entirely strange to the merits of one's claim. The complaint of offense against religious freedom or disrespect for religious symbols won't sound equally convincing when made by a gypsy black woman or by a Christian white man. The testimony in a domestic battery case won't be equally credited when given by a white male medical doctor and a black drug-addicted female prostitute. Besides, certain groups have in their disfavor the reputation of being especially contentious, belligerent, whining, nagging, hyper-sensitive etc., which might have considerable impact on how their complaints and declarations are taken into consideration. Their unfavorable reputation becomes easily exploitable by the other party, who can reinforce previously constructed stigmata or stereotypes and then sound automatically more convincing. Those are cases where social inequalities that exist outside the courtroom are brought into the proceedings without the participants other than the discriminated ones even noticing the impact of their bias at work. If the judicial procedure were to be a context free from all inequality other than having the best argument, then it should counteract the power of these social biases. But not only it doesn't, but also the problem itself is as little addressed as possible in legal statutes and scholarship.

Finally, one issue is especially important to approach from the point of view of judicial systems in periferic developing countries. In these countries' legal systems, it is common to see a peculiar phenomenon of judicial compensation for inequalities, that manifest itself in certain types of cases in the form of a reversed bias in favor of certain parties (like workers, consumers, retirees, pensioners, health insured, wives etc.) and against other ones (like large companies, banks, telecoms, providers, health insurances, husbands etc.) as a result of the widely shared belief that, in those types of cases, one of the parties is almost always right and the other almost always wrong. It might be considered a reversed bias, because instead of favoring the party in the better off social position, it favors the other one. One must even say that it turns being in the worst off social position an advantage for being in the better off judicial position. Although the strength and pervasiveness of these reversed biases are usually exaggerated by the conservative media and common sense, it is not a non-existent phenomenon and, as a judicial systematic tendency, this dissertation would be remiss not to address it.

At least two things must be said about the significance of the reversed biases in the judicial procedure. The first is that it reacts to social inequalities from outside of the courtroom by creating reversed judicial inequalities within the courtroom. As such, it is a response to inequality according to a compensatory strategy, a utilization of inequality to counteract inequality itself, in order to promote impartiality as a kind of finally re-balanced result. The second thing to say is that one must distinguish between two modalities of these reverse biases. One is legal-procedural, where legal principles (like the reversal of the burden of proof in Brazilian labor procedural law and consumer procedural law) and procedural strategies (like ex officio court orders and judicial interventions) make the reverse bias mandatory (despite its usual negative connotation, "bias" can still be used in this context). The other one is judicial-cultural, where public officials, especially judges, juries and prosecutors, regardless of legal orientation to do so, develop a unilateral attitude in favor of one of the parties (actually, in favor of one of the typical parties in certain repeated cases) motivated by the perception of that party's weaker economic or social position. The greater the economic and social inequalities present in one society, the more likely these compensatory attitudes become in their judicial systems.

As is probably predictable due to the subject matter, reverse biases are at the same time measures of equalization and causes of distortion. They justify themselves from the point of view of a statistical approach to impartiality, since they contribute to equalization in most cases and bring about injustices in least cases. However, even in the cases where they achieve their intended goal, reverse biases introduce an element of inequality other than the merits of the claim. If, for example, an employee, say, a poor single mother, sues her former employer, say, a retail giant, and in every step of the lawsuit, the judge takes her claims and evidences more favorably than the ones of the defendant, then her socio-economic condition, an element completely strange to the merits of her case (since she could be a poor single mother former worker and be right, or be the same and be wrong), is being taken into consideration, affecting the equality of discourse and having impact in the final result. In other words, even when they are a strategy for equality in discourse, they are not a discursive strategy, in the sense that they don't reinforce the discursive nature of the court interaction. In view of that, from the standpoint of a critical theory of the judicial procedure, reverse biases must be seen at the same time with benevolence and suspicion.

Short Digression: Do Inequalities Truly Matter?

Before going any further, I would like to mention and confront the possible criticism according to which variables like time and money, as well as other inequalities between the parties, actually don't have a major role in deciding who wins or loses in a lawsuit, because even the most favorable position can lose if the merits of one's claim are weak and even the most unfavorable one can win if the merits of one's claim are strong. As counterfactual as this objection might sound, it cannot be simply dismissed on the ground of its naivety. On the contrary, I must explain where and why it is naïve.

First of all, this objection assumes that the merits of one's claim are something pre-existing and independent of how lawyers construct the case, present their facts, arguments and evidences, of how they decide to act or react in each point of the judicial procedure and of how judges and juries are affected by what the parties and their representatives are, do and say. Let me call this position "metaphysical realism" regarding the merits of one's claim. According to this position, one's claim is either weak or strong independently of whom it refers to and of what is done and said in the course of the legal case. If this

position were true, then all my concerns with inequalities in the judicial procedure would be vain and unnecessary. The ideal of perfect equality, where no inequality other than having the best argument truly matters, would have be already obtained from the start. White and black people, male and female, rich and poor, well or poorly prepared and represented, would all have the same chances of winning lawsuits, for nothing other than the merits of their claims would ever count in their favor or disfavor. Judicial justice would be blind to everything other than what the nature of the claim really is.

What might be said against this type of metaphysical realism? Well, much actually. Not only centuries of unfairly designed and handled judicial procedures, but also multiple generations of a voluminous social scientific literature denouncing the influence of many extrinsic elements on the result of court cases would be the first indication that the real world of courtroom procedures resembles nothing like this piece of fantasy. Actually, too little of the judicial procedure history and legislation would be even intelligible if the metaphysical realist account were true, since much of the attempts to make the judicial procedure better is motivated by the recognition that it tends to treat the parties unfairly and the ever renewed intent to make it more balanced and impartial.

On the basis of this much evidence on the contrary, one would be led to accept precisely the opposite view, that is some type of "metaphysical anti-realism" concerning the merits of the parties' claims. The merit of one's claim is not something that exists independently of the courtroom dynamics, but actually something built on the choices, actions and words of the parties and profoundly depending on the positive or negative impression these parties are capable to imprint on judges and juries. It's not that the most favorable position guarantees victory, or that there is no hope for those in the most unfavorable one, but rather that their chances of winning are highly affected by how favorable their relative positions are.

Affected, however, without being determined. It is definitely true that the judicial procedure is not just a function of how much status, wealthy and power one person has, a rigged game setup for the powerful. The discursive nature of the legal argumentation makes room for some chance for those in weaker social and economic positions to revert the odds and eventually win. There is still this silver lining where the best claim might come up in spite of the extrinsic conditions. This

silver lining is perhaps what makes the supporter of the metaphysical realist position to insist that the merits of the claim are independent of extrinsic elements, but this is clearly an exaggeration of the truth. The non-exaggerated version would simply state that the institutional nature of law, that makes the result of the judicial procedure considerably dependent on how much each party's claim is backed by the law, puts a limit on the constructability of the strength of the claim itself. Here is where the anti-realism must be tempered with an observation: the merits of one's claim are highly affected by extrinsic conditions and considerations, but never to the point where the existing law cannot still be invoked to revert the odds and determine the result. The more justified position would be one of anti-realism that still allows for the emergence of truth in law, an anti-realism without skepticism.

Since this anti-realism without skepticism is a position one can only sustain on the basis of at least some substantial empirical evidence, it cannot be presented as more than a realistic assumption in a more armchair philosophical approach like my own. But certainly a necessary one. The metaphysical realist view would render every consideration for inequalities of extrinsic conditions unnecessary, while the full-skeptic anti-realist variant would render the very project of a critical theory concerning the judicial procedure impossible, for no route of emancipation out of the heavy extrinsic inequalities would ever be available. So, if only as a matter of methodological necessity, that is the adequate position to be held here.

Intelligibility

At the ideal level of discourse, intelligibility requires each participant to understand each speech contribution with the same degree of clarity and competence, by means either of the usage of a universally understandable language or of topic clarifications of terms and expressions and reformulations of statements whenever necessary. From the four basic requirements of discourse, intelligibility is the least impossible to attain altogether in empirical-institutional discourses. With no more than some disposition and effort on the part of the involved, complete or near to complete intelligibility can be achieved and maintained throughout the communicative process. Little to no concession or adaptation is necessary in order for this requirement to be implemented in practice. However, intelligibility in legal discourse is a wholesome different story.

Before going any deeper into the analysis of intelligibility in legal discourse, two issues must be determined whose answers are far from obvious. One is: Who count as participants in the legal discourse? The parties, their lawyers or the unit composed by both as one of the corners of the judicial triangle? The other is: What counts as intelligibility when a technical language is at play? Is there enough to be works of legal dogmatic defining the same technical terms and expressions in a way that is at the same time similar among them and convergent with the history of relevant judicial decisions, or must the actual participants of a lawsuit understand each technical term in the exact same way concerning both to abstract definitions and to most concrete applications? And how could one be sure of that to have been obtained?

It appears as though the answer that the lawyers are the participants should be ruled out from the start. Once the interests at play are those of the parties themselves, they are the affected, and a definition of participants without the affected would be unacceptable from the point of view of a discourse theory. However, the implications of that line of reasoning for empirical-institutional discourses in general would be staggering. It would mean that, for example, in representative democracies, the participants in the legislative discourse wouldn't be the parliamentary representatives, but rather the represented themselves, which would render dubious any claim about intelligibility (a legislative discourse would have to be intelligible for all voters, and ultimately for all inhabitants of the territory, which is never true except for the least of cases), not to mention about consent. If we are to preserve the validity of the empirical-institutional discourses most characteristic and central to our times, we seem to have to compromise the equation between participants and affected, letting the representatives count as participants for the purpose of our considerations.

And yet there is a reason to distinguish between legislative and judicial representative. Both are granted a mandate to act in the name of the represented, but while the legislative representative can only be evaluated and replaced with another in the next election, the judicial representative, if a private lawyer, must consult the will of the represented in each step of the journey and can be fired and replaced at any time. Although the cases of the public defender and the public attorney are more complicated to explain, the example of the private lawyer, as the standard judicial representation, points out that she is not the sole participant in the lawsuit. It is more of a conjoint enterprise

between her and her client. So, for the purpose of my analysis, I will consider the unit between lawyer and party to be the relevant participant in the legal discourse.

As for the second issue, I have to make a clarification first. Although such explanation cannot be found in Habermas', Apel's or Alexy's texts on discourse, it would not betray their intentions to say that the requirement of intelligibility has two meanings or aspects to fulfill. One is the aspect of clarity, that is a characteristic of the statements that are made, for what is spoken must be such that the participants can understand and respond to it. The other is the aspect of competence, that is a characteristic not of the statements themselves, but of the language in which they are formulated, for the language in which things are spoken must be such that by means of it the participants are able to say whatever they want. Statements must be understood and the language must be empowering for those that participate. So, if I want to answer the more challenging question of what counts as intelligibility when a technical language is at play, I have to refine the meaning of intelligibility itself so that it encompasses both aspects at the same time.

That much having been said, that is, that the relevant participants are the units composed by the parties and their lawyers and that intelligibility must satisfy both an aspect of clarity and one of competence, the conclusion of the answer to our issues ceased to be hard to draw. For now, regarding the use of a technical language, clarity demands of the statements to be clear and of the lawyer to explain the technical aspects of them to her client, while competence demands that the language spoken allows for the lawyer to make the argumentative and strategic decisions that her client expects from her and for the party to have full or near to full control to what is done with her lawsuit. None of those requirements are easy to meet or to verify, but they are now at least determinate, providing our discussion in this topic a more promising departing point.

Luckily I don't have to say anything about how much these requirements are actually met in judicial procedures. I only have to show to which extent the procedural rules are committed to promote the fulfillment of those requirements. That gives me four questions, concerning whether procedural law makes enough effort to (i) make the statements clear to the lawyers, (ii) ensure each technical statement is properly translated to the parties, (iii) use a language that enables lawyers to make their moves, and (iv) use a language that enables the

parties to have control over their judicial destinies. I begin with (i) and (iii), the questions with respect to the lawyers. The questions (ii) and (iv), regarding the parties, I address right after.

When discussing the clarity of the statements, I find it appropriate to limit myself to the most relevant statements in a legal case, which would be a sort of summary of each pleading, response, evidence, and decision, instead of the full content of each writing and speech, sentence by sentence. Those are the statements whose meaning a lawyer must be able to grasp without assistance and the party with her lawyer's assistance. I will refer myself to those hereafter as the basic statements. For example, in a pleading for child support in family law, the basic statements would be the claim that the plaintiff is a child of the defendant and the request for the defendant to pay a certain amount per month in the terms of the law. In an accusatory pleading in criminal law, the basic statements would be the claim that the defendant committed the crime she is being charged with and the request for her to be punished in the terms of the law. As far as I see, a similar approach can be extended to responses, evidences, and decisions.

About the clarity and competence for lawyers I would like to point out three recurrent characteristics of judicial procedures: stylistic obscurity, strategic vagueness, and interpretive contentiousness. As for the first, what I call stylistic obscurity is the lawyers' (judges included) penchant for pretense, pomposity, and preciosity in the language they often choose to wear. It is not of course a universal trait, but is widespread enough to be mentioned. One of the traditional angles for jokes about lawyers, other than their greed for fees, compulsion to lie, and general lack of ethics, is their inclination to say and write unnecessary Latin expressions and paraphrase common speaking into corporate gibberish. Some of them go the extra mile and complement these features with a soft spot for literature, poetry, music, oratory, history etc. and the desire to pour into their professional statements their knowledge on those matters. They seem to believe that the remedy for the usual dryness and dullness of legal discourse is misplaced lyricism and erudition. As a result, many pieces of legal speech and writing become spectacles of affectation, which obviously doesn't help to promote clarity or competence. But maybe the decision to confine my analysis to the basic statements can work around this vicious habit and concentrate on the other points, although I wouldn't like to miss the opportunity to hypothesize that this might be more than a comic trait – it

is more likely to be a tool of the trade intended to maintain professional power by means of linguistic smoke wall and acrobatics.

The second point is strategic vagueness. Sometimes lawyers prefer to use vague statements of fact and of law, sentences whose meaning is open enough to leave two or more strategies available even after the rival's response; omissions, exaggerations or euphemisms intended to elicit an emotional reaction or to sugar coat an inconvenient truth; insinuations they can take back after the intended purpose is achieved etc. As long as the use of language in law is also strategic, that is, aimed not only at truth and justice, but also at improving the probability of winning the case, and the commitments of clear and competent language unwelcomingly narrow the range of possibilities possible to exploit, increasing the predictability of one's strategy and facilitating the adversary's counter-attack, there is a limit for how much clarity and competence lawyers, as strategic players, can commit to. The judicial procedure is a game where clear and competent language can be a hazard and a disadvantage. And there's little or nothing the rules of procedural law can do in order to change that scenario.

Finally, the third point is interpretive contentiousness. Even without taking sides in the Dworkinian controversy of whether disputed legal concepts are evidence of the interpretive character of law itself, one has to concede that at least some of the core concepts of law, like right, obligation, responsibility, intention, willingness, harm, predictability, proportionality, fairness etc. not only have more than one meaning in circulation among lawyers but leave room for legal argumentation to jump forth and back from one meaning to another according to the interests at play and the intended results. Sometimes it is a problem of linguistic disagreement resulting from different emphases and paths of legal formation. Sometimes it is a matter of ideological dispute, of lawyers that represent two sides of an ongoing controversy in legal scholarship. But there is also a sense where two lawyers don't understand a legal, contractual or testamentary expression in the same way not because they have a linguistic disagreement or an ideological dispute, but because, in the best interest of their represented, they can't gravitate to the same meaning. Legal hermeneutics meanders like a snake around legal concepts and theses. Unless law ceases to be contentious itself, this is also a feature hardly expected to ever change.

In all three cases, language that is intentionally obscure, vague and disputable is used, and there is little or nothing that the rules of

procedural law can do about it. Actually, these features are seen not so much as unfortunate but inevitable, but rather as non-existing or, if existing, almost completely harmless. It allows for the conclusion that intelligibility as clarity and competence is perhaps instrumentally necessary and relevant to a certain extent, but not exactly a priority deeply cared about and promoted in legal discourse, not even among lawyers themselves.

The situation becomes worse when we turn our gaze to the parties. For most people, entering a judicial procedure is like stepping into a world whose language, rituals, and inhabitants are all strange and intimidating. Their lawyers are at the same time their guides, their hosts and their guardians in this threatening universe of suits, sheets and technicalities. No wonder that most people that go to the court for the first time experience reactions similar to visiting religious temples or confronting political and military authorities: nervousness, solemnity, and fear. In theory law is a product of the citizen's will and is at the service of the citizen's interest, the courtroom being one of the citizen's homes; in practice, lawsuits and court proceedings are more like something that the parties resent to have happened to them than like something they take part in or control. There can be few circumstances that feel more like estrangement, alienation and abandonment than being in a court case and relive some of the worst aspects of infancy.

But even if we put this phenomenology of estrangement aside and concentrate solely on the linguistic aspect of the experience, we see that the discursive oppression, exclusion and domination persist in other forms. The parties are left in a position of complete and unconditional dependence on their lawyers from start to finish. From the first interview it is made clear that nothing of what the future plaintiffs have to say is legally relevant to any extent unless their lawyers say so. Law is foreign territory, with other language, rules and practices, and only the scholarly and experienced lawyer can navigate these dark waters and achieve the intended goal. That deprives the parties from competence since day one. As a speaker, the party is powerless, for she lacks the title, the gestures, and the language to be heard.

If that is disempowering for the future plaintiff, one can only imagine the frightening and nerve-racking experience of the future defendant right after being served and, therefore, let know of a lawsuit against her. Putting it to work a heavy and noisy machine that one does not understand or control properly can be fearsome, but twice as

fearsome is to learn that one is in the lane of the machine's trajectory, risking to be run over under its gears. If the plaintiff needs a guide, the defendant needs a savior. She's often not even aware of the meaning of the words in the document she's been given, not even sure of what she's being charged with. It is only later, in her first interview with her lawyer or public defender, that she will perhaps achieve a clear and firm understanding of what is really happening and what can eventually come to happen. Now she knows who is saying what about her and what she wants to say back, but she can't say it for herself. She needs an interpreter and a champion. Before the interview she was left in the dark; now she is left in the lawyer's hands. The lack of clarity was followed by the lack of competence.

Let us now suppose the best case scenario, where the lawyer is day after day a renewed source of clarity and competence. The lawyer is overly patient and care-taking, she responds to every e-mail, texting and phone call from her client, reads with her every pleading or response from the other party and every order or decision from the judge, explains with much detail the meaning, possibilities and consequences of every move in the game board, and always let the final word to be said by the client, properly informed, warned and advised. Even in this ideal scenario, extremely rare except with novice advocates and departed from the reality of everyday practice of lawyers and public defenders with too many clients, cases and deadlines to be so caring about them all, one undeniable fact is to be observed: nothing of what the ideal lawyer did was even remotely influenced by the rules of procedural law. The judicial procedure itself had nothing to do with it and would have gone forth just as smoothly if the lawyer in question had done the opposite and been the worst possible legal representative.

It is certainly true that the legal system expects, at least from those that can pay for their own lawyers (with few exceptions, clients of public defenders are pretty much stuck with the ones they've been given), that they require from them the best possible work and, if they fail to deliver so, they walk away and look for another one. The fact that there are multiple possible choices of lawyers to look for would, theoretically at least, ensure the parties some power for picking those that serve them best, the free market of lawyers guaranteeing for proficiency and trustworthiness.

But, beside the fact that this might be true to some extent only to a very limited number of possible parties, there is a second, more

powerful, no quantitative argument about that: Leaving intelligibility to the market of lawyers and to the self-interest of the parties is incompatible with making the necessary effort to implement it. And, inasmuch as the discursive validity of the final result is dependent on the fulfillment of this requirement, that lack of interest for intelligibility indicates a lack of interest for making the judicial procedure a true discursive interaction. The formal appearance of intelligibility, where lawyers speak and respond to each other, is taken as good enough, which means that, regarding the parties, clarity and competence are even lower priorities than they are for the lawyers. The commitment of judicial procedure with intelligibility is way weaker than one would expect from something really intended to be a discourse.

Inclusion

Although the precise term "inclusion" doesn't appear much in the lists provided by Habermas throughout the years of discourse basic requirements, it names certainly one of the most important items of such lists. Sometimes it appears as the necessity of every affected person to be consulted. Other times it appears as the prohibition that any affected capable of speaking, directly or by means of some aid, be prevented of taking part in the discourse. It can take other forms too. However, in general, as an ideal requirement, inclusion demands every person whose interests would predictably be affected by the prospected result of a discourse to take part in such discourse and give their consent to the final result. It is a "no affected left out" requirement.

Now it strikes as a challenging requirement for an empirical-institutional discourse to meet for a couple of reasons. First, depending on how one determines who the affected people are, the number of requisite participants of the discourse might become truly out of reach. Take a discourse about handling of climate change or changes to immigration policies and suddenly all individuals currently alive on Earth have to be consulted on the matter. If it is practically undoable to gather every living person in order to address the issue, yet the issue must still be addressed somehow, then some kind of compromise of the original requirement is imperative. Even more so if you consider the possibility of issues where the interests of the past or future generations are involved. That brings to light the issue of representation.

Second, there must be a way to handle things even when one or more of the requisite participants refuse to take part in the discourse.

Since the absence of decision on the matter might be in the interest of some of the prospected participants, it is only natural to predict that those in the favorable position, as long as they can, will hold back indefinitely and do whatever they can for the discourse never to come about. If some measure is to be taken in order for the discourse to happen despite the reluctant participants' efforts to prevent it, then once again some compromise of the original requirement is inevitable. Since their interests cannot go unconsulted but, at the same time, no one can be obligated to participate in the discourse (one can even compromise the freedom requirement and force the participants to be there, but cannot force them to make the best argument for their interest), the issue of representation once more comes forth.

So representation might be inescapable. But the empirical-institutional problems regarding inclusion don't just stop there. For starters, one needs a way to determine who the affected people are, and that might reveal to be less obvious than it reads at first. Imagine a case where two parties, A and B, debate to which of them a certain land property belongs. At first, only the two of them appear to be the affected ones. But imagine party A, that was already there, had an agreement with C that C could cross A's land with her herd of cattle whenever C needed, while at the same time A had an agreement with D so that D could help herself with the water of a well located in A's land whenever D needed. Since B, who intends to take over the property and making her own decisions concerning the use of the land, could not abide by either of the agreements, C and D would turn to be affected by the result of the litigation between A and B. Now imagine, to add to the complexity of the scenario, that A, by her turn, was just expecting the conclusion of the litigation before making a mortgage contract with the bank involving the disputed land in order to raise the money necessary to initiate a cornfield that would generate hundreds of new jobs, supply the entire surrounding region with cheaper groceries and accelerate the growth of the local economy, and suddenly both the bank and most of the other landowners, unemployed people and even simple inhabitants of that corner would qualify as affected ones. That same reasoning can go on and on if the changes in the local economy could affect larger regions, even the country or maybe the world (what would be far more likely if, instead of corn, we were talking about oil, valuable minerals, or uranium deposits). Either way, the examples illustrate why some kind of litmus test for someone to qualify as a participant is in order.

Law has a way to deal with it, recurring to two main criteria: rights and harms. Rights are those interests or claims that one can legally require to be protected or repaired, by means of coercion if necessary, while harms are those losses or damages that one can legally demand to be compensated for, by means of coercion if necessary. In both cases an interest is at play, but by insisting on rights and harms law limit its consideration to those interests already deemed relevant enough to be legally protected. A rationally reconstructed reading of this limitation could see it as a litmus test for qualifying someone as a requisite participant of a legal discourse. In the example above illustrated, although C and D would suffer with the replacement of A with B, none of them qualify as having right to the permanence of A, or as owing a compensation for their future losses with B's substitutive ownership. The same would apply for the bank, the other landowners, the unemployed people and the inhabitants of the region, who, while certainly having an interest for the victory of B, would have neither the right to have B winning or to be compensated for the losses with A's victory. Only A and B, whose interests can arguably qualify as rights, would count as the requisite participant of a legal discourse concerning the property of the disputed land. So the requirement of inclusion wouldn't have been met if neither A or B were heard and taken into account, but most certainly would if, as happens normally, none of the other interested individuals and institutions were consulted.

Of course both representation and limitation of the affected, despite necessary and practical, raise questions of discursive legitimacy. If, in order to take place, an empirical-institutional discourse has to recur to representation and limitation, therefore not meeting the ideal demand of the inclusion requirement, does that make representation and limitation discursively legitimate or does that make the would-be empirical-institutional discourse cease to be a discourse at all? The easy solution here would be to say that, if the debated representation and limitation are imposed by laws democratically deliberated and approved, then they are legitimate enough to be accepted. But that would be a circular solution, once the referred to democratic deliberation would also unquestionably have recurred to representation and limitation. So here again it appears as though the only solution to the problem is one at the methodological level: If, in order to remain critical, a critical social theory must regard at least democratic procedures to be legitimate, then pragmatic devices like representation and limitation, as long as they are used and necessary for democratic procedures to work, must be seen as

legitimate from a discursive point of view. If skeptical pessimism is to be avoided, then representation and limitation are to be accepted. That would put to rest the question of whether representation and limitation are legitimate, while still leaving open the question of what types of representation and limitation are to be tolerated. The latter, however, could now be properly responded by means of democratic deliberation, allowing us to draw the reasonable, even if lazy conclusion that the types of representation and limitation imposed by democratically made laws are legitimate enough for the purposes of our analysis.

Other than representation and limitation, there is also the issue of what counts as "taking part in the discourse". Basically two alternatives are available. In the first, that we could call "weak participation", one takes part in the discourse only if one's interests and contributions are taken into consideration by the those who make the final decision. In the second, that we can call "strong participation", one takes part in the discourse only if the final decision is made by one's final opinion or cannot be made without one's final consent. The weak participation alternative is more easily compatible with representation and limitation, but can hardly be considered quite as inevitable as them. After all, achieving a final decision with the vote and consent of the participants is doable, as the parliamentary deliberations make evident. However, the strong participation alternative would render practically all judicial procedures illegitimate only because a third party makes the final call. Although this issue will be largely more debated in the topic about consensus, some further words on it in advance are necessary in a topic about inclusion.

There is one account of the issue that could present the third party's final decision-making as, if not entirely compatible with the inclusion requirement, at least pragmatically necessary for legal discourses. It goes like this. One can say that, as the parties in a judicial procedure are unlikely to have the same account of the facts and rights and to reach a final agreement on the disputed matter, a third party, impartial towards the interests of both parties, but limited to what each has said and claimed, plus everything the law makes mandatory, is necessary to arbitrate between their competing demands. By taking their contributions and the democratically made law into consideration and making a final decision, the third party doesn't interfere in the discourse with a purely external judgment nor function as the sole decisive voice in a dispute where she has a conflicting interest herself. The judge act

like the balanced rational consciousness that the parties lack due to their agonistic engagements. So inclusion is as honored as it possibly can in face of the parties' irreconcilable positions. There's certainly more to say about that (again, see the topic on consensus), but for the moment it will suffice as an answer to the issue. Like representation and limitation, the third party's decision-making doesn't preclude inclusion, at least not to the point where one must say that the legal discourse fails to be a discourse in the proper sense.

CHAPTER 4 – Judicial procedure as remedial discourse

This chapter aims to introduce the concept of *remedial discourse*, as opposed to institutionalized discourse, and argue that the former reconstructs the judicial procedure better than the latter in terms of both *cognitive and critical power*.

As for *the concept of remedial discourse*, it sustains that if differs from institutionalized discourse in the following three aspects:

a) *Pragmatic nature*: While an institutionalized discourse is a practical discourse that respects the democratic principle and its requirement of legal institutionalization, which means that its very institutionalization is the fulfillment of its discursive commitment, remedial discourse is a form of conflict-administration (an exercise of administrative power) in situations where a full-fledged discourse is not expected to be possible and recurs to some discursive features, both at the content and the pragmatic level, in order to obtain greater legitimacy (and then efficacy) for its outcomes.

b) *Target conditions*: While an institutionalized discourse occurs where the outer conditions previous to discourse (for example, freedom, equality, solidarity etc.) are less than ideal, but still discourse-friendly, that is, adequate for genuinely discursive practices, only requiring institutional organization and pressure, a remedial discourse is called upon only where those outer conditions are discourse-unfriendly, that is, inadequate for genuinely discursive practices, requiring more than only institutional organization and pressure.

c) *Logic constitution*: While in an institutionalized discourse the inner conditions strange to discourse itself (for example, regulations) do not compromise its argumentative logic, but merely set up its temporal, social and substantive dimensions, in a remedial discourse they do compromise important elements of the argumentation logic in order to improve types of functionality, mostly celerity, uniformity and efficacy.

As for the *advantage in terms of cognitive power*, this chapter claims that reconstructing the judicial procedure as a remedial discourse:

a) *Captures neglected objective elements*: Explains better the presence of elements as strange to the idea of discourse as authority, coercion, solemnity, technicality, unwillingness to learn or listen,

agonistic dispute, decision by a third party, review of outcome even in the absence of new evidence etc.

b) *Captures neglected subjective elements*: Gives the judicial procedure the ambiguity between discursive and anti-discursive that better reflects the senses of estrangement, make-believe and compulsion the participants have within it.

Finally, as for the *advantage in terms of critical power*, this chapter claims that reconstructing the judicial procedure as a remedial discourse also:

a) Reintroduces the issue of the influence of self-interest, money and power in the distortion of communicative processes, which reconnects the one concern, dear to a discursive theory of law, with the normative self-understanding of modern legal orders, to the other concern, dear to a critical theory of society, with the threats of strategic interaction or functional imperatives over communicative rationality.

b) Allows for time diagnostics of the judicial procedure by identifying pathologies of celerity (like the appeal to settlement and alternate dispute resolutions), uniformity (like the standardization and formulaicization of decision-making) and efficacy (like judicial activism and the judicialization of politics), as forms the social pathologies of bureaucratization and mercantilization take in the procedural domain.

Now let us examine each of these points in detail.

4.1. Institutional discourse in *Between Facts and Norms*

As emphasized in a former chapter, Habermas's purpose in giving a reconstructed interpretation of some general rules of the German criminal and civil procedural law in the end of Ch. 5 of *Between Facts and Norms* was proving that, in the tension, typical to judicial decision-making, between argumentation and regulation, the rules institutionalizing court procedures in the temporal, social and substantive dimensions did not interfere with (but rather "clear the way for") the inner argumentative logic of application discourses.

As a result, the concept of an institutionalized discourse was associated with three features: in its pragmatic nature, it is a discourse whose institutionalization results from the very democratic principle it is governed by; in its target conditions, it applies institutional organization and pressure on less than ideal, but still discourse-friendly outer

conditions; and, in its logic constitution, it maintains intact, despite the institutionalization, an inner argumentative logic.

As to its pragmatic nature, an institutionalized discourse is no more a hybrid between ideal presuppositions and empirical institutionalization, for the latter has become yet another validity requirement of legal discourse; now both the presuppositions and the institutionalizations fulfill requirements of the same discursive principle. Instead of mixed, half discursive, half empirical, the institutionalized discourse is now discursive from top to bottom.

In a previous chapter, I had the opportunity to discuss in detail the change through which, in my view, the requirement of institutionalization passed from *Discourse Ethics: Notes on a Program of Philosophical Justification*, in 1983, to *Between Facts and Norms*, in 1992. To summarize what I said at that point, in 1983 (see MCCA 92) institutionalization was explained to be necessary in view of empirical limitations and internal and external interferences, but was at the same time submitted to normative conceptions derived from our intuitive grasp of what argumentation is. In contrast, in 1992 (see FN 110-1), institutionalization became part of the requirement of the very principle governing the discursive practice, that is, the democratic principle, which demands a collective decision-making by legal consociates under legally constituted conditions and, therefore, operates at the level of external institutionalization - determining form, but not content.

Since judicial decision-making is submitted to the democratic principle (and institutionalization) just as much as lawmaking is, the rules that institutionalize court procedures also fulfill a requirement contained in the principle governing legal discourse. The call for institutionalization comes no longer from the need to make discourse feasible within empirical conditions (despite having this effect), but from the very discursive principle the participants are complying with. It is no longer a requirement of facticity (despite setting factual conditions), but one of validity. This corroborates that, regarding its nature, an institutional discourse is not a hybrid, but a full-blood discourse: even its factual regulation is but a requirement for its discursive legitimacy.

As to the second feature I pointed out, the target conditions, an institutionalized discourse occurs where the outer conditions are discourse-friendly. These outer conditions are made up of willing actors,

solidarity, continuous collaboration, willingness to listen and learn with one another, good faith etc. Being discursive-friendly, in turn, means being less than ideal, but still adequate for genuinely discursive practices, only requiring institutional organization and pressure.

This is the case with "the theoretical discourse in science and practical discourse in parliamentary activity" (MCCA 92). Subjects in these two contexts are maybe not "Kant's intelligible characters", but nor are they (at least in the normal case) incapable of reaching an agreement or immovable from their initial strategic and self-centered positions. In neither case does institutionalization have to give them a third party to, after being informed and persuaded, make a decision that will stand in lieu of the consensual agreement they should have reached, but were unable and unwilling to. With some organization (place, roles, stages) and pressure (time, requirements, criteria), the participants themselves can understand one another and make (and then comply with) their own agreed decision, with no coercion required. The same can hardly be said about the judicial procedure.

Finally, the third feature I have pointed out in the institutionalized discourse is its logic constitution, that is, the integrity of the argumentative logic. Habermas, as we also have seen in a previous chapter, goes to such lengths to prove that regulation does not interfere with (rather, "clears the way for") argumentation that, by now, this point must be very well made.

The only point yet to be added is that, in saying that the inner argumentative logic of the application discourse remains intact, Habermas means less than he appears to mean. He seemingly refers to all elements typical to a practical argumentation, when in fact he means only the arguments admissible (the logical level of discourse). As we have seen in previous chapters, it would be impossible for a court procedure to respect the dialectic and rhetoric levels of a practical discourse while being a coercive practice, conducted in technical language, constraining unwilling participants to contribute to, and then comply with, a decision to be made by a third party, in the hopes that this decision serves one's interest rather than the other's, but at the risk also of it serving none. Nothing in this description resembles a discourse in the slightest.

This point is especially important, for most of our criticism to reconstructing the judicial procedure as institutionalized discourse

comes from our sense of what is lost, cognitively and critically, by focusing only in the logical dimension of the arguments employed.

4.2. Remedial versus institutionalized discourse

According to the conclusion I drew in the end of my previous chapter, the judicial procedure cannot be considered a mere institutionalization of an application discourse. On the one hand, its discursive features exist, but are not as completely realized as one would expect from an institution making its best to be a legitimate discourse; on the other hand, its other features are not all aimed at the institutionalization of discourse, but are justified on the basis of other ends, strange to, or in some cases conflicting with, discourse itself. That gives the judicial procedure a mixed nature: while some features would remain unexplained without resorting to the idea of discourse, others would remain unexplained resorting to the idea of discourse alone.

That's why, in this chapter, I find it necessary to go one step further and say that the concept of an institutionalized discourse is not only prone to give a mistaken, unilateral characterization of the judicial procedure, but is a classification to be abandoned in favor of one more appropriate to its ambiguous nature. So I introduce the alternative concept of a remedial discourse, that, instead of a merely institutionalized discourse, is a mix of administrative and communicative power. It is essentially not a pursuit of consensus, but an enforcement of authority; it only takes in some discursive features (in the content and the pragmatic level) in order to improve the legitimacy of its outcomes and ensure compliance, thus achieving efficacy. It is not a discourse with elements of authority and coercion, but rather an administrative institution with elements of discourse.

If I said myself that the judicial procedure is a mixture of administrative and communicative power, claiming the enforcement of authority to be essential and discourse, accidental seems to be mistaken and discretionary. Mistaken for misrepresenting the deadlock ambivalence of the real picture and discretionary for going dashingly one way while it could just as easily go the other. However, three reasons might be invoked to explain why giving administrative power the upper hand is the right way to go: the first historic, the second pragmatic, and the third critical.

The historic reason is that, throughout the history of western procedural law, the enforcement of authority has never ceased to be present, whereas the discursivity of the proceedings had advancements and retreats, ups and downs, depending on the cultural, political and moral circumstances of the period. Even far back when debtors were dismembered, ordeals were good evidence, torture was legitimate interrogation, women were unreliable witnesses and the wrong formula meant ruin, the political sword never failed to give the final outcome its iron blessing. Besides, what distinguishes the judicial procedure from predecessors like bargain or arbitration are authority and coercion. All of that counts in favor of considering administrative power the very backbone of the judicial procedure - and discursivity, its accidental and shifting complement.

The second reason is pragmatic. Besides being a historical constant, the presence of administrative power, in the form of authority and coercion, is also a pragmatic certainty in every judicial procedure. In the most fortunate of cases, justice (the normative aim of discursivity) will be served as much as will administrative power be exerted. In the less fortunate ones, one of the halves will suffer – and power is almost never the one that suffers. In a trial, justice is merely possible. It is looked for, hoped for, fought for. But one can never leave a courtroom quite sure that it has been done. Now administrative power never raises the same doubt. It's visible, palpable, unmistakable. Maybe the debt wasn't real, but the car has been retaken. Maybe the defendant hasn't killed anyone, but now he is locked for life. If the judicial procedure goes on without justice, but not without power, so the latter is more constitutive of what it is than the former.

Finally, the critical reason at the same time stands for itself and follows from the other two: If one is to critically evaluate the judicial procedure, it is better to assume that discursivity might or might not be there and then verify whether it is one case or the other, than assuming discursivity is always there, only to discover that in many cases it isn't, or it isn't as much as it should. In fact, the reason why a critical evaluation is so relevant and required is that, whether justice is served or not, administrative power will, as certainly as it gets, be exerted over human beings. For critical purposes, assuming the certainty of power as constitutive for the judicial procedure, while expecting and demanding justice, is the best policy. Taking the suspicious departing point, to be the discursive skeptic, is better than take an over-optimistic one.

If the judicial procedure is a form of conflict-administration and recurs to discursive features in order to improve efficacy by means of legitimacy, then, what features of the judicial procedure are fashioned to be discursive? This answer has two steps. First I limit my exam to the modern judicial procedure, emerged from the rationalization of law, the statification of the judicial power, the establishment of the rule of law and due process, and the primacy of procedural rights. Second, regarding this type of judicial procedure, I sustain that two of its features were fashioned in view of discourse: the *form of the arguments* and the *form of the interaction*. On the one hand, at the content level, the parties' arguments - even if aimed at the satisfaction of the party's interest at the expense of truth and law - are to be presented as if intended to contribute to the discovery of the truest account of facts and the fairest account of law. On the other hand, at the pragmatic level, the interaction between the parties - even if turned into an agonistic competition and intended to influence solely a third party's decision-making - is to be handled in a dialogical structure, as if one party were responding to the other's claims and requests. As a consequence, the final decision of the judge will also be presented as intended to the truest account of facts and the fairest account of law and also be handled in a dialogical structure in relation to the parties' claims and requests. These will be treated by the final decision as factual and legal contributions to be assessed and candidates to decision to be accepted or dismissed on the basis of arguments.

Of course, taking power to be essential and discourse, accidental (as well as speaking of the *form* of the arguments and the interaction), doesn't mean I defend that judicial procedures perform only an appearance of discourse, a theater for fools, a chatter to conceal the horizontal agonistic relationship and the vertical imposition of authority and coercion. As Habermas explained in repeated texts, whenever power recurs to communication to improve efficacy by means of legitimacy, it allows itself to the same extent to be domesticated by communicative reason and, then, controlled to go only as far as the rational consent of the affected would let it. It is no different with the judicial procedure as administrative institution. Inasmuch as it incorporates discursive features within its working, it becomes less authoritarian and gets limited within the domain of moral justice and legal freedom. This process whereby administrative is domesticated by communicative power is very real and must not go unnoticed.

However, nor must this domestication phenomenon be overrated as to neglect that many times administrative power does go further than rational consent would let it, at least if said consent was sufficiently informed and critical. By taking advantage of the fact that the affected's opinion and will is to some extent manipulable with ideological arguments, administrative power manages to expand its scope of action beyond its ideally acceptable reach. When it comes to procedural law, this is the case especially when legal reforms concerned with improving celerity, uniformity, and efficacy are either wrapped in such thick jargon as to escape democratic scrutiny or disguised as measures to improve the protection of the addressees' rights (for example, respectively, the right to a timely decision-making, to equal treatment and to effective protection, as I explain in more depth in a later chapter). In view of that, it would be fair to say that domestication can actually go both ways and that finding the citizens' consent domesticated by power is at least just as frequent, if not more frequent, than the opposite scenario.

Besides this first characteristic, of being a conflict-administration with discursive features to improve efficacy by means of legitimacy, a remedial discourse has other two, which are equally important. It applies upon outer conditions that are not discourse-friendly and it doesn't leave the inner argumentative logic entirely intact.

When speaking of outer conditions of discourses, I mean the social scenario in which a discourse is to be attempted. They include objective conditions, like the social degree of freedom and equality of the parties, the social degree of efficacy and legitimacy of the administration in general and the judicial power in particular, the availability of material, technical, and personal resources to the best pursuit of evidence etc. But they also include subjective (and intersubjective) conditions, like the parties' disposition and ability of assuming a performative attitude as well as decentering and learning, the degree of solidarity and communication, as well as the culture of agreement or dispute prevalent in that particular society etc. Such conditions influence the probability of a discourse both to happen and to succeed. In the most favorable scenarios, discourse is more likely to emerge and to achieve agreement and understanding. In the less favorable, it must become ineffective or, at the limit, completely impossible. That's why I speak of discourse-friendly and discourse-unfriendly outer conditions.

Now, when outer conditions are discourse-unfriendly, discourse is, as I said, rendered ineffective or even impossible. These discourse-unfriendly outer conditions are precisely the ones where a second-best alternative to discourse must be attempted. Now, although I don't claim that remedial discourse is the only second-best alternative to genuine discourse, I do claim that it is at least one of them. The discourse-unfriendly outer conditions upon which it is applied are the following: the parties' incapability of agreement and understanding, to which remedial discourse responds with authority and coercion; the parties' hostile attitude to one another and strategic behavior, to which it responds with collection of evidence on the basis of agonistic dispute; the abundance of legal sources and the degree of specialization of the legal doctrine and language, to which it responds with technicality and representation; and the threat of social and cultural discourse-distorting factors, to which it responds with corrective and compensatory rules (this problem-remedy dynamics is explained in full detail in a later chapter). Inasmuch as it is a second best alternative and attempts at giving each of the problems an appropriate response, this "discourse" (actually, a conflict-administration with discursive features) can be called "remedial". The measures with which it responds to each discourse-unfriendly outer condition I call "remedial measures".

This leads to the final characteristic of a remedial discourse, that is, its partial compromising of the argumentative logic of judicial procedures. Now we have better conceptual tools to explain it. In judicial procedures, the application discourse is set in motion by the rules of procedural law. These rules encompass two types of additions: institutional conditions and remedial measures. Institutional conditions (of the kind explained in Habermas's *Erläuterung*) organize the temporal, social and substantive setting for an application discourse to take place; remedial measures counter-effect discourse-unfriendly outer conditions, replacing discourse with administrative power and resorting to some discursive features (the form of the arguments and of the interaction) to improve the efficacy of outcomes by means of their legitimacy. While institutional conditions simply turn application discourses empirically possible and discursively legitimate (according to the institutionalization requirement contained in the democratic principle), remedial measures interfere with the inner argumentative logic of application discourses, limiting this logic to operate only in the limited domain of the form of arguments and of the interaction.

As a result, the argumentative logic of application discourses is not left entirely intact. Many elements necessary for an application discourse to be a discourse *in toto* are absent in judicial procedures: the cooperation of the parties to achieve an agreement and understanding by themselves, an evolving process of individual decentering and mutual learning, the commitment of the participants with truth and justice, the complete intelligibility of the discourse language to the very participants, the freedom from authority and coercion in every stage of the argumentation, the affected's consent to the final decision etc. The only truly discursive elements that remain are, as I already underlined, the form of the arguments, that must be presented as contribution to the best solution of the case, and the form of the interaction, that must be handled as a dialogue among responsive participants. If these remaining discursive features are not too little to be ignored, for they can (and to some extent do) domesticate administrative power, nor are they much enough for one to claim that all the relevant characteristics of a genuine discourse can be found in judicial procedures. As remedial discourses, judicial procedures retain just the features necessary for the outcomes to be legitimate and, then, efficacious.

4.3. Improvement in cognitive power

Conceiving the judicial procedure as remedial, instead of institutionalized, discourse has some relevant advantages both in cognitive and in critical terms. This topic aims to examine two reasons why the remedial-discourse account would be an improvement in cognitive power. First, in the objective aspect, the concept of remedial discourse allows to better explain some non-discursive and anti-discursive features of the judicial procedure than one would do taking them to be mere institutionalizations. Second, in the subjective aspect, it also allows to reflect better the ambiguity of the experience of the participants, especially the senses of estrangement, make-believe and compulsion towards some aspects and moments of a judicial procedure.

First the objective dimension. A remedial discourse better explains some non-discursive and anti-discursive features of the judicial procedure. Here I refer myself mainly to these elements in procedural law I earlier called "remedial measures", like the deployment of authority and coercion, collection of evidence on the basis of agonistic dispute, the need for technicality and representation, and discourse-restoring attempts of corrective and compensatory rules. As they

distance themselves from what one would expect from a genuine discourse, they are hard to explain in terms of institutionalization alone. They don't implement empirical conditions for an application discourse, but strip the application discourse from some of its discursive features.

Illustrating my point with one pair of contrasting procedural rules might be of help here. Consider the rule that sets up the deadline for filing an appeal to a higher court (in short, appeal deadline) and the rule that authorizes the forceful taking of some of the debtor's goods to sell at a public auction (in short, bailiff's taking). If one conceives the judicial procedure only as an institutionalized discourse, one is likely to see both rules as institutionalizations, one in the temporal, other in the social dimension. The appeal deadline would be seen as setting temporal limit to avoid delay and over-length, while the bailiff's taking would be seen as setting a coercive expedient to make happen by force what the debtor would do voluntarily were if more committed to justice than interest. But that overlooks the important difference that, while there's nothing anti-discursive in time limits, coercion is a positive indication that participants are not being led only by the "unforced force of the best argument". In contrast, if the concept of a remedial discourse is available, the difference in question can be captured: while the deadline is an institutional condition, in the interest of the realization of discourse in time, the bailiff's taking is a remedial measure, counter-effecting the participant's unwillingness to accept the result of his argument's defeat, in this case, the consequences of the prevalence of the creditor's claim.

Now the subjective dimension. A remedial discourse better reflects the ambiguity of the experience of the participants. Here I refer myself mainly to the senses of estrangement, make-believe and compulsion they undergo in view of some aspects and moments of a judicial procedure. Examples of estrangement are moments where the participants are forced to go out of their ways (clothes, language, manners) to behave in the courtroom or where they can have little or no voice at all as to what decision to make next in their own suits because only their legal counselors are capable to understand the language and evaluate the predictable outcomes of the possible courses of action. Examples of make-believe are moments where the participants make insincere factual declarations (tenants that falsely claim that their landlords accepted them to pay the back rent later; defendants that claim to be innocent of crimes they committed etc.) or exploit questionable and manipulative interpretations of the law (companies that protect

themselves from liability by appealing to small printed clauses of contracts; parties' requests based on precedents known to be eccentric or irrelevant etc.) relying on the fact that it is "the way the game is played" and it is the "other party's role" to prove them wrong. Finally, examples of compulsion are moments where the participants are forced to do or not to do something that, were not for the financial or criminal consequences, they would have chosen otherwise (virtually almost every instance of submission to authority and coercion). In all these scenarios, the participants know, trusting in their intuitive grasp of the enterprise they are involved in, that, for better or for worse, they are not in a free and cooperative search for truth and justice.

Again, if all one has available is the concept of institutionalized discourse, the theoretical account of the judicial procedure one can provide would go in the opposite direction as those anti-discursive experiences of the participants. These subjective apprehensions would have to be proven as misinterpretations, mistakes, anomalies, or irrelevant exceptions. Now, if one has the concept of remedial discourse, the anti-discursive remedial measures that this concept already makes it expected to find in judicial procedures can both better reflect and explain those senses of estrangement, make-believe and compulsion the participants can report to have. This is evidence that the cognitive improvement the remedial-discourse account provides not only include the explanation of more objective elements of judicial procedures, but extends to the incorporation of more subjective experiences the participants in judicial procedures are used and likely to have.

4.4. Improvement in critical power

As I said in the beginning of the last topic, conceiving the judicial procedure as remedial, instead of institutionalized, discourse has not only the relevant cognitive advantages I addressed, but also some other advantages from a critical-theoretical standpoint. This topic aims to examine two reasons why the remedial-discourse account would be an improvement also in critical power, but each of such reasons demands an extra explanation about one feature of the remedial measures. First, the remedial-discourse account reintroduces the issue of the influence of self-interest, money and power in the distortion of communicative processes, reconnecting discursive theory of law and critical theory of society. This requires explaining that remedial measures, despite claiming legitimacy in view of discourse-unfriendly outer conditions,

can also be ideologically appropriated to sacrifice discursive features for the benefit of functional imperatives. Second, this account also allows for time diagnostics of the judicial procedure by identifying pathologies of celerity, uniformity and efficacy as forms the social pathologies of bureaucratization and mercantilization take in the procedural domain. This can't be sustained without explaining that, while remedial measures are originally associated with administrative power, they can easily make room also for the influence of economic interests and disparities.

For one, the first critical-theoretical advantage of the remedial-discourse account is that it brings back the issue of the influence of self-interest, money and power in the distortion of communicative processes. If institutionalization was all that was in judicial procedures, their rules could be taken to merely render discourse possible in view of empirical circumstances. That doesn't waive the red flag of communication distortion, ideology or colonization, at least not if one believes that institutionalization maintains the inner logic of application discourses untouched and intact. However, as soon as one realizes that, besides institutionalization, there are procedural rules that function as remedial measures and do interfere with the discursive logic of judicial procedures, it becomes real the possibility of such measures to be taken too early, too often or too far, not only by ignorance or mistake, but also in view of the pressure of discourse-distorting social factors. What claims to be remedial can in some cases actually be poisonous.

This would not be possible were not for one important feature of remedial measures: they don't counter-effect the anti-discursive problems with discursive solutions, but rather with equally anti-discursive solutions. Authority and coercion, for example, are as much anti-discursive as solutions as is unwillingness to cooperate, the problem it is aimed to solve. Agonistic competition is also as much anti-discursive a solution as is lack of commitment with truth and justice, the problem it is aimed to solve. Technicality and representation are also as much anti-discursive solutions as are the complexity of law and specialization of doctrine, the problem they are aimed to solve. They don't make the unfavorable conditions more discourse-friendly. They counter-effect them with anti-discursive remedies.

That's why they are *ideologically appropriable*: they are the open window through which anti-discursive factors expelled through the front door return unnoticed. Every entrance where anti-discursive concessions

are allowed is an immediate candidate for ideological exploitation. Inasmuch as it reintroduces this concerning issue in the debate over judicial procedure, the remedial-discourse account reconnects the one concern, dear to a discursive theory of law, with the normative self-understanding of modern legal orders (in which ways the judicial procedure is related to discourse?), with the other concern, dear to a critical theory of society, with the threats of strategic interaction or functional imperatives on communicative rationality (are the constraints on discourse in judicial procedure acceptable or ideological?).

Finally, the second advantage of the remedial-discourse account from a critical theoretical standpoint is that it gives the critical theorist tools to make time diagnostics, not on society in general, but on the judicial procedure in particular. One can understand and evaluate better the time in which we find ourselves in the history of the judicial procedure development by examining how much the remedial measures that interfere with the argumentative logic of trials are being used in the interest of functional imperatives.

This remark, however, calls for two clarifications. The first is that, considering only the political system, that is, the systemic domain of administrative power, the functional imperatives served by ideologically exploited remedial measures are three: celerity, uniformity, and efficacy. There's a connection of these three functional imperatives of power in judicial procedures and the three dimensions of institutionalization. Celerity refers to the temporal dimension, namely, to the shortening of the time length of both each stage in particular and the whole trial in general. There's a component of cost saving and productivity enhancement also involved. Uniformity refers to the social dimension, not among the participants, but among procedures, in order to make, in the pragmatic level, their proceedings as similar as possible and, in the content level, their final decisions as convergent as possible. There's a component of predictability and certainty also involved. And efficacy refers to the substantive dimension, namely, the guarantee that the outcomes of trials will be enforced and will influence the future behavior of the addressees. There's a component of power reassurance and social control also involved.

What makes these functional imperatives of administrative power in judicial procedures to go unnoticed in the ideological exploitation of remedial measures is that the three of them are each capable of association with at least one respective procedural right, giving it

opportunity to be presented in a form acceptable from the performative viewpoint. Celerity, instead of proposed as functional to cost saving and productivity enhancement, can be presented as normatively mandatory to protect a supposed right to a timely judicial decision. Uniformity, instead of proposed as functional to predictability and certainty, can be presented as normatively mandatory to protect a supposed right to equal treatment by the courts (deciding like cases alike). And efficacy, instead of proposed as functional to power reassurance and social control, can be presented as normatively mandatory to protect a supposed right to effective legal protection. As these ideological presentations and the respective procedural pathologies they allow for are explained in full detail in a later chapter, I will not go further in this first explanation in this topic. I will, instead, turn to the second explanation the remark above requires.

The second explanation concerns the relationship between remedial measures and the economic system. This relationship is established in two different ways, one general and indirect, the other topic and direct. The general and indirect way is that the advancement of the functional imperatives of administrative power in judicial procedures (celerity, uniformity, efficacy), inasmuch as it provides cost saving, predictability and social control, also benefits the working of the capitalist system as a whole. It is general because it doesn't benefit the economic interest of particular actors, but rather of all economic actors as participants in the capitalist economy. And indirect because it benefits capitalism just as much as it would benefit any teleological scheme (including, which is important, the individual's self-realization and life plans) that could take advantage of those features. Important as this relationship can be from the point of view of critical theory, for the satisfaction of capitalist demands may as well be a reinforcement of functional imperatives of administrative power, it doesn't open any new path of critical analysis.

Different is the topic and direct way the relationship between administrative imperatives and economic interests can go. This happens when remedial measures "clear the way for" strategic interaction and economic power in judicial procedures, much like Habermas says institutional conditions do for the application discourse. In a later chapter I discuss the examples of settlement and alternative dispute resolutions, since I believe to see in their incorporation as tools for celerity and small-scale agreement the sign of a real pathology in current

judicial procedure. So I won't get into both examples now. But there are plenty of other examples that illustrate the same pattern, that is, a remedial measure that ends up benefiting those in the best negotiation position. The increasing specialization of some requirements of evidence, concentrating the last word in matters of proof on complex and expensive technical reports make it easier for the richest party to achieve the most decisive evidence. Class actions that require the signature and consent of a multitude of affected individuals at the same time make it easier for big companies, with their army of lawyers paid by the hour, to have each of them not to agree with filing the lawsuit or appear as witness than it is for NGO's and private lawyers to have each of them to do either. Complex legal battles over long and detailed contracts make it easier for the party with more and better lawyers to get what they want in less time and to prevent the other party to have what it wants until the last day of the last appeal available.

Those are the cases where celerity, uniformity and efficacy become also target selective: they make all things work better for one side than for the other. This way both types of interests, administrative-functional and economic-strategy, intertwine in the same web. In this way pathologies typical to the judicial procedure may, in small scale, reproduce or reflect pathologies that affect society in general, namely, bureaucratization and mercantilization - which is another sense how time diagnostics of the judicial procedure may reconnect the discursive theory of law and the critical theory of society.

CHAPTER 5 – Critical assessment of remedial discourses

5.1 Introduction

This chapter aims to respond whether remedial discourses are to be praised or criticized, improved or fought against, from both a moral-political and a critical-theoretical point of view. The question is asked with view to four aspects (social necessity, private autonomy, public autonomy, emancipatory value) and the answers, as expected, are neither unambiguous nor final.

Concerning *social necessity*, the question is whether they are inevitable for *contemporary societies*. I respond that, in view of individuals turned morally ambiguous and strategically oriented, societies with various competitions and disagreements, and conflicts over irreconcilable interests and perspectives, resorting to some sort of coercive exercise of authority does seem inevitable.

As for *private autonomy*, the question is whether remedial discourses diminish or improve individual's self-determination. The answer is dubious. On the one hand, they diminish self-determination, for they treat participants as less than capable of reaching a free agreement by themselves and living together on their own terms; on the other hand, they improve self-determination, as long as they remove obstacles for self-realization and prevent one individual from violating other's rights with impunity. That doesn't come, however, without submitting each individual's life, freedom, and property to bureaucratic scrutiny and coercion and creating a litigious culture that threatens to corrode solidarity and cooperation and increase conflict and insulation.

On the issue of *public autonomy*, the question is whether they diminish or improve *popular sovereignty*. Here the dubiety recurs. On the one hand, remedial discourses diminish popular sovereignty (or at least the aspects thereof more connected with public autonomy), for they confine public matters of social coordination to the private participation of those directly affected and the bureaucratic decision-making of the judge or court in charge; on the other hand, they improve popular sovereignty, as long as they submit social conflicts to public general laws and give these laws the enforcement and efficacy they are expected to have in a successful democratic society. But, again, it doesn't come without a disempowerment of direct public power over matters of justice and a technification of law.

Finally, with respect to *emancipatory value*, the question is whether remedial discourses threaten or contribute to the ideal of a *society communicatively coordinated and free from coercion*. Again it can only be answered in a dubious vein. On the one hand, they threaten the ideal of free communicative society, for they embody the support of strategic interaction and the use of administrative power that distance a society from being consensual and non-coercive; yet, on the other hand, they can contribute to that ideal, as long as they exploit strategic interaction only in the interest of finding truth and achieving justice and resort to administrative power only to enforce legitimate applications of general, democratically made laws. However, one more time, it doesn't come without the perils of the functional colonization of law and juridification of society.

With this overview of the general debates of the chapter in mind, we can move to the examination of each aspect in particular.

5.2. Are they inevitable for contemporary societies?

Social necessity is the name of necessity of an institution in order to serve some relevant function in a certain stage of social development. It encapsulates the larger question about the necessity of something like a remedial discourse for late modern societies, with the characteristics and problems peculiar to the latter. It is a question both simple and indispensable, but in no way easy to answer to.

Before tackling the subject of what "necessity" means, I underline that, in the relationship between remedial discourse and late modern societies, the first retains the meaning I gave it last chapter, while the latter correspond to the three-level social ontology (culture, society and personality) Habermas adopted since TCA. Therefore, on the one side, remedial discourses are dispute-solving administrative routines that incorporate some discursive features for the sake of legitimation. They are not discourses, but rather the next best thing, an exercise of administrative power following some discursive lines.

On the other side, late modern societies are supposed to be those distinguished by, at the level of culture, the separation of validity spheres and the rationalization of lifeworlds beyond tradition and metaphysics; at the level of society, the autonomization of the two functional systems of administrative power and market economy and the central role of law in both the coordination of action and the institutional

organization; and finally, at the level of personality, by individuals both self-interested (instrumentally and strategically oriented) and capable of problematize and agree with each other. So, regarding the question of the social necessity of remedial discourses in late modern societies, the two ends of this relationship are that administrative routine with discursive features and these rational, divided and complex societies.

Now about "social necessity". Claiming that something is "necessary" can mean different things. It is philosophical common practice to distinguish between logic and empirical necessity. According to this dichotomy, social necessity would be empirical. But while empirical necessity refers to the laws of the physical world scientifically proven to exist (at least in a realistic reading), there are no "social laws" social necessity could be grounded upon. It depends on an accepted social ontology, as proposed by some social philosophy or science, containing both the social functions to be served and the conditions for mechanisms that serve such functions to work. Its guidelines and limits are hypothetical and theory-dependent. A mechanism is necessary in a certain society if, according to some social philosophy or science, it is "the only viable way" to serve an important social function within the particular constitution and development stage of that society.

The real problem is that "the only viable way" to serve a function is actually a slippery notion. How one is supposed to know that? How can one be sure that no other mechanism would do the job as effectively? Are we dealing with the limits of a social ontology or with the limits of our institutional experience, knowledge and imagination? How can we know how well or badly an alternative mechanism would perform (both in the short and the long run) if attempted? In terms of necessity: If one is not sure of the limits of what is socially possible, how can one say anything about what is socially necessary?

That last troubling question is probably the cue for a shortcut. For the sake of this discussion I assume there's enough evidence that something is socially necessary whenever it performs, all things considered, better on serving an important social function than every other acceptable alternative known and tested until now. So the social necessity I take into account is subject to a triple restriction: it is limited to known and tested alternatives, limited to acceptable alternatives and comparative in terms of performance against concurring possibilities.

What would then be the concurring possibilities in the case of remedial discourses? Well, since the problems remedial discourses are set out to solve are conflicts of interests and claims within a democratic and law-ruled society, we ought to leave aside violence, intimidation, bribery and manipulation and focus on the acceptable known and tested alternatives: counselling, conciliation, mediation, and arbitration – the mighty four of alternative dispute resolution. These methods alternative to litigation are the concurring possibilities remedial discourses are to be measured against to respond whether they are socially necessary.

What we are talking about here is a scheme capable to handle and solve all, or at least most, of the conflicts of interests and claims arising in a modern, complex, pluralistic and individualistic society, conflicts that extend from neighbor disagreements to corporation fusions, from criminal judgments to environmental tragedies, from labor issues to constitutional disputes. This degree of generality can hardly be hoped for with some of the aforementioned methods.

Counselling is a dispute resolution where an expert gives legal advice to one or both parties, who, cognizant of the norms, the costs and the odds, might give up the dispute altogether or seek a solution other than litigation. Counselling solves the problem only when one or both parties are inexperienced with the relevant law and can benefit from the counselor's objective opinions. Since most parties in litigation would arguably keep the dispute going even after given information about the law and their chances, this method can't replace litigation as a whole. It relies too much in the power of legal information. It can only be thought of as a filter intended to discourage and withhold some conflicts and diminish the total amount of cases that reach the litigation phase.

Conciliation and mediation are similar, for in both the parties dialogue and reach a voluntary agreement still in a pre-trial stage, with the difference that conciliation takes minimal third-party coordination, while mediation relies heavily on it. Conciliation and mediation both depend on the parties' willingness to dialogue and compromise, which is rare and inconstant to say the least – especially if there was no time and money consuming litigation to compare it with and turn the parties less stubborn and belligerent. In conflicts where the matter is too important or confrontational to negotiate or compromise with or the relationship between the parties is too strained or harmed to still allow for good will, proposals of conciliation and mediation are expected to be rejected or fail at reaching a final solution. Both methods rely too much on dialogue

and understanding. This type of communicative solution would work for most cases only in a very small, traditional and solidary community.

Finally, in arbitration both parties agree, before or after conflict, with presenting their claims to a third person and complying with the decision she makes. Arbitration retains most characteristics of litigation, except for running cheaper and faster, having more flexible rules and being carried by arbitrators that might not be lawyers. For the purposes of our brief comparison, it would be a shorter and cheaper remedial discourse at best, and not an alternative to it. More important: the fact that parties informed past counselling and antagonistic past conciliation and mediation usually recur to arbitration as next step is the strongest testimony that remedial discourses are a social inevitability.

5.3. Do they diminish or improve private autonomy?

Even accepting that remedial discourses are necessary, it would not mean they are correct or legitimate. That equation would be guilty of a naturalistic fallacy. Certain things are currently inevitable but highly problematic, such as bureaucracy or capitalism, and remedial discourses could easily be one of those. If we are to give remedial discourses a normative evaluation, we should look at their capacity to advance some normative ends. In our reading of Habermas's theory of law, the natural candidates to such ends are private and public autonomy. So in this and the next section I investigate whether remedial discourses diminish or improve private and public autonomy.

Before examining the relationship of remedial discourses with private autonomy, however, I would like to say some words about two possible objections. On the one hand, one could say, first, that whether remedial discourses improve private and public autonomy is irrelevant, and my only concern should be whether they enable communicative rationality to generate final decisions that are legally adequate. On the other hand, one could say, second, that, since private and public autonomy, when properly understood, have been proven in Ch. 3 to be congenial and co-dependent, one can only examine whether something diminishes or improves both at the same time, but not each at a time. I have to address this liminal objections before going forward.

Against the first suggestion, I must show how circular in a bad sense it would result. If I should examine whether remedial discourses enable communicative rationality to generate legally adequate decisions,

I would be checking whether they are discursive enough to come to the right answer. But that is the question of whether judicial procedures are discourses, the one we have been answering since the beginning of this work. If I managed to show that judicial procedures are not full-fledged discourses, but at best remedial discourses, to inquire now whether remedial discourses succeed to be full-fledged discourses would take us a step back, not forward, in the investigation. Having established that judicial procedures are administrative routines short from discourses, the question that now needs to be asked is how far they land from the target, or, which is the same, how much they compromise the normative ends a Habermasian critical theory would deem most necessary. That's the reason for choosing private and public autonomy to play the metric role. The more remedial discourses shorten both sides of autonomy, affecting freedom and citizenship, the more unacceptable, and therefore deserving of vigorous criticism, they would prove themselves to be.

As for the second objection, I shy away from interpreting Habermas's thesis of the congeniality of private and public autonomy as meaning they can't be examined no other way but together. Habermas, in the passages he refers to losses for one side implicating losses for the other, seems acceptant that both losses can first be measured separately and then be shown to be connected. For example, censorship would be a loss for free speech (private autonomy), which would then bring about a loss for political debate (public autonomy). Dictatorship, on the other hand, would be a loss for political self-determination (public autonomy), which would then bring about a loss for proper protection of freedom (private autonomy). In both cases, the fact that the losses are connected doesn't mean they are the same or can't be measured separately. It also doesn't mean that one thing can't be a bigger threat to one than to the other or affect both in different ways. That's why I consider not only possible, but also desirable to examine the impact of remedial discourses first on private autonomy and then on its public counterpart.

Done with the objections, the next methodological step before studying the relationship of remedial discourses and private autonomy is deciding whether the latter should be taken in its pre-constitutional or post-constitutional meaning. Considering as constitutional the moment where, according to Ch. 3 of FN, the five groups of unsaturated basic rights are saturated by the political legislator, the pre-constitutional meaning of private autonomy is self-determination of the individual, while its post-constitutional meaning is the saturated rights thereafter

constitutionally provisioned and guaranteed in at least the three first groups of Habermas's list (and maybe also in the fifth).

But there's a reason to stay away from the post-constitutional meaning of private autonomy. Past the constitutional moment, the basic rights of the three first groups are part of the constitution, rendering illegitimate violations of them unconstitutional. So adopting the post-constitutional meaning of private autonomy would turn the question of its being diminished or improved with remedial discourses in one about the constitutionality of remedial discourses, replacing a moral-political evaluation for a formal-legal evaluation and losing in critical bite. After all, what we want to know is whether and to what extent remedial discourses compromise the individual's self-determination – and not the excuses that can be made for that loss not being unconstitutional. Hence I will maintain the more basic and pre-constitutional sense of private autonomy while discussing the impact of remedial discourses over it.

The first and most obvious respect of how remedial discourses diminish private autonomy is that they are mandatory and coercive. I already examined in my third chapter the aspects of judicial procedures that are incompatible with various exercises of freedom. I won't repeat myself about it. But the freedom I showed the judicial procedure to diminish is the ones internal to discourse (like free participation and expression) and the ones external but connected to it (like the portion of life, liberty and property taken from the defeated party by the judge's decision). However, there's another way remedial discourses diminish private autonomy: they treat participants as less than capable of reaching a free agreement by themselves and living together on their own terms.

Of course, one can say that no party of a judicial procedure is forced to give up trying an amicable agreement with her neighbor and living on the terms they reach together before filing her complaint to a court. There's no direct coercion involved. But there is an indirect one, in the form of a disincentive to one party to propose an extrajudicial agreement to the other and to the other to accept it, if it is nonetheless proposed. If a landlady wants to solve the problem of her tenant's back rents, it is easier for her to contact the tenant threatening to sue and evict her right away unless she pays what she owes and, if it doesn't work, effectively suing and evicting her as promised than trying any form of extrajudicial solution by means of dialogue or negotiation. If the indebted tenant, by her turn, proposes a payment plan of the back rents that works for her, the landlady is less likely to accept it, once she

knows she can obtain her money or her place faster through an eviction process. Even if the landlady finds her tenant's payment plan fair and is willing to accept it, she would prefer to do it during the process hearings, having the tenant's promises written down on paper and enforced by a judge, than just taking her word and expecting her punctuality to be upgraded thenceforth. In this sense, the availability of a bureaucratic and coercive procedure (as long as it be inexpensive and fast) works as a disincentive to attempt an extrajudicial agreement. Their private autonomy as free individuals capable of cooperation and understanding is diminished by the interposition of remedial discourse as the primary channel for their relationship. (This shared private autonomy, as ability to communicate and achieve an understanding free from coercion by means of consensus, is the aspect of the lifeworld of individuals that advocates of dispute resolutions like conciliation and mediation say they recover and promote. As we shall see in my next chapter, a critical theory should take that with a grain of salt.)

On the other side, following the same example, the landlady's rights to her place and her rent are being violated by the tenant's refusal or inability to pay (continuing injustice). And the alternative to mutual understanding would probably be a violent charge or eviction that could violate the liberty and safety of the tenant (imminent violence). In view of that, remedial discourse looks less unfair and harmful. If it diminishes their shared private autonomy in one sense, it protects their competing private autonomies in the other. It guarantees that the landlady won't bear an undue prejudice and the tenant won't be treated with disrespect when forced to pay or leave. When remedial discourse compares to free agreement, it strikes as coercive and violent, diminishing the private autonomy of the individuals to living together on their own terms; but when it compares to continuing injustice or imminent violence, it strikes as more fair and secure, protecting the private autonomy of both parties. Since in other legal fields like labor law, criminal law, environmental law etc. the types of continuing injustice and imminent violence could be even worse and more dangerous than in the landlady-tenant example, other legal examples are likely to reinforce the same conclusion.

But then again, this protection comes with a price. There is a secrecy to both the landlady's and the tenant's lives that is paramount to their private autonomy. Personal freedom lies where the public eye is left in the dark. Certain parts of their lives shouldn't have to be brought to light or scrutiny, and forcing them to do so in order to have either

money or a place to live is a form of privacy violation. That these acts of self-revelation are often voluntary and painless is no proof that they are free or non-violent. They aren't free, because the sacrifice of privacy is seen as necessary to achieve another end felt as more important. They aren't non-violent either, because their being painless only shows how legitimated and normalized they became in a society ruled by law. It is only in certain cases and situations, where the information at stake is more sensitive and the secrecy, more precious (a discriminated disease, an embarrassing fetish, an intimate pastime, a shameful love affair, a hurtful memory, a traumatic episode of molestation or rape etc.), that the coerced and violent character of the self-revelations becomes apparent. But it\s always been there. The protection of private autonomy in one aspect is then paid with the sacrifice, often voluntary and painless, of the same autonomy in another. Secrecy – a cornerstone of private autonomy – is the price one must pay for protection.

There's one more damage to private autonomy. Where a litigious culture establishes itself and takes over the life of a community, it bleeds the sources of self-comprehension and solidarity to the point where people begin to treat each other with safe distance and constant fear. People become less likely to speak, interact or help and more prone to antagonize, distrust and hurt. The juridification of culture weakens both morality and fraternity and replace a once meaningful lifeworld for a now lifeless social wasteland where no one can enjoy living together. Maybe no community has ever suffered a solidarity loss to that extreme and dystopian extent. But judicial procedures, as remedial discourses, carry that risk in their DNA and will spread their plague wherever and whenever they become frequent and likely enough. As insulation and hopelessness are not a healthy environment for the exercise of freedom, that risk, however distant or unlikely, has to be addressed in any list of the possible impacts of remedial discourses over private autonomy.

5.4. Do they diminish or improve public autonomy?

As was the case with its private counterpart, public autonomy too has to be treated in our assessment with its pre-constitutional meaning. If in the post-constitutional moment, public autonomy can be identified with the popular sovereignty a citizen enjoys by means of her basic rights to political participation, in its pre-constitutional moment it is still the community's self-determination by means of political decisions.

It would be easier to prove that the fact that citizens don't get to decide the legal cases brought to court is no violation of their basic rights to political participation. After all, those rights, once saturated by the political legislator, are generally confined to the ability to cast a vote in open general elections, to use free speech and association in the public sphere and to have a say or a seat in plebiscites, referenda and popular councils. But, since republican experiences of the past (like Athens) saw judging as a citizen's duty and power, what that approach would fail to address is whether the removal of the right to judge from the content of popular sovereignty is a decrease in public autonomy. That's the reason why we should maintain the concept of public autonomy with its pre-constitutional meaning and then widen the range of critical scrutiny we are to exert on remedial discourses.

I admit in advance that, in our day and age, considering the possibility that the public should be called to judge every judicial case sounds not only odd, but also truly unnecessary. For apparently the judicial cases are way too many and the law way too technical for it to even count as a viable model. The countries where juries remain legally existing and relevant usually limit them to few legal subjects and submit them to the expertise of a judge that gives the relevant information and writes down the questions to which the jurors respond (individually or collectively). No trace can be found of the ancient model of a jury of hundreds of citizens called upon each new case in every branch of law and casting votes to decide the parties' fate without orientation or instruction. It can't but smell to misplaced neo-Athenian nostalgia – a philosophical fault of which no true Habermasian should be guilty.

However, I would advert that the exclusion of what we can call "popular jurisdiction" is contingent, but not necessary, to constitutional democracies. There's nothing in popular jurisdiction incompatible with constitutional democracy. Wherever the constitutional legislators chose to give jurisdiction to a publicly selected body of professional lawyers, they could have chosen otherwise and had it given to citizens. The right to have one's demands appreciated by public jurisdiction would remain protected whether the jurisdiction was professional or popular; the right to multiple levels of jurisdiction, where it is a basic right, would also remain protected whether all the levels were professional or popular. The fact that constitutional democracies have juries among their models of jurisdiction for some cases witnesses that the same model could be applied to many other, if not all, legal subjects. If some conceptual

impossibility would prevent jurisdiction from being popular, it would do so for every case, and then even the juries that do exist would be violations of the citizens' rights. If that's not the case, then juries are conceptually possible models of jurisdiction and popular jurisdiction would be just as compatible with constitutional democracy if applied to the totality of law. Suddenly it's not so odd anymore.

One could object that what I call popular jurisdiction would retain many characteristics of regular litigation and change only who is the one to make the final decision: a body of citizens, instead of a professional lawyer. In this sense, it wouldn't be an alternative to remedial discourse, but rather a modality of it. That objection would be half true. Indeed, many characteristics of litigation - some of which incompatible with the idea of a discourse, like coercion instead of freedom, dispute instead of cooperation, multiple influences of inequalities etc. - would remain in popular jurisdiction. However, it doesn't follow that it would be a simple modality of remedial discourse. Remedial discourses are administrative routines, which mean they are exercises of administrative power. If we take seriously the distinction between communicative power of the public sphere and administrative power of state bureaucracy (Ch. 4 of FN), then, popular jurisdiction would be a form of public sphere - institutionalized, like the parliament, or even a general assembly of citizens, would be, but still belonging to the public sphere - where communicative power would be generated and exercised. If authority and coercion were present, these would be the authority of the people reunited and the coercion of the decisions they make together. Something to be carefully distinguished from the authority and coercion of the bureaucratic state, that as exercise of administrative power, can only be legitimate by the indirect means of domestication by the communicative power. Popular jurisdiction would be an exercise of communicative power and, as such, should not be mistaken with remedial discourse. The difference would be sensible.

One could also object that, if popular jurisdiction is not remedial discourse, then professional jurisdiction wouldn't be so either. After all, it would be possible to reinterpret professional jurisdiction as no more than a popular jurisdiction that followed a career-based model. For example, given the number of cases, popular jurisdiction would have to assign some citizens to each case, as representatives of all the citizens. Even so, the same citizen would be called for many trials. Given the complexity of law and of the cases, the citizens assigned to them would

have to spend a lot of time studying the law and the cases. If these citizens had certificate formal training in law and had official salaries paid by the state in order to exercise that task full time, their ability and efficiency to perform their task would increase considerably. That would result in professional judges. If one citizen-judge was assigned to each case, that would greatly improve efficiency and specialization. But, as many cases would have results that might displease those in charge of hiring and firing, the free judgment of the professional judges would be better secured if their positions were stable and lifelong. Suddenly all the aspects of professional jurisdiction would be present in this career-based model of popular jurisdiction. And even if the career-based model was deserving of criticism, one couldn't deny that it would be at least one of the legitimate models for a popular jurisdiction to take in order to be sustainable along the time.

This objection sounds appealing, but is actually deceptive. The fact that a career-based model of popular jurisdiction is one of the legitimate models how it could be realized doesn't mean that it would retain the non-bureaucratic, non-remedial nature of popular jurisdiction. The career-based model implies that some citizens would judge and others would not, implies that the citizen-judge would judge alone and not in dialogue or confrontation with others, implies that a formal training in law is the feature a citizen should have to be a judge, implies that a citizen-judge who is judge full time loses contact with the other aspects of being a citizen and with the views shared by the other citizens and implies that a stable, lifelong judge position would convert the citizens-judge in another branch of the state bureaucracy etc. I would prefer to say that the career-based model of popular jurisdiction is no popular jurisdiction at all, for it represents all that bureaucratic jurisdiction is and became in most late modern societies. But even if one defends that the career-based model is a form of popular jurisdiction, one would have to concede that it is not the most fruitful form to compare with remedial discourse, because it is remedial discourse with another name. I insist in giving remedial discourse the contrast of the more political and citizenship-based model of popular jurisdiction.

In view of that, I claim that just as, concerning private autonomy, remedial discourses were to be compared with free understanding on one side and injustice and violence on the other, now, concerning public autonomy, remedial discourses are to be compared with the best and worst aspects of popular jurisdiction. The best aspects are summarized

in the formulas “people over judges” and “people over parties”, while the worst ones are so in “juries over law” and “juries over people”.

On the one side (“people over judges”), remedial discourses do diminish public autonomy. An important aspect of political power, namely judicial power, is taken from the citizens and given to lawyers. One could say there’s no loss in that, because judicial power is limited to democratically made law and does nothing but apply it to particular cases. But that would be guilty of the formalist picture of judicial decision-making as the reproduction to particular cases of the contents of general laws (as in Montesquieu’s depiction of a judge as the “mouth of the law”). Ch. 5 of FN, that I summarized and explained in my first chapter, begins precisely with the realization that that view of the law is no longer credible. Rules are partially indeterminate, language is built with an open texture, texts can be interpreted in multiple ways and no interpretive, analogical or filling formula can make the problem of judicial discretion disappear. If both legal indeterminacy and judicial discretion are inevitable, then, judicial power can longer be represented as secondary, modest or irrelevant. If the citizens have the right to make a law, but that law can be interpreted and applied to a case in two different ways, why wouldn’t the same citizens have the right to decide which of the ways should prevail? If the choice of the law that should exist is political and suitable for the people, why would the decision between different ways to interpret and apply the same law be less so? Insofar as remedial discourses prevent the public to decide how to interpret and apply the law made by and for the public, remedial discourses diminish public autonomy.

Another aspect (“people over parties”) diminishing of public autonomy is that remedial discourses limit judicial participation to those directly involved in each case. There’s this liberal and individualistic idea that in a conflict between A and B, A and B are the only ones affected and interested in a fair solution. But a case can be made for a more republican and collective approach. One can say that in a conflict between A and B, the whole community is affected and interested in a fair solution. There’s a sense where the interest for justice is an interest of every citizen in every possible case, no matter the nature of the case or the identity of the direct involved. Some of this is present in criminal cases being named “the people versus defendant” in the US and “the Queen versus defendant” in the UK and then being filed and prosecuted by district attorneys instead of private lawyers. So is it with some class

or collective actions, concerning public accounts, human rights and the environment, where public attorneys represent the whole community against some particular (like in Brazil). But even that might still give the impression that the whole community is only interested in the victory of one side. In fact, if the defendant is innocent, the whole community should be interested in the absolution. And the same goes for the victory of either the plaintiff or the defendant in regular and small civil cases.

There's an objective interest of the public that a plaintiff like the landlady of my example from before, if her payments are due but late, have her back rents paid or her tenant evicted, just as exists an objective public interest that her tenant, if she is in good standing with payments or can pay her back rents in some effective and mutually beneficial way, recovers her good name and retains her rented house. Every citizen other than the landlady and the tenant of this case could be affected and interested in a fair solution for their dispute. Maybe the citizen thinks that someday she might be the one wanting her back rents paid or her tenant evicted, or might be the one wanting to come back to good standing and avoid eviction. Maybe she is concerned with rental defaults or housing deficits in the current economic climate and context and wants to help finding reasonable solutions for that. Or maybe she is just so civic and involved with the state of community members in general that every possibility of justice or injustice affects her at a moral and personal level. Whether every citizen considers the possibility of being in the same position of the parties in the future or have an interest for solutions and justice regardless of self-interest considerations, a case can be made that limiting the participation to the parties directly involved, like remedial discourses do, is a sensible decrease in public autonomy.

On the other side ("juries over law"), remedial discourses actually improve public autonomy. If self-government is one of the core values of public autonomy and self-government takes the form of a legal association of citizens ruled by positive law, then positive law is one of the main expressions of self-government. Ideally speaking, professional jurisdiction, as found in remedial discourses, is more likely to be limited to the application of the existing positive law than popular jurisdiction. It is so because the foundation of professional jurisdiction is lawyers' technical expertise (something very different from legislative power), while the foundation of popular jurisdiction is the citizens' political power (something much similar to legislative power). Say, following Hart's famous example of legal indeterminacy, a law prohibits vehicles

from entering the park, but we don't know which meaning of "vehicles" ("all vehicles no matter what" or "vehicles that pose a threat to peoples' safety") should be applied to certain cases (a bicycle, a pair of roller-blades, a baby carriage etc.). A professional judge is more likely than a popular one to choose between both meanings according to some patterns and purposes found in law itself. She is also less likely than a popular one to take this opportunity to restrict, expand, distort, divert, cancel or change entirely the original content of the law (deciding, for example, that backpacks, flyers, boards and banners, despite not being vehicles, should also be forbidden to enter the park). It means that popular jurisdiction would convert itself more easily into a second act of legislation instead of an instance of application of the existing law. That would weaken public autonomy, instead of strengthen it; would take steps towards the authoritarian scenario of casuistic legislation, with decisions made ad hoc, applied retroactively and contradictory with each other both in space and time. By avoiding that and strengthening the limits of existing positive law, remedial discourses protect popular sovereignty and, in that sense, improve public autonomy.

Other trait ("juries over people") improving of public autonomy in remedial discourses is their ability to prevent the replacement of the general understanding and will of the people for the particular ones of the jurors in the case. Now I'm no longer talking about going beyond the law, but rather about going, within the limits of law, against the people's understanding and will behind the law. Consider the example above of the prohibition of vehicles in the park. If, say, the legislators (as people's representatives) made the law having the "all vehicles no matter what" meaning in mind, but the jurors in a case reject that view and prefer the "vehicles that pose a threat to peoples' safety" one, deciding, for example, for the allowance of bicycles, roller-blades and baby carriages, popular sovereignty would now have been usurped in a another way. Depending on the dominant judicial culture, professional judges in remedial discourses would be less likely to disregard the legislators' understanding and will in the process of applying the law they made. Their decisions would tend to renew and reinforce the inner connection between the judgement of a concrete case and the general understanding and will realized in the democratic law-making. In yet this way remedial discourses respect popular sovereignty and improve public autonomy. (If one thinks that, given Habermas's endorsement of Dworkin's interpretivism, considerations on the legislators' intentions have been permanently put to rest, one would be advised to check

Dworkin's support of these considerations, based on the respect for equity, in Hercules' method as applied to the Snail Darter case, in *Law's Empire*, Ch. 9. Since Habermas doesn't explicitly desert such position and it is somehow unclear how it interacts with the role assigned to legal paradigms in Ch. 9 of FN, one should accept that legislative intents might be at least part of the judicial concerns of democratic judges even in a Habermasian reconstruction of their activity.)

Something that can't be overlooked in these considerations is the tension between popular jurisdiction and the counter-majoritarian nature of some individual's basic rights. Popular majorities can turn tyrannical. A popular jurisdiction model would tend to follow a majoritarian logic and then make it difficult to protect some individual rights when the public opinion and will weigh heavily on the other side. So happens in criminal cases with defendants precipitately found guilty or demanded to be treated as less than citizens by public opinion. So happens in civil cases with parties who enjoy wide public dislike or have preconceived expectations against them. Unless the judicial culture of the citizens is very aware and combative of their own biases, casting votes to decide cases with majoritarian distortions would only confirm the predictions of irrationality and give public mistakes a delusive aura of legitimacy. So in yet this sense remedial discourses, insofar as they are less likely to give away to majoritarian irrationality, improve popular sovereignty in the sense that they keep it from doing injustices from which it would have been too blind or weak to steer away on its own.

Of course, the three last considerations, that favor remedial discourses over popular jurisdiction, must be taken with one caveat: the probabilities for each result depend on expectations about the dominant judicial culture. Professional judges are assumed to have a dominant judicial culture more passivist and self-restrictive, more technical and formalist, more vigilant with coherence and stability etc. Popular judges are assumed to have a dominant judicial culture more active and non-self-restrictive, more political and purposivist, more concerned with consequences and utility etc. Either if professional judges have a more activist judicial culture or popular judges have a more passivist one, the odds would change drastically or even reverse completely.

So one could argue that the advantages granted above to remedial discourses could not only fail to exist in the real world but also just as well be cultivated in regular citizens in charge of popular jurisdiction. That is very true. But also true is that it is arguably easier to have a

passivist judicial culture among lawyers trained for a long time to put their opinions and preferences aside and follow the law made by the people than among citizens that see themselves as the very people that made the law and could easily have made it otherwise, had they known or thought at that point what they know or think now. That remains an upper hand of remedial discourses over popular jurisdiction on the issue of respecting popular sovereignty.

5.5. Do they threaten or contribute to emancipation?

Finally, with respect to emancipatory value, I will outline a first look on the issue, since the next chapter gives it a more specific approach and attempts at doing a time diagnosis of procedural law in general, cataloging three pathologies I envisage as structural tendencies on the western common and civil law traditions. So in the present chapter I won't speak of the emancipatory value of remedial discourses from a perspective situated in a particular context. Instead, I address the subject from the standpoint of the potentials of remedial discourses to serve both emancipation and domination.

Next I need a referential for what emancipation is or looks like. Quite slippery a task. Since the term is highly idealistic and consistently transcendent of every attempt at defining its contents and limits, a provisional definition, gathered from Habermas's theory itself, will have to do and be good enough. From this point of view, the question is whether remedial discourses threaten or contribute to the ideal of a society communicatively coordinated and free from coercion.

Even at this early stage, an objection can be made against my attempt at measuring emancipatory value by using the ideal of a society communicatively coordinated and free from coercion. One must say that, according to Habermas's version of critical theory, emancipation can only be found as a potential, ever in the way of being realized but blocked by some structural obstacles and threats, and never as a fully realized state, forged in the philosopher's imagination and treated as a Utopian condition to be achieved. That is correct, but too hasty and zealous against Utopian references. Of course, the last temptation a critical theory should fall into – second only to skeptic realism and cynic praise of reification – is the normative transfiguration of Utopia. But a society communicatively coordinated and free from coercion is less a Utopian end or stage of progress than an inherent self-comprehension of social relations by means of communicative rationality. In less jargon-

filled terms, it is what the agents already struggle to have every time they pursue an understanding by means of language. Expressing an ideal in the form of a goal isn't the same as hypostasiating it to serve Utopian functions. As long as it doesn't require for humanity to overcome itself in search for final reconciliation or invite humanity to endure sufferings and injustices in hope for an inevitable redeeming future, an immanent ideal in critical theory can be normatively ambitious without the risk of being methodologically unacceptable. So I'm not recurring to Utopia.

Now the assessment. On the one hand, remedial discourses threaten the ideal of a free communicative society, for they embody the support of strategic interaction and the use of administrative power that distance a society from being consensual and non-coercive. We can conceive of the judicial-procedural relationship as a triangle where the two vertices at the base are the plaintiff and the defendant and the upper vertex is the judge. Following this image, the problem in the horizontal line, the relationship between the competing parties, is that remedial discourses allow and invite them to behave so strategically that the cooperative search for truth (or the right answer) turns second to the pursue of self-interest (the end of winning). On the other hand, the problem with the vertical lines, the relationships between the judge and each party, is that remedial discourses rely so much in authority and coercion that the room procedural rules carve out for the communicative power to flow through is increasingly filled with administrative power in the form of standards, limits, deadlines, assumptions and impositions, to the point where the final decision enjoys very little of the credibility of a communicatively achieved consensus. The more frequent and pervasive litigation gets, the more it infuses all aspects of the lifeworld of the individuals with the same amount of contentiousness, formalism, bureaucracy and authoritarianism they get used with in the courtroom. It serves well the anti-pedagogic function of presenting individuals with a paradigmatic representation, to be internalized and reproduced, of the systematically distorted relations of late modern societies in general.

On the other hand, remedial discourses can contribute to that ideal, as long as they exploit strategic interaction in the interest of finding truth and achieving justice and resort to administrative power to better enforce democratically made laws. To proceed with the triangle metaphor, the discursive nature of at least some features of remedial discourses allow them to revert the same lines that serve domination in order to achieve emancipation from within. Along the horizontal line, of

the relationship between the parties, the judge can take some advantage of their competition to generate as many evidences and arguments as possible to one side and the other so that her task to make an impartial and informed decision can be performed. And along the vertical lines, of the relationship of the judge and the parties, the latter can use the democratically made law and the open texture of their basic rights to argumentatively force the former to go beyond authority and coercion and reconnect her administrative power with the communicative power of both positive law and their semi-discursive exchanges. In this case, the courtroom makes for a perfect representation of social relations in late modern societies (or even in general): systematically distorted at first, but always filled with an inner potential, even if hidden, weak, limited and unlikely, for criticism, transcendence and emancipation.

So remedial discourses, like law in general, is traversed by two tensions between validity and facticity. One is internal and follows the lines of the relationship between the parties and the judge, where strategic competition turns into discursive cooperation (and vice-versa) and coercive authority turns into legitimate decision (and vice-versa). The other one is external and covers both the effort to block and frustrate the communicative potential of remedial discourses (turning the judicial procedure more and more selective, unequal, standardized and bureaucratic) and the effort to use remedial discourses as a replacement for democratic decision-making in order to use coercion to impose political agendas that serve functional imperatives (making more and more aspects of private and public life justiciable). The former reverts the relationship between form and purpose asphyxiating purpose in the name of form, while the latter reverts the relationship between democracy and courtroom submitting society in general to judiciary power. A critical theory must be attentive to all these tensions and diagnose at each time how this game of forces is manifesting itself. That exam and diagnose is what in the next chapter I intend to prove to have become possible with the concept of remedial discourse in a way that earlier was not with institutional discourse. That will be the ultimate justification of this doctoral thesis as a whole.

CHAPTER 6 – Time diagnosis of procedural law

6.1. Summary of the next three chapters

The aim of the next three chapters is providing a critical assessment of the current situation of the constellation of discursive and anti-discursive forces in procedural law and mapping some tendencies I identify as pathological in the changes procedural law has been undergoing in the last decades. To this end, I develop the chapter according to the sequence of items listed and summarized below:

a) First, I try to give the critical-theoretical term of art "time diagnosis" a meaning suitable for the task I consider possible and want to accomplish regarding current shifts and tendencies in procedural law. I take the current time, in the critical-theoretical sense of the current situation of an ongoing conflict, as the subject of the diagnosis and take criticism, in the critical-theoretical sense of denunciation of ideology and domination, as the purpose of diagnosis.

b) Second, on the one side, I explain how a time diagnosis of procedural law in western advanced legal systems (like the US, the UK, Germany and Brazil) is possible despite looking only at certain shifts in procedural legislation, dogmatic and behavior. I propose to read these shifts as the result of a slow-grown combination of functional pressures towards celerity, predictability and efficiency (rhetorically disguised as interests of the citizens instead of systemic imperatives) and normative ideologies recurring to elements of private autonomy (individual rights and interests) rhetorically conceived and promoted to the complete expense of public autonomy (communicative power, positive law and democracy in general). On the other side, I explain how these shifts can be shown to respond to large-scale changes in those societies in general and in the role of their laws and courts in particular.

c) Third, I address the first of the current pathological tendencies in procedural law I discern as such, namely, at the level of content-control, what I call "diversification of jurisdiction". That is the overall increasing demand for (and decreasing resistance against) adoption of alternative dispute resolutions such as counselling, conciliation, mediation and arbitration, usually under the functional rhetoric of celerity and cost reduction and the normative rhetoric of informality and anti-litigiousness. I advance the hypothesis that the putative finality of this functional-ideological process is freeing traditional jurisdiction from

two different types of judicial demands: the sub-jurisdiction of the demands of the poor (poor individuals and small businesses, for whom counselling, conciliation and mediation are most intended), whose claims and interests are so small, urgent and insignificant to the point of not being worthy of judicial consideration and state time and money; and the super-jurisdiction of the rich (rich individuals and large companies, for whom arbitration is most intended), whose claims and interests are so big, urgent and significant to the point of requiring special treatment in terms of rules, forms and arbiters. This way, traditional jurisdiction would be more and more left with cases concerning the relationship between individuals (both rich and poor) or businesses (both big and small) and the state (with other demands becoming incidental), with state time and money being put only into the task of securing state claims and interests.

d) Fourth, I address the second of the current pathological tendencies in procedural law I discern as such, namely, at the level of form-control, what I call "uniformization of jurisdiction". That is the overall increasing demand for (and decreasing resistance against) legal constraints and controls on how unpredictably and divergently courts decide cases, usually under the functional rhetoric of celerity and cost reduction and the normative rhetoric of equal treatment and coherence. I advance the hypothesis that the putative finality of this functional-ideological process is securing both the market and the state with the type of fast-running, low-cost, stable and predictable environment where their plans and investments are most assured to have their intended and expected results (an increase of decisional functionality) and the type of control over newly admitted singular judges to prevent them from giving the open texture of law and the inherently self-transcendent contents of basic rights the interpretive approach that would put bureaucratic and capitalist long-run and large-scale arrangements in risk of damage and dismantling (a decrease of interpretive hazard).

e) Fifth, I address the third of the current pathological tendencies in procedural law I discern as such, this time a double phenomenon, namely, at the level of purpose-control, what I call, following long-established academic practice, "judicialization of politics" and "judicial activism". That is, first ("judicialization of politics"), the overall increase in legal and judicial treatment of, control over and interference into issues traditionally belonging to government or parliament, usually under the functional rhetoric of celerity and effectiveness and the

normative rhetoric of a better balance between powers and the fight against basic rights violations. And, second ("judicial activism"), the overall detachment of judicial behavior from the traditional profile of neutrality and containment toward a more engaged and purposivist frame of mind and pattern of choice and action, usually under the same functional rhetoric of celerity and effectiveness but with the different normative rhetoric of search for truth and justice and taking of social responsibility. I advance the hypothesis that the putative finality of this functional-ideological double process, even more if combined with the former two, is creating a post-democratic environment where judicial power will assume the prominent role and function as a well-disguised autocracy meant to legislate and govern from the bench, by combining a demagogic discourse of morality and protection with the surreptitious functionality of containing and limiting the emancipatory potentials of both democracy and law. This judicialized post-democracy would give the legislative and executive powers only the residual functions of being the arena where symbolic and material struggles capture most of the public attention without changing anything of significance in society and the cabinet of politicians and bureaucrats that advance small-scale routines that do nothing but keep the system running and large-scale measures that would have been made no matter what, how or by whom a seemingly partisan and personal face and responsibility.

f) Sixth, I explain how the identification and denunciation of such pathologies was possible only with the concept of remedial discourse as introduced in Chapter 6 and discussed in Chapter 7. I also underline how they would go undetected and undenounced if we kept using the concept of institutional discourse as employed by Habermas. This diagnostic capacity is, as I stated earlier in Chapter 6, one of the main advantages of a more nuanced and balanced conception of the judicial procedure, as offered in my idea of a remedial discourse. I end up by examining whether and to which extent my time diagnosis is still Habermasian at heart, as well as whether and to which extent this matters anyway.

6.2. A time diagnosis suitable for my research

In what follows I attempt at giving a time diagnosis of procedural law. Calling it something else – virtually anything else – would make my task much easier. "Map of current tendencies and ideologies", for example. It would convey the same idea, but sound less pretentious and less guilty of misusing one of critical theory's key terms. It would as

well avoid some unexpected visits and enduring interrogations with the terminology police. If, however, I neglect every wisdom and insist in making the most controversial choice, the least I can do is paying my dues and give it a fairly acceptable rationale. So here it comes.

A first question one could ask is why I don't simply incorporate Habermas's diagnosis of time regarding law in general, in Ch. 9 of FN, and apply it to procedural law. After all, my quandary with Habermas's ideas in FN throughout my thesis (whatever other disagreements I might have with them beyond the limits of this doctoral research) lies in his hyper-discursive depiction of judicial procedure in Ch. 5, something one would have a hard time proving to interfere in any significant way with his time diagnosis in the end of the book. According to Habermas, the comprehension and application of the basic rights in which both private and public autonomy realize themselves is governed by legal paradigms, that is, by shared background understandings connecting those rights to images and conceptions of the society, the individuals and the state. Habermas explains the change of patterns of interpretation and application of the basic rights in terms of two transitions, one from a liberal to a social paradigm, and the other from a social to a procedural paradigm. The latter emphasizes participation and deliberation as proper ways to fully advance and realize the individual rights, then closing the hitherto existing gap between private and public autonomy. So why not saving my breath and just using that?

While speaking of "time diagnosis" from a critical theoretical point of view, I want to stay away from two positions. On the one side, I wouldn't claim to be using it with the same meaning of Adorno's and Horkheimer's "Dialectics of Enlightenment" or Habermas's "Theory of Communicative Action" (assuming it's the same meaning in these two, despite not being the same diagnosis). On the other side, nor would I have the temerity to claim having some personal and new meaning in mind, one that would add in substance and value to the already long and rich enough history of critical theory. Instead, all I want is for the expression to be taken in some adapted or intermediary sense, where it would mean the same as in the masters of the genre except this time applied to a different subject, with smaller scale and scope. An applied mini version of a time diagnosis, if you will. Let me first explain that.

It is applied in the sense that the subject of analysis falls short of the whole of society, focusing on one aspect of it. Actually, it might be said that it is the whole of society, only in the way it manifests itself in

one of its constitutive aspects (namely procedural law). It is holistic, then, only in a very indirect manner. In what I am about to attempt, philosophical considerations (a unidisciplinary effort) strive to connect shifts in procedural law (a one-aspect subject) to changes, forces and tendencies in society as a whole.

What I take to be a "time diagnosis" is a sort of conceptual-empirical photograph of the current state of the struggle between forces of emancipation and domination. In the case of the legal procedure, considered as a remedial discourse and, therefore, comprised of both discursive and anti-discursive aspects, such struggle would occur between advances and retreats of the communicative power. Of course many factors other than procedural law have considerable impact on the advances and retreats of the communicative power, but the time diagnosis I offer focus solely on procedural law as a source of influence upon the struggle between discursive and anti-discursive forces.

Something is also to be mentioned about the role of ideology. In my version of time diagnosis, there is a connection between functional forces that threaten the communicative power in legal procedures and the normative justifications given to the public in order to conceal or to reinterpret those functional forces in a more favorable light. In each of the current pathologies of procedural law, I intend to point at both the particular functional force I take to be in action and the respective normative justification under the disguise of which such demand is publicly presented. My way of doing that is first by dismantling the normative justification at the argumentative level and then proposing an alternative explanation as to why that demand is currently being pressed on and incorporated in rules of procedural law.

On top of that, I am well aware that arguing that some recent change or tendency in procedural law is disadvantageous to the communicative power in legal procedures is not the same as proving that such change or tendency is a pathology in the sense relevant for critical theory. That's why I finish each topic on one of the pathologies by attempting this demonstration. In my consideration, a retreat in communicative power is a pathology only if it is less an administrative measure to overcome some social-empirical deficit of discourse than a disguised interference of administrative power in order to diminish or eliminate aspects of discourse in legal procedures potentially threatening to functional demands and dynamics of the bureaucratic state or the capitalist economy. This connection with either bureaucracy or

capitalism, domesticating discourse to render it functionally harmless, is the key element to recognize a change or tendency as truly pathological.

But first I have to explain why I consider it to be possible to give a time diagnosis of procedural law encompassing its different branches and its current shifts in countries with different traditions and scenarios.

6.3. A time diagnosis for late modern procedural law

The time diagnosis I mean to provide is supposed to encompass both different branches of procedural law (civil procedure, criminal procedure, administrative procedure and, where pertinent, labor procedure) and its manifestations in countries with different legal traditions (civil law and common law, for example) and different cultural, social, economic and political scenarios (like the US, Germany and Brazil). Given the obvious challenges of such a task, I want to explain the reasons why I believe it to be possible.

First of all, "procedural law" doesn't name a single body of law. Since the early times of Roman law, a divide between civil and criminal procedure was applied and became influential. Civil procedural law is applied to cases concerning civil relations and obligations, like those deriving from family, testament, contract and damages, capable of generating real or personal obligations, while criminal procedural law is applied to trials over offences and crimes, like those of murder, battery, assault and robbery, capable of generating fines and penalties. In Modern times, such divide became still more pronounced, since the civil procedure maintained the idea of horizontal relations between equals, justifying symmetrical duties and burdens between the parties, but the criminal procedure, on the other side, developed a series of guarantees and protections in the defender's favor, grounded on the idea of a vertical relation between a powerful State and a vulnerable individual.

On top of that, the intricacies of the Modern bureaucratic State brought to light an administrative procedure, in order both to separate the relations between the State and its citizens from the ordinary standards of civil procedure and to separate the relations between the State and officials accused of wrongdoing concerning their functions from the ordinary standards of criminal procedure.

Lastly, in countries where the working class was provided with social rights, a labor procedural law became increasingly necessary. In labor procedure, the relations between employers and employees are

also asymmetrical, assuming the workers as vulnerable and giving them guarantees and protections that, while different from those of criminal procedure, are nevertheless equivalent to them and designed to perform a similar function. Therefore, civil, criminal, administrative and, where pertinent, labor procedure are the currently existent branches of procedural law, all of which must be taken into account when giving "procedural law" in general an encompassing time diagnosis.

That diversity of procedures appears to be an insurmountable obstacle to such encompassing diagnosis. After all, the idea that civil, criminal, administrative and labor procedural law are all being affected by the same set of changes and tendencies seems highly unlikely. Nonetheless, that's exactly what happens. In countries as diverse as the US, Germany and Brazil, phenomena like the diversification of jurisdiction, the uniformization of jurisprudence, judicial activism and the judicialization of politics are not exclusive to any of the procedural branches, but rather pervasive and entrenched in all of them. This is no coincidence either. Since the element they share is their being conducted by the judicial system, changes in the role and dynamics of the judiciary are expected to affect the whole plurality of procedural forms. That is also the reason why a diagnosis of such pathologies encompassing all branches of procedural law is entirely feasible.

A second seeming obstacle to an encompassing diagnosis is the divide between two traditions or systems of law: on the one hand, common law, the tradition or system based on precedent as its main source of law, as practiced in the US, in the UK, in Canada, Australia, New Zealand etc.; on the other hand, civil law, the tradition or system based on legislation as its main source of law, as practiced in Germany, France, Italy, Brazil etc. Since changes in the common law, including those in its procedures, are usually made by initiative of the judiciary itself and are expected to happen much less often, this system is viewed as almost invulnerable to trends and vogues of the last season. Its more legislative-centered cousin, the civil law, looks like something the will of rulers and legislators could much more easily change and mold according to the interests they have or represent in each moment.

But then again, appearance is disavowed by reality. In countries with either system the recent changes and tendencies of procedural law are being made by the widespread introduction of new and detailed legislation. The US, which is the representative of common law among the examples I mostly focus on in this chapter, has had in the last twenty

years its civil, criminal and administrative procedures increasingly more regulated by legislation, in the form of procedural codes, to the point where various standards of litigation, subpoenas, deadlines, evidences, testimonials and juris that once were reliant on precedents and doctrines are now almost entirely dictated by written law. Since procedural law in the two systems is becoming so eerily similar, changes and trends introduced via legislation are key to both the systems, making it possible an encompassing diagnosis aimed at the two sides of the divide.

Finally, something that also makes an encompassing diagnosis look unlikely is the very different cultural, social, economic and political scenarios of countries as the US, Germany and Brazil. If the recent changes and tendencies in procedural law I want to expose as pathologies are indeed the product of functional demands of the bureaucratic State and the capitalist economy, then, a liberal neutral State as the US, a Welfare neutral State as Germany and a half-Welfare neo-patrimonialistic State as Brazil would be expected to have different demands, as well as mostly exporting, industrial and financial leading economies as the US and Germany and mostly exporting, extractivist and agricultural peripheral economies as Brazil would be expected to require different adaptations from procedural law. If State and economy are the sources of the pathologies, different political and economic configurations should spark and feed different pathological schemes. The US, Germany and Brazil seem too dissimilar to have the state of their procedural laws encompassed by a single diagnosis.

And yet the pathologies I want to scrutinize happen in similar ways and degrees in all three of these countries. The diversification of jurisdiction, the uniformization of jurisprudence, judicial activism and the judicialization of politics are currently crescent and/or prevalent in American, German and Brazilian procedural law. It’s not a matter of “if”, but of “why” it is so. My explanation is double. On the one hand, the globalization of international law and worldly capitalism forced each State and economy to serve not only their local needs, but also increasingly more the needs of a global environment which spins in its own time, speed and logic. On the other hand, celerity, uniformity and efficiency are functional demands equally valuable for almost any form of rational state and any stage of market economy. They maintain a structural relation with bureaucracy and capitalism in general, rather than a structural relation with some of their modalities. Either way, no

matter how diverse the scenarios in the US, Germany and Brazil might be, their procedural law can be encompassed by a single time diagnosis.

6.4. First pathology: Diversification of jurisdiction

With "diversification of jurisdiction" I refer to a set of alternative dispute resolution methods, like counselling, conciliation, mediation and arbitration, to which procedural legislations worldwide are increasingly recurring as promising reliefs and substitutes to a worryingly expensive, slow and overwhelmed traditional jurisdiction.

As counselling is primarily concerned with individual parties pursuing better legal information before litigation, rather than becoming a real alternative to litigation, I don't dedicate any of the following considerations to it. In the case of conciliation and mediation, between which the only difference would be the degree of active interference of the third party, I deal with them together, making here and there the pertinent observations about their differences. Arbitration, however, I approach in a topic of its own, due to its different design and target. For each alternative dispute resolution, I introduce what they are, display the main normative justifications with which they are usually presented and defended to the public, point at the problems with such justifications, undoing existing arguments and dismissing possible counter-arguments, until they reveal themselves as no more than functional measures to promote cheap celerity. Then I conclude the topic with an explanation as to why their increasing acceptance and ground gaining in recent procedural reforms should be considered a pathological tendency.

Conciliation and mediation

In both conciliation and mediation two parties find a consensual solution to their problem and then refrain from seeking litigation. But conciliation involves much less help from a third person than mediation. In conciliation the third person assists the parties to listen to each other and to recognize their interests, makes them see the advantages of an early agreement and invites them to consider finding middle ground, while in mediation she facilitates the settlement from top to bottom, giving ideas and proposing measures, stimulating cooperation and demanding compromise. However, in the paragraphs below, every observation on conciliation can be extended to mediation, adaptively.

Conciliation and mediation spend much less time and money than litigation. No argument here. Their problem lies in two other aspects, namely justice and democracy. From the point of view of justice, the conciliation or mediation parties often find their original claims just and only agree with compromising to something lesser at the prospect of a

long and expensive litigation. That is accepting less than justice because of costs that shouldn't even exist were the judiciary system efficient. So the parties pay in the currency of justice the price of the state's inefficiency. Now, from the point of view of democracy, the parties distance themselves from what the political community said to be right and create a private commitment between them more binding than the public commitment of democratically made law. That is allowing private agreement to supersede a shared sense of justice and a public self-legislation process. So the political community pays in the currency of democracy the price of the state's inefficiency. Both conciliation and mediation require for the parties to agree with something other than justice and allows them to commit themselves to something other than democratically made law.

Now there are of course very direct answers to both criticisms. I mean to show that these answers are less convincing than they appear. Against the objection of justice, one can say that the parties are not obligated to agree with a middle-ground solution. If they do, they give up their former claims and accept the settlement terms. That means either that the settlement is just to their eyes or that their agreement with it makes it just from then on. So in this case consent makes justice. Against the objection of democracy, one can say that conciliation and mediation are only valid where the rights in question are private and disposable. The parties agreement over their rights can't differ from democratic law because such law is what made their rights disposable. So in this case the parties' ability to transact and compromise bears the stamp of democratic legality from the very beginning.

The response that consent makes justice is very misleading. First, the parties' agreeing with the result does not imply they find it just. One party's offer takes into account what the other, self-interested party can agree with, not what is just. If justice requires one party to defeat the other completely, it can't be served in a conciliation or mediation settlement. Say a conflict between an employer and her former employee over alleged unpaid overtime wages. On one hand, the employer is convinced no overtime was incurred, therefore, no wages are due. On the other hand, the employee is convinced all of the alleged overtime was incurred, therefore, all the requested wages are due. If both settle for the employer to pay the former employee, say, half of all the requested wages, then, one party agreed to pay for half of the overtime she thinks never incurred, while the other agreed not to receive

for half of the overtime she thinks truly incurred. There's no way either of them finds the agreed solution just. Quite the opposite, really. The minute they agreed to seek conciliation, they knew they were leaving the warm chambers of justice and entering the cold grand hall of compromise. Whether one knows she is right and the other knows she is wrong or both think they are right, they agreed with the alternative solution to avoid the burdens of litigation. That is utter coercion under the name of justice. If nothing else, they were blackmailed to settle.

Second, their agreeing with the result would not imply it is just even in the unlikely event that they find it so. For once, they might be misguided in their thinking. For instance, in my last example, the employer might find paying half the overtime wages just because she regrets to have sometimes mistreated her former employee, while the employee might find receiving half the overtime wages just because she lacked trustworthy witnesses to support her claim. Both are simply wrong in their beliefs, since mistreatment is not connected with overtime and the burdens of proof typical to trials do not apply when seeking compromise. Therefore, their believing the result was just is irrelevant from a more well informed and reasoned point of view.

Besides, their acceptance of the result neglects what society thinks is just. In a democracy, we should live under the terms of one shared conception of justice, not under whatever terms the people in particular interactions happen to find just in each case. Better developed: In a democracy the citizens agree to settle their disputes under a second-level conception of justice that they share and whose terms they transform into law, renouncing the first-level conception of justice that each citizen or group of citizens might prefer instead of the shared one. So, there may be a first-level conception of justice to which the two parties agree, where paying half of unproven overtime is just, but beyond and above that there's another, second-level conception of justice, shared by the whole of society and hence currently universally mandatory, where alleged overtime is either completely due or undue, no halfway allowed. Conciliation and mediation operate by cancelling the second-level conception of justice and making the decision to rely on the first-level conception of the involved. Thus, it not only betrays justice in itself, but particularly the kind of justice under whose terms disputes should be settled in a democratically constituted society. One could of course object and say that part of our second-level conception of justice is that some matters are to be decided according to the first-

level conceptions of the affected. In that case, one has shifted from the first response (consent makes justice) to some version of the second one (law makes some rights disposable).

One might find this idea of a second-level conception of justice to be more Rawlsian than Habermasian, for it is resembling of Rawls' overlapping consensus. That is not the case. First, I'm referring to levels of conceptions of justice, not about the relationship between a public conception of justice and a particular conception of the good. Second, Habermas' idea of decentering is entirely compatible with a scenario where a smaller, less diverse group of individuals would agree with certain solution X, while a larger, more diverse group of individuals, encompassing but going way beyond the smaller group, would agree with a conception Y, case where two conceptions of justice exist but the members of the larger group must be committed to give up the former in favor of the latter. The term second-level conception of justice, then, would only be an alternative name for a larger, more decentered consensus. There's nothing wrong or non-Habermasian about that.

The response based on the concept of disposable rights is equally deceptive. Rights can be either disposable or non-disposable. Disposable rights are those whose bearers are allowed to decide whether and when to exercise fully, partially or not at all. Rights, for example, to privacy, to image, to come and go, to property and to payment can be partially or fully abdicated by their bearers, by telling someone a secret of theirs, by authorizing to have their pictures published, by agreeing to be confined within certain bounds, by giving away their belongings and by forgiving debts others owe to them. Non-disposable rights are those whose bearers have no say in their enforcement. Rights, for example, to life, to liberty, to health, to security and to a clean environment, within certain limits in each case, cannot be likewise abdicated, neither fully nor partially. The latter, as advocates of conciliation and mediation will insist, are not the subject over which the parties are called to try to reach an agreement. There is – at least there should be – no conciliation or mediation hearing about murder, slavery, medical malpractice, domestic battery or ocean pollution. Conciliation and mediation only apply to disposable rights, those where the parties, as explained above, are allowed by the positive law to decide whether and how to exercise. So goes their argument.

There are cases of legislation on conciliation and mediation in the US and in Brazil (I'm not well informed about Germany) where non-disposable rights have been subject to alternative dispute resolution.

Plea bargain, for example, where a public investigator, prosecutor or judge is authorized to offer a criminal defendant the chance of having the charges against her diminished or withdrawn in exchange for valuable information the defendant is capable of supplying about other criminals or persons of interest deemed more important or more closely connected to the head of a complex organization or operation. Since the defendant benefited from plea bargain – especially in a system where the institute is as common and widespread as in the US – may have committed violations as grievous as kidnapping, false imprisonment, rape, torture, battery, extortion, robbery, assault, and even murder, the reduction or withdrawal of their charges is equivalent to treating the rights of their victims as disposable, nonetheless not to themselves and their private interest to prosecute their criminals, but to the State and its public interest to prosecute other, allegedly more dangerous criminals.

But an advocate of conciliation and mediation could avoid this criticism by simply expressing disagreement with this crossing of borders. She could simply remain adamant to the idea that only where the rights of parties are disposable the resource to conciliation or mediation should be viewed as legitimate. What I should really provide is one argument – apropos, way harder to make – against the use of conciliation and mediation within the very limits of disposable rights.

I provide two of them. The first is a controversial argument about freedom. Say one person lent money to another. The right to payment is, as I said earlier, a disposable one. The lender can forgive the debt. The borrower can ask for her forgiveness. But the borrower cannot put a gun on the lender's head and force her to forgive the debt. If she did, the forgiveness wouldn't hold good. That's because, although the lender can dispose of her right, she can't be coerced to do it. The very nature of a disposable right is that the bearer can dispose of it, but such act is only valid as long as it is non-coerced, as long as it is free. Now put this idea together with that about conciliation and mediation as blackmail, where the inefficacy of the judiciary to solve conflicts timely and cheaply is used to coerce the parties to compromise with their rights in order to avoid the burdens of litigation. Because a trial is so time and money consuming, many people would gladly forgo some of their rights in order to escape the troubles and horrors of a judicial nightmare. What results is that certain rights, however disposable they may be, are being disposed in a non-free fashion, therefore, not validly.

Yet this argument is problematic. In law, being coerced by the circumstances, whether natural, social, cultural or personal ones, doesn't invalidate an act. The selling of a house to pay for costly medical care or the selling of one's labor force to support oneself and one's family, for example, are coerced by circumstances, and are nevertheless valid under the law. If I equate natural, social, cultural or personal coercion with the type of coercion law treats as such, my argument becomes about what law should be, not about what it is. Under the law that currently exists, disposing of one's disposable rights in face of the burdens of litigation is valid. If I would spend in trial twenty times the value of the debt I am suing for, then, it is within my right to forgo that debt and decide to live with the lesser loss. If that is considered valid, why wouldn't be equally as valid to forgo half of it in the course of a conciliation hearing to recover at least part of what belongs to me? My argument of freedom apparently wouldn't resist to this *a fortiori* analogy.

Only apparently, though. The "law as it is" objection cannot be the final word. After all, I am criticizing alternative dispute resolutions that have already been introduced into positive law, being, therefore, part of law as it is. If one censurable part of the law is based on another censurable part of it, both parts are open to criticism. But some caution is advisable. With each new criticism, the original becomes more and more reformist, to the point where criticism and normativism conflate. The more limited and local the criticism, the better. So I won't fall into the trap of criticizing the very idea of autonomy of the will over which much of modern law is built, which would inevitably come up if I took into account the natural, social, cultural and personal restraints one's will is constantly subject to. That would call for a total reform of law as we know it, and then the smell of utopia would be unbearable. So I won't insist that the burdens of litigation invalidate the forgoing of disposable rights. Instead, as my second argument, additional to the one about freedom, I will focus on the reasons for the burdens of litigation. That, hopefully, will show why that is a circumstantial coercion a critical-theoretical appreciation of law should pay attention to.

It is a mantra of our times that justice is overwhelmed. There are too many lawsuits, too many appeals, too few judges, too little time etc., so that the fatal outcome is an expensive, slow and inefficient system. In Brazil, one may file a judicial complaint for a relatively simple matter today and only come to a final sentence at the first judicial instance between one or two years later. Add to that further instances of appeal

and it becomes a three or four-years ordeal. Even more if constitutional issues are raised. It may take six to ten years for a case to see its final decision in Brazilian Supreme Court. Why is that? As usual, the reasons are many and not easy to trace or summarize. But the main causes are to be listed in that order: The state sues and is sued too much; small and big businesses sue and are sued too much; the system of appeals is very formulaic and redundant; first-instance judges, prosecutors and public attorneys work less than they should; the federal and the constitutional courts occupy themselves with way more cases than they should. The first two are structural reasons, very hard to reform unless a large social, cultural and political change takes place. The last three are institutional ones, easy to reform were not for the interest groups and parliamentary obstacles to a general agreement on the solutions. Despite that, as we shall see in the topic on the uniformization of jurisprudence, practically all recent legislative reforms tend to focus on interpretive and judicial disagreements and idiosyncrasies as their main target.

In this context, the rights of some subjects are treated as more disposable than those of others, exploring both the positive and the negative meaning of the term "disposable". If one has the time and money necessary to persist with a lawsuit to the very end, one is free to dispose of her rights as she sees fit. Here disposable means "available", free for choice and use, like the disposable assets of a business. If one doesn't have the time and money necessary, one is forced to choose between retaining the time and money that she currently has and exercising her rights fully. In this other context, disposable means "expendable", easy and ready to be thrown away, like a disposable plate or a plastic cup. So a judicial system charged with the heavy burdens of litigation makes the disposable rights of some subjects available and the disposable rights of others expendable. Conciliation and mediation, as long as they depend on the dark prospects of a long and expensive lawsuit, treat the disposable rights of their main users as more expendable than available. The rights of small businesses and individuals are treated as not big or important enough to deserve full jurisdictional protection. They can be demoted and relegated to a lower form of protection, based on dialogue, bargain, and compromise. All one needs is to advertise it as cheaper and faster and selling it like an emancipatory key to a peaceful solution through mutual understanding. What it is underneath is a second-class jurisdiction for those whose disposable rights are, from the perspective of the State and of big businesses, completely expendable.

Now back to the disposable rights argument. I said earlier that, instead of questioning the whole idea of autonomy of the will as it exists in Western modern law, I would focus on the burdens of litigation and its reasons, in order to make it explicit why the argument of the disposable rights is flawed. Then I explained why the burdens of litigation are not a natural phenomenon, something like an inevitable, metaphysical outcome of the very nature of the judicial procedure. They have both structural and conjunctural causes, as well as they affect very differently those with and without time and money to await. Insofar as the burdens of litigation, instead of being fought against and alleviated, are focused on and used as justification to recur to alternatives to classic jurisdiction, they are constraints to the rights of persons that one does not bother to remove exactly because they serve to a functional purpose. They exist because they are maintained and augmented, and such is the case because, as long as they are real, the rights of the prospected parties become disposable less in the sense of available and more in the sense of expandable. Like one used to say about the natural phenomenon of the drought and desertification in Brazilian Northeast, it is a tragedy ones does not seek to prevent or reverse because it is a very profitable and convenient tragedy, a source of opportunity and justification for what in other context would be seen as violent and unfair. A perpetuated tragedy, if I may. So here is my argument: If one forgoes of her right in view of the effects and costs resulting from a perpetuated tragedy, one does not exercise freedom, but is rather coerced by those feeding and sustaining the tragedy. It is, again, nothing short of social blackmail. Calling this forgoing of rights *consented* does not make justice to the self-violence experienced by the parties forced to make that call.

So, against the argument of consent makes justice, I presented three arguments: one, normally those conciliated and mediated don't find their settled solution just; two, even if they do find it just, they might be mistaken about it; and three, even if they do find it just and are not mistaken about it, they are implementing a first-level conception of justice where democracy would require a second-level one to be in force. Now against the argument of law makes some rights disposable, I raised two further objections: one, normally a party does not forgo her right in ideal conditions of freedom and consent, making disposable rights mean less available than expandable ones; two, the main reason why parties do forgo their rights, namely the burdens of litigation, is something like a perpetuated tragedy that is tantamount to social blackmail. Those are the reasons why I consider that even the best

normative defense of conciliation and mediation – as necessary in view of the overwhelming of the judicial system and the burdens of litigation, consented by the very parties in play and limited to their legally disposable rights – does not hold and, therefore, a functional explanation is required, which I intend to give in the final part of this topic.

Arbitration

Arbitration is the submission of a dispute to a third person designated by the parties to the controversy, who agree in advance to comply with the decision, to be issued after a hearing at which both parties have an opportunity to be heard. It is private justice for private parts, to be levied on their disposable rights and deriving from these rights. It doesn't mean there can't be official courts of arbitration, which do exist in some countries, but even there the State provides regulation, location and personnel without interfering with the decision-making process. In "arbitration in law" the third person is supposed to apply the existing positive law to solve the dispute, while in "arbitration in equity" she is allowed to deviate from the existing law, using criteria of justice and impartiality deemed as more beneficial to the parties and more prone to generate mutual understanding. Arbitration is similar to conciliation and mediation in that they are alternative dispute resolution, but is actually more similar to traditional jurisdiction, if the latter was devoid of mandatority and coercion. I discuss firstly arbitration in law, for much of what I say about it applies equally to arbitration in equity, while the latter requires further examination of aspects peculiar to it.

Arbitration might differ from litigation in three levels. At the level of judging, arbitration is different because the decision is left to an arbiter, not a judge, who may possess or lack legal background, possess or lack technical experience with the issue at hand but does necessarily possess experience with arbitration itself. At the level of procedure, arbitration is different because it is simpler, faster and cheaper, with few hearings followed by a final decision. That's why it is little suitable where issues are complex and detailed or evidence is key and requires more than documents and witnesses. Finally, at the level of regulation, arbitration might differ from litigation in that it relies on judgments of justice and impartiality alien to existing law (arbitration in equity) and, even when it relies on existing law (arbitration in law), it might focus more on the terms of previous agreements and contracts between the parties than on statutes or precedents that would make the core of traditional judicial decision-making.

The two objections against conciliation and mediation (the one about justice and the one about democracy) would also apply to arbitration, with adjustments to the nature of the latter. In the name of justice, one could attack arbitration "in law", while in the name of democracy, one could attack arbitration "in equity". Otherwise, let's see.

In arbitration "in law" the arbiter is supposed and committed to enforce the existing law to the case. So the second-order conception of justice of society as a whole is not replaced with the first-order conception of justice of the involved. Neither is the justice of the final result dependent on the consent of the parties with the particular result of the arbitration. On the contrary, the standard used to solve the problem is the one society as a whole established as such by means of a democratically conducted process of law-making. In view of all that, one could then ask: What reason would there still be to criticize this form of dispute resolution in the name of justice?

Here is my response: An official judge is more constrained by legal precedents, legal doctrine and legal paradigms as a whole than an arbiter would ever be. And that impacts how law is enforced. It is not enough that the law to be applied to the case is the one the legal community made such, but it is also necessary for this same law to be interpreted and applied according to the comprehension prevailing in each time of law in general and of that law in particular. Not only the "what", but also the "how" matters. That is the whole point of addressing the rationality of jurisdiction in Ch. 5 and the shifting, prevailing legal paradigms to basic rights in Ch. 9 of FN.

Say a legal clause is somewhat obscure, ambiguous or vague and hence more open to interpretation. An official judge would search for the prevailing comprehension of that clause among legal specialists and within legal precedents, using her own understanding of it only as a last resort and, even in that case, in accordance to principles deemed important in that legal branch and in analogy with other cases where the same or a similar doubt was dealt with. On the other hand, an arbiter would be much more inclined to apply her own understanding of the clause, since neither possible changes in her decision in higher courts nor the overall coherence of the legal system appear in her list of main concerns. To make it clear: I am not making the case for a corporative defense of lawyers as better interpreters of law and better legal decision-makers, both of which qualifications a lofty and negligent lawyer might lack and a studious and prudent arbiter might abound with. This is not a

contrast between the professional's and the layman's understanding of the law. This is actually a divide between making a decision within or outside a structured system of jurisdiction, with and without the burdens of coherence and exhausting grounding of one's decision. The reason why this difference matters is that, according to Habermas, the legal paradigms that encompass the community's current comprehension of the state, society and the individual infiltrate themselves into legal decision-making by means of the influence of doctrine, precedent and coherence. The less a legal decision takes those elements into account, the less such decision is in touch with currently and commonly shared comprehensions of the most important issues of each time.

Neither am I concerned with idiosyncratic legal decision-making. My argument is not that, free from the burdens of coherence and systematicity, arbiters would enforce unpredictable understandings of the law, aggravating the problem of uncertainty. Rather, my concern is one of justice: the formation of field-sensitive or party-oriented arbitral paradigms. As arbitral decisions repeat themselves and accumulate over time, certain ways of interpreting and enforcing legal rules become common practice and be expected to last. As it turns out, however, those ways of interpreting and enforcing the rules would more likely to be influenced by the type of subject in question or by the type of parties involved. Suddenly there would be an arbitral paradigm for rules of labor contracts in the mining sector and the automotive industry and another for rules of contract agreements with investment banks and airline companies – whose differences would have almost nothing to do with shared conceptions about basic rights. If the legal paradigms Habermas writes about in Ch. 9 of FN are public and reflect shared understandings, these arbitral paradigms would be particular to groups and fields and would more likely reflect the interests and practices of the involved, and not a shared sense of justice capable of challenging and changing those interests and practices. This is yet another way how law could lose its critical bite and transformative power.

So in arbitration "in law" arbiters would enforce the existing law in ways that could frustrate the socially shared sense of justice provided by legal paradigms. On the other hand, in arbitration "in equity" arbiters are allowed to deviate from the existing law, using criteria of justice and impartiality deemed as more beneficial to the parties and more prone to generate mutual understanding. Law is either mildly tempered or completely replaced by equity, which here means the arbiter's ruleless

sense of justice and convenience. The problems with that are many. I will comment on one of them, from the point of view of the objection of democracy: the subversion of democratically made law.

This subversion may come in two forms. The first one is by disregarding the existing law and enforcing some standard deemed more just or appropriate to the case. Law says, for example, that in insurance contracts of product transportation, whenever the product is delivered with delay and loss, the insuring company should pay the insured for both the delay and the loss. But, in the course of an arbitration, the arbiter could find it more just or appropriate to make a certain insuring company pay only for the delay, but not for the loss, for she considered the loss to be a collateral and inevitable result of the delay. The insured would receive its payment right away and the case would be closed. Now suppose the reason for the democratically made law to have decided that the insuring company should pay for both the delay and the loss was the consequentialist assumption that, if so, insuring companies would only insure transportation with companies known for making their deliveries timely and safely and, thence, the insured would only contract these companies and, thence, all transportation companies would try their best to meet these parameters, improving as a result the transportation scenario in the whole country. So it is more than likely that the reason the arbiter used to exempt the insuring company to pay for the loss, namely, that it was inevitable and it would be unfair etc., had already been taken into account by the lawmakers and reckoned as less relevant than the goal of making the national transportation scenario better for everyone in the long run. So the legal community considered reason A more relevant than B and discarded the latter, but the arbiter considered reason A less relevant than B and brought the latter back to be the critical rationale of her decision. That means the community's hierarchy of priorities had zero impact upon the decision-making. One person's sense of justice trumped the community's opinion and will.

The second form of the subversion of democratically made law is a domestification of jurisdiction against the perils of democracy, particularly against the peril of the imposition of the citizens' will over the interests of big businesses. Sometimes the legislative power, as institutionalized public sphere, becomes permeable to communicative power and transforms the diffuse public sphere's prevalent opinion and will into positive law. If, in one of these moments, the public, tired of being misled and exploited, decides to have some section of the big

businesses pull their weight and pay their dues to society – to preserve some degree of realism, probably with the help of some conjunctural advantage to one economic sector to restrict the power or profits of another one –, a jurisdiction committed to enforce the democratically made positive law becomes a threat to the interest of corporations. If, however, some modality of arbitration "in equity" allows the arbiter to distance herself from the letter of the law and to decide according to parameters deemed more reasonable or beneficial to the parties, in this case, to the very corporations once threatened by the positive law, that authorization is tantamount to an escape route by means of which the big businesses can have the status quo ante re-established.

Other way of making the same point would be saying that, while, in a traditional jurisdiction, the judge is capable of, by using the positive law as a ladder, assuming the public's point of view and confronting the publicly damaging particular interests of the parties, the same is never possible for the third party in an arbitration process. Arbiters assume the point of view of the particular relationship between the parties and make a decision aimed at being acceptable and good to the parties' eyes. In this sense, arbitration lacks the power to access the democratic sources of emancipation and to give the public's opinion and will prevalence against the parties' interests and expectations. An arbiter "in equity" coordinates between two interests without ever representing a third one, that of the political community as a whole.

6.5. Diversification of jurisdiction as pathology

To finish this topic proving that the diversification of jurisdiction is not only problematic, but also a genuine pathology, I must expose the connection it maintains with the bureaucratic State and/or the capitalist economy. Its functionalities should now be clear: it alleviates traditional jurisdiction from many cases, reduces costs and time of dispute solving and protects private interests from the most threatening interferences of democratically made law. Now I explain how these functionalities serve demands from both the State and the market. I have two ways of doing that. One is more modest, the other, more ambitious.

The more modest way is showing how the workload-relief benefits doubly the bureaucratic State and how the cost-, time- and risk-reduction also benefits doubly the capitalist economy. On the one hand, the workload-relief benefits the bureaucratic State, firstly, by improving the efficiency (measure in a cases/time ratio) of its judiciary power and,

secondly, by making way for cases where the State appears as one of the parties to enjoy this more efficient jurisdictional environment mostly for themselves. The State works less, produces more and have their legal cases more rapidly appreciated. On the other hand, the cost-, time- and risk-reduction benefits the capitalist economy, particularly corporations, for it creates a faster and cheaper way to solve disputes, but also for, when corporations deal with individuals and small businesses, they can use conciliation and mediation to reduce their costs and, when they deal with other corporations, they can use arbitration to speed up the decision and to protect themselves from having their interests threatened by democratically made law. They spend less with those below and are more protected between equals. The scheme with State justice for State cases and private justice for private cases is perfect in every way to the functional demands of both the State and the market.

The more ambitious way, however, is by offering what I like to call a "projective picture" of the pathology's target. I know critical theory should not venture itself into prophetic territory. But a projective picture is less a prediction of what will happen than a description or picture of one possible future that the pathology can be expected to produce or help to make more likely. A nod to where the current path might be directed to. Here the term "projection" is used in the sense of the geometer rather than in that of the statistician or the psychoanalyst. In statistics, a projection is a tendency, something close to a prediction followed by the "all things being equal" clause. In psychoanalysis, a projection is the defense mechanism where the patient attributes to objects or other people features and dispositions she would have a hard time admitting to be in herself, so that saying a patient is projecting something onto something is accusing a consumed fact, an actuality. Conversely, in geometry a projection does not convey prediction or actuality. For instance, two lines are said to be perpendicular even if they never actually cross each other, sufficing that their *projected* prolongations crossed. A chair is said to have been moved three meters towards the window wall even if it never actually reaches the window wall, sufficing that the *projected* continuation of the movement would take it to reach such wall. In both cases, projected means imaginarily taken forward, extrapolated beyond its current state, but yet in the same sense or direction that the current state already pointed at. It serves to localize the course and understand the direction of a movement, rather than to know its current position or predict its final destination. It is in this sense that here I speak of a projected picture.

So, my projective picture of the pathology of diversification of jurisdiction is a three-level system of justice: The higher, super-jurisdiction of the rich, with interests too big and important to expose themselves to the times, costs and risks of regular jurisdiction; the traditional, medium jurisdiction of the State and for the State; and the lower, sub-jurisdiction of the poor, with interests too small and negligible to be deserving of regular jurisdiction. That way the market, the State and the lifeworld would each have their own jurisdiction, fitting to how important their respective demands are from a functional point of view and ready to give functional demands the greatest possible protection from and prevalence over normative and discursive considerations. This three-level system of justice, reminiscent of the late medieval courts (King, corporations and landlords), might very well return in a new version for late modern societies.

Of course, if the projective picture of a pathology is simply extrapolation for purposes of comprehension, it cannot function as the very evidence of its pathological nature. But what does it prove after all? The way I see it, it shows where the movement has been heading to until now. In this case, the diversification of jurisdiction not only responds to functional demands, but it moves towards stratification, projecting an order of immunity, inequality and exclusion, thus being a serious compromise of universality and isonomy of jurisdiction.

CHAPTER 7 – Second pathology: Uniformization of jurisprudence

7.1. Introduction

With "uniformization of jurisprudence" I refer to measures of control, be it horizontal (collecting similar actions so that all have the same decision), vertical (binding the decision-making of lower courts to that of higher courts on the same issue) or external (submitting judges to monitoring and disciplinary agencies outside the judicial system), over how judges decide their cases, with the aim to prevent them from taking different stances on the same issues. So the pathology of uniformization of jurisprudence is an effort to uniformize how judges decide the same issue in similar cases, whether at the same time or over time.

The problem with discussing uniformization as a pathology is that "uniformity", like "celerity", has both positive and negative connotations, both functional and normative facets. On the one hand, it exerts control over arbitrariness, limiting how divergent one judge or court can be from the rest, or two judges or courts from each other. On the other hand, it builds an iron cage for creativity, public debate and self-revision, turning the first or the higher standard into the only one that matters, the indisputably right one, or worse: the one that will prevail whether right or wrong, no matter how disputable it might be. It can be presented as both a guarantee and a prison. On the one hand, it appears to improve equality and coherence for the individuals, while on the other hand it surely secures celerity and security to the market and the State. It can be presented as both the ultimate goal and the complete dismissal of an interpretive community of judges. One can think of many judges deciding the same issue over and over as both a regrettable waste of time and money in a judicial system that is already slow, expensive and overwhelmed or as a democratic guarantee that a mistake won't pass unnoticed and become paradigmatic and that the best answer will have the proper time and chance to emerge. In the debates on each of the three strategies of uniformization, arguments from both sides will return and have to be duly considered and carefully weighed.

7.2. Horizontal control

There are two forms horizontal control may take. Both collect many cases and give them the same decision, but one of them (collective cases and class actions) gathers many cases of different plaintiffs against the same defender or defenders over the same problem or damage, while

the other one (repetitive cases) gathers many cases of different plaintiffs against different defenders over the same issue or type of issue. Many clients suing the same telephone company for the same improper billing or many residents of the same area suing a mining company over a case of river pollution would be examples of the first one. In this scenario, many individual actions against the same defender are collected and turned into a single collective action, in need of a single solution. On the other hand, many account holders suing their respective banks for the same illegal operation or many workers suing their respective employers for the same adjustment of their salaries would be examples of the second one. In this other scenario, many individual actions over the same issue will have the same decision as soon as the issue (that the bank operation was indeed illegal or that the adjustment of the salaries was indeed due) is decided in abstract and then applied to each case. In the first case, many actions become one and have one solution, while in the second, many actions remain as such, but have the same solution. But the "many birds with one stone" logic informs both schemes.

Advocates of horizontal control defend such schemes as both preventing a colossal waste of time and money with the judicial system and guaranteeing plaintiffs equal and coherent treatment of their claims. They say they aren't anything new, but merely give continuity to ideas underlying the doctrines of joinder of parties and joinder of claims (*litis consortium* in Romanic-Germanic legal systems), as well as those of collateral estoppel and issue preclusion in common law (*litis pendentia* in Romanic-Germanic legal systems), which would mean that collecting cases that overlap parties or issues is at least as old as Roman Law. On the one hand, giving many connected cases to the same judge or court saves time and money, providing the parties with a faster decision and liberating other judges and courts to decide other cases. On the other hand, it prevents parties that find themselves in similar situations to have their demands responded differently by the judicial system, raising justified doubts over the concern of law with equality and coherence. The easiest way to ensure equal and coherent responses is having all the cases assigned to one single responder (judge or court), making the uniformity of jurisprudence a function of the unity of jurisdiction.

Critics emphasize the loss of sensitivity with the particularities of each case and the risk of a premature and definitive win of the most economically or politically powerful of the sides. Differently from the already existing doctrines about overlapping of parties and issues,

horizontal control is not based on the impossibility of appreciating the cases separately, but rather on the functional inconvenience, in terms of time and costs, of doing so. It assumes not only that, ideally and in the long run, similar cases should have similar decisions, but also that, factually and in the short run, either they would have the same decision for sure, and then repeated appreciations would be a wastage, or that they wouldn't anyway, and then one single and definitive appreciation would be the only way of imposing unity where it was not expected to emerge on its own. With either hypothesis, they underestimate the value and the power of jurisprudence to spread in divergence at first and reach out to convergence over time. Both the mentality of reducing time and cost and that of guaranteeing equality and coherence from the start rely on a poor comprehension of the nature, mission and dynamics of jurisprudence over time in a public sphere, putting uniformity, stability and security above all other considerations.

What advocates of horizontal control also neglect is the value of singularity, particularly the relation between singularity and justice on the one hand and between singularity and inequality on the other hand. The appreciation of every case on its own emphasizes the differences that may well bring new realizations and insights on the nature and many aspects of the issue. The telephone company may have improperly billed many clients, but it doesn't mean the impact of the billing on their time, liberty and money was the same or the evidences the company would bring to prove the billing was due would hold equally convincing to each of the cases. The judge of each case would be in touch with one unrepeatable event and notice nuances of injustice that went undetected by her colleagues. Turning all of the cases into one will reduce them to their lowest common denominator, cancelling their differences and keeping important doors and windows closed to justice considerations.

Likewise, in actions against economically or politically powerful parties, where the one defender is shielded by an army of lawyers and provided with all the time and money to install, wait, wear out and win, while the plaintiffs, however many they may be, are vulnerable, underrepresented, unprepared and oftentimes in desperate need of an early decision or any offer in their favor, a collective decision may come as yet another advantage for those better legally equipped and capable to dominate negotiations. On the other hand, if the powerful defender is forced to defend itself in many lawsuits, the lawyers of the next case take advantage of what those of the last ones did right and top what they

did wrong, making each case stronger, digging further evidence, gathering better precedents, refining their interpretations of the law and creating a chain reaction where judges can only go forth, never back, in their admittance of the plaintiff's claims. Multiple and sequential fronts are likely to do more damage, even against powerful opponents.

What the "if they are similar, let's decide them as one" attitude behind horizontal control also fails to grasp is that what makes cases not only superficially similar, but relevantly similar, is not their having the same issues, but their relying on the same reasons. And, differently from issues, reasons are not immediately apparent. The reasons brought to the lawsuit in the initial complaint are, so to speak, front piece reasons, put there in order to make the case and the request recognizable as a demand of law. It is, however, throughout the process of taking evidences and hearing witnesses, of examining documents and considering experts' reports, of visiting places and ordering complementary diligences etc., that the true, underlying reasons why the request should be granted or denied are made clear. That's why the reasons a lawyer gives to support her initial request and the reasons a judge give to decide over the same request usually differ so much, even when she decides to finally grant it. If one decides according to the standards of horizontal control, one only looks at the issues at the surface, and all underlying reasons stay hidden. It's a waste of hermeneutic and argumentative potential in law.

7.3. Vertical control

I would like to begin by stressing a point that, from a critical-theoretical standpoint, I think is important: There's something oddly medieval, very Ancient Régime with vertical control. Although I am about to argue that the vertical control I denounce as pathological is different from the kind that exists in common law systems, this first criticism encompass them both. Lower courts having to decide as higher courts told them to carries an aura of hierarchic society and of power over law. As lower courts are usually comprised of career judges, validated by direct vote or public tender, promoted by antiquity or by choice of their peers, while higher courts are usually filled with political choices of the head of the executive, what in practice vertical control does is subjecting the professionals to the nominated, the legal experts to the political favorites, adding the sword of power to the factors disturbing the balance of law. Although I am a critic of the law versus politics divide, I can't but recognize that vertical control allows for the

wrong kind of politics (administrative power) to heavily interfere in the dynamics of law. It reinforces that the final say about the law belongs to the spokespeople of the very ruler law was supposed to control.

That said, I focus henceforth only on the vertical control that is not oddly entrenched in the very structure of constitutional democracies, the one that goes beyond regular, the one I deem truly pathological.

There are two regular, non-pathological forms of vertical control found in modern constitutional democracies. The first, belonging to both common law and civil law traditions, is the system of appellate courts and, where pertinent, higher and supreme courts. The US, Germany and Brazil, my three favorite examples in this work, all have this system, which already establishes one kind of vertical control, where decisions of single judges or district courts can be revised, revoked or changed. Insofar as this model, from a strictly legal point of view, doesn't come to the point of forcing judges of lower courts to decide according to the higher courts' orientations and standards, I refer to it as a "weak form" of vertical control. I emphasize that it is "weak" only from a strictly legal point of view for, from a more empirical standpoint, in terms of a sociology of power, status and professions, the diffuse and concentrated social pressure and the disciplinary dispositives over lower court judges to conform to the decisions of their higher counterparts may be not only very real and evident, but even stronger and more effective than it would get to be if it were a formal and explicit legal rule.

The second one, intermediary, a "medium form", is the system of *stare decisis* found in common law traditions. Where *stare decisis* holds, past decisions of an issue are precedents for decisions on the same issue. Precedents can be persuasive or binding. A precedent is persuasive if it is not mandatory to follow, if its disregard doesn't violate *stare decisis*. This is so with precedents of a court with equal or lower level than the one in charge of the decision. The precedent may be taken into account, but must not be followed. On the other hand, a precedent is binding if it is mandatory to follow, if its disregard violates *stare decisis*. This occurs with precedents of a higher court or of the very same court in charge of the decision. In this case, from a legal point of view, the precedent must be followed. Failing to do so entails the nonconforming decision to be revoked and the judge disciplined.

As this system does force judges to conform to higher courts' decisions and standards, it is not weak, as the last one. But neither is it

strong, as the next one, for a precedent is a case, not a rule. Taking a precedent into account is applying an analogy between the precedent and the new case. Only if they are similar in all relevant aspects the decision of the precedent is binding to the new case. Otherwise, the judge might recur to a *distinguishing*, that is, a disregard of the precedent, justified by some relevant difference in the new case that allows for a different decision. Besides, a court can change its own precedents (*overruling*), based on some mistake in the original decision or on considerations about the change of values or circumstances.

Well, what's left to the strong form, then? What I call the strong form of vertical control happens when higher courts are allowed to create rules, interpretive or complementary to legislation, mandatory to lower courts. The best example of this is found in Brazil, that since 2004, by means of a constitutional amendment, adopted a legal novelty called "súmula vinculante" (binding court-rule). If some understanding of the law is supported by two thirds of Brazilian Supreme Court's justices, the court can publish an official guidance from which lower courts and singular judges can't move away. And, as is widely known, the way a rule covers its cases is different from how a precedent does the same thing. A precedent is a case, with some particular features, to be compared with a new case, with other features, and to be applied to the latter only if, by means of analogical reasoning, a judge realizes they are similar enough in the relevant aspects. There's some room for interpretation, for consideration of similarities and differences, for discussion of how general or special the original case was etc. But a rule informs only the abstract aspects of each future case upon which one is to concentrate, making them a sufficient reason to apply to the new case the majoritary understanding of the higher court. There's no room for any interpretation other than realizing whether the case contains or not the relevant features and no room for distinguishing or divergence. It's a higher court telling the lower courts how to interpret or complement the law, making one interpretation or complement mandatory, even if others were possible. It's artificial creation of interpretive convergence, not through learning, discourse and consensus, but through sheer authority of a contingently majoritarian position in the higher court.

The fact that a binding court-rule only exists in a formal way in Brazil doesn't make strong vertical control an exclusively Brazilian phenomenon, though. Every time a higher court goes beyond deciding appellate cases (weak vertical control) and creating precedents (medium

vertical control) and advances a rule, direct or indirect, bound to be treated as binding and mandatory to lower courts, strong vertical control is at work. In this more informal way, the strong type marks its presence in practically all judicial systems, albeit in some significantly more than in others. The truly pathological scenario is found where an increasingly greater number of issues are covered by these binding court-rules, formally or informally. From the point of view of democracy, it means complementary legislation is being made by non-elected court justices. From the point of view of justice, it means that significant differences among cases are being neglected and the contingently majoritarian understanding of a higher court is taking the place of a rich debate and learning in the legal community. There begins to take place a gradual substitution of legislation by jurisprudence and of pluralistic debate by majoritarian authority. Law passes to be a matter of what those in charge of the last judicial word say it is.

Advocates of strong vertical control could try to make the case that the strong type is not much different from its weak and medium counterparts. The formal or informal binding court-rule is a way to abbreviate the same multi-year process that would lead to the higher court deciding the last appeal of the same case, or even a way to communicate in a more direct and explicit manner than with a precedent what the higher court expects from the lower courts' decision-making henceforth. That, however, would be very misleading. Free from the binding court-rule, lower courts could decide differently, justifying their judgment in such a way as to promote debate and to influence a different final outcome of the higher court in an eventual appellate decision. If the court-rule is binding from the start, debate is over, divergence is dead and learning becomes impossible. The only way to change the fixated understanding is either with another majority decision of the same higher court or with a legislative decision, both involving a cost of time, effort and negotiation way harder to achieve than the more fluid process of persuasion and change of understanding by means of arguments to one side or to the other. That makes it harder to defend that nothing becomes different with the adoption of means of strong vertical control.

But now the advocates could admit that strong vertical control is indeed different and more anti-discursive and stiff, while at the same time trying to advertise that as a good thing. They can take the functional road and insist on time-saving, cost-reduction, gain of predictability and stability, or they can take the normative road and

speak of equality, of coherence and, a Brazilian typical favorite, of effectiveness of rights. As the others fall within the same problems I mentioned while talking about horizontal control, the one to be considered is the last one. I discuss more on the "effectiveness of rights" argument when I touch on judicial activism and the judicialization of politics, but as of now something is to be said about it. In general, those using this argument mean that lateness and divergence make the rights somehow less effective, apparently or willingly unaware that time and debate were employed to know for sure which rights were to be effected. It's not like we knew from the start what was the right answer to the case, but failed to turn it into reality because lazy bureaucrats and idiosyncratic judges got in the way. Instead, time was spent trying to determine what the right answer was and confronting different judicial perspectives on the issue. But the cognitive gain is represented as a functional loss. In name of the rights being more effective, the very process of determining the rights to be effected is campaigned against and ultimately suppressed. There's little to be gained with strong vertical control from a cognitive or normative point of view. In the end, after due problematization, only the functional arguments remain.

7.4. External control

Much has changed since the times where Montesquieu and the Federalists could express no concern for excesses on the part of the judicial power, for it was limited by its own nature of being the mere enforcer of an already existing law. Judicial review, the new generations of human rights, the affirmation of the welfare state, an expansion of constitutional law, the emergence of principles as comprehensive and mandatory standards, judicial activism, and the judicialization of politics all contributed to transform the formerly most harmless of the powers into a force in need of being limited somehow, on pain of violation of the rule of law and allowing of an unlimited and tyrannical power. That explains why, since at least the seventies in the international context, and the nineties in Brazil, the constitution of some agency outside the judicial system to supervise, refrain and discipline judges became one of the most loud and repeated slogans of concerned legislators. They insisted that the judicial power was in urgent need of some kind of external control, which invariably means administrative control.

This is something to be highlighted. There never occurs that the proponents of an external control to the judicial power defend a more

discursive and democratic form of control, like popular councils or audiences. Not that I ignore the risks of submitting the judicial dynamics to the demands and prejudices of the people or the particular interests and agendas of social movements, but that would at least be a nod in the right direction, even if in need of procedural adjustments. What almost always happens, however, is the constant proposal (as in the US and in Germany) and the eventual realization (as in Brazil, with the creation, in 2005, of the "Conselho Nacional de Justiça", CNJ, National Council of Justice, "NCJ" hereafter) of administrative solutions, where nominated bureaucrats are put in charge of determining judicial deadlines, productivity goals, thematic priorities and interpretive criteria to be mandatorily followed by all judges in all courts of the country, under the very real and harsh threat of disciplinary charges and procedures. Although not all agencies of external control would behave similarly to the Brazilian NCJ, I recur to some of the NCJ's deeds to prove my point in the line below. I don't deny the NCJ's importance as an agency of data collection, strategic planning, ombudsman and internal affairs. Instead, I focus exclusively in its role as administrative controller of the judicial dynamics and interference with the content of judgments.

First we have the judicial deadlines and productivity goals. I would like to use the paradigmatic case of the "mark two" ("meta dois") policy, which determined that, at the end of 2009, all the cases whose initial complaints were filed in 2005 or before were duly sentenced. That comprised tens of thousands of cases that, over the time, were accumulated and left behind and then, in the course of one judicial year, should have all their initial complaints appreciated, their defender's responses filed and considered, their hearings done, their evidences presented and evaluated, their arguments given and judged, and their sentences made and published. But there was no extraordinary hiring of public attorneys, defenders, judges and personnel, it all should be achieved with the public servants already hired and working. The result was a series of "task forces", collective efforts to have hearings and prepare documents, going way beyond the working hours and limited competences of the servants and interns involved, doing their best to hit the target goal. In this case, however, "their best" included many byways and shortcuts. Non-listed or non-usual documents or evidences were rejected in the name of celerity. Hearings were short and heavily conducted, often in the absence of one of the parties, usually misdirected to the judge's guess of who was right or wrong. Incidents of wrong jurisdiction, lack of competence, decadence of right or prescription or

preclusion of deadlines were forced into judicial interpretation and recognition to dismiss cases and abbreviate decisions. Decision patterns of the higher courts were blindly incorporated and reproduced in order to facilitate justification and prevent appellate reformation. Cases supposed to be similar were judged collectively and received the same generic sentence. Ironically, the public justification of mark two was the interest of preventing a violation of procedural fairness, securing procedural celerity and the reasonable duration of the judicial procedure, but the target goal was only attained by means of multiple violations of procedural fairness in almost all other aspects imaginable. Nonetheless, the NCJ considered mark two duly achieved at the end of that year and a true case of success in its beneficial effect over the judicial system.

Then we have the thematic priorities and interpretive criteria. Many times the NCJ threatened to invigilate and discipline judges that neglected or refused to take into account certain concerns and criteria: the impact of condemnations of the State on the public budget, the impact of fines and indemnities on companies and their employees, the impact of some decisions on the economic and financial stability of the country, the disregard of limits trespassed and rights violated many years ago (the so called "doctrine of the consumed fact"), the inevitable reality of overcrowding in correctional facilities etc. This is undoubtedly a case of indirect sabotage of the constitution and legislation by means of the disciplinary action of an executive agency. Judges are supposed to enforce the law and to protect rights, unless the law or the rights in question threaten certain functional demands that can't be messed with. This strategy is also usually used to reinforce strong vertical control: judges with more cases sentenced and less decisions reformed in the courts of appeal are preferred when deciding about their vacation time and their relocation to sites closer and closer to the state capitals. It's the judicial disciplinary version of the traditional "stick and carrot" policy. Stick to those most threatening, carrot to those more well conformed to the functional demands of their system.

In response, advocates of external control can say one of three things: a) that the above illustrated interferences are bad, but not all external control would be like the NCJ's; b) that those interferences are bad, but other actions of the NCJ were necessary and beneficial; or c) that these interventions are not bad at all, but actually necessary or beneficial. Since I agree with a) and b), c) is the only one I would like to challenge. One can defend the "mark two" policy, for example, by

saying that procedural celerity is an important goal, elevated to the status of a constitutional principle in Brazil, and that some extreme measure was necessary to restore the minimum standard of republican decency and respect concerning the duration of judicial procedures in Brazil. The problem with both arguments is that, since many other aspects were sacrificed in the name of celerity, the one making the case for mark two has to consider all the other sacrificed aspects as less important than celerity or indifferent to republican decency and respect. And it is too much of a bad argument to maintain that a poorly but quickly judged case is better than a slowly but properly judged one.

As for the NCJ's criteria that interfere with the content of judgments, one could say that those considerations are functional but important and some official organ of the state should indeed have stated and invigilated them since long ago, or that they are cryptonormative considerations, that is, normative considerations disguised as functional: the State's budget is necessary to the realization and protection of rights and the provision and improvement of services, the companies' and the market's health and stability is necessary for jobs, wages and incomes without which private autonomy is menaced, predictability and security are necessary to enable citizens to have and pursue their life plans in the long run etc. The problem with both modes of arguments is that those considerations lead to decisions that disregard other rights and demands that are also important and normative. Securing the public budget prevents granting victims their rightful indemnity, securing companies' health prevents those companies to be fined as heavily as they should to abandon their illegal or predatory practices, securing predictability prevents individual differences and justice considerations to be taken into account in the judicial decision-making. In order to insist with one's defense of those criteria, one would have to say that the cryptonormative considerations they carry are more important because they refer to larger groups or to society as a whole – something one can't pull off without falling into the type of Utilitarianism that is incompatible with the internal structure and logic of rights and principles.

7.5. Uniformization as pathology

It's not obvious that uniformization of jurisprudence is a pathology of procedural law. From a more general point of view, one could argue that it is the culmination of the systematic character of law: a system is expected to be uniform, and its struggle to be a system must

involve some effort to uniformize its outcomes. On the other hand, from a more Habermasian point of view, one could argue that Habermas himself spoke of legal paradigms, dominant and consensual among lawyers of one time, which free judges from Herculean interpretive burdens precisely by uniformizing the lawyers' comprehension of legal concepts in general and of basic rights in particular: if nothing else, paradigms are also expected to uniformize. Insofar as it is both a systematic and a paradigmatic enterprise, law is expected to have some degree of uniformization. If one is to propose that some types of uniformization are signs of a pathology, one is supposed to differentiate the pathological uniformization from the more general features of systematicity and paradigmatization.

Uniformization is different from systematicity because they don't apply to the same level of the legal system. Systematicity is primarily a characteristic of legal norms, not of legal decisions. If a set of norms is, at the abstract level of their sources, content and relations, unitary, consistent and complete, then, it is a system. There's nothing about being a system that requires the decisions of concrete cases to be uniform. Kelsen, Hart and Raz, for example, all three of them champions of the idea of law as a system of norms, speak of the norms as authorizing multiple interpretations and speak of the judicial decision of hard cases as an act that involves choice and allows for divergence. There's no contradiction between being a system and allowing for different decisions. A unitary, consistent and complete system can have decisions that differ significantly from each other.

Uniformization is also different from paradigmatization. Paradigms are shared understandings of concepts and rights, not uniform patters of decision-making. They enable lawyers of one time to have the same comprehension of what concepts mean and how rights are to be protected or realized, not to be institutionally obliged to decide similar cases in the same exact way. In a sense, paradigms are the very opposite of uniformization. Paradigms are the product of discourse, formed through a process of giving and taking arguments, of rational conviction, of taking part in a community of free and equal speakers in search for a understanding. Uniformization is a limit that cancels and prevents discourse, based on authority, not conviction, and vertically imposed, instead of shared between free and equals. Paradigms treat judges as rational decision-makers whose grasp of law and sense of nuance and difference are valuable and welcome. Uniformization treat

judges as robotic servants, in charge of reproducing in lower courts what the higher courts have discussed, interpreted and decided previously and in their place. Paradigms are a source of communication and learning; uniformization is a practice of administrative power.

What's inherently pathological about the uniformization of jurisprudence is that it restrains the discursive character of judicial decision-making to the point of rendering most of the parties' arguments pointless and the judge's particular understanding of the law and the case almost unnecessary. Or worse: unwelcome. If a judicial procedure is a remedial discourse, comprised of both communicative and administrative elements, committed both with rationality and authority, uniformization is a clear attempt to unbalance this relationship in favor of the functional aspect of the whole thing. Its hostility to uncertainty, divergence and revision makes it an expression of the imperialist demands of the market and the State. It's functional misappropriation with a normative pseudo-justification: a casebook example of ideology.

What uniformization is really committed to prevent is not so much divergence, but risk. While law was pretty much an enterprise of the rich and powerful, using early liberal ideology to protect and favor the rich and powerful, no control over divergence was thought to be necessary. As a rule, the decisions were very similar, because cases were standard, rights were less comprehensive and law was less of a tool of deconstruction of privilege and denouncement of exclusion. When the cases became more complex and the law became more controversial, when judges came from many classes and ideologies, when decisions became threatening of the regular functioning of market and the State, judicial decision-making turned into a liability, a risk to be contained. I don't need this explanation based on the social causes to characterize uniformization as pathological: the suppression of the discursive elements of judicial decision-making suffices. But this explanation in terms of a reactionary movement, of a strategy of risk-containing, adds yet more sociological credibility to my hypothesis.

CHAPTER 8 – Third pathology: Judicial Activism and Judicialization of Politics

8.1. Introduction

As both terms have been used with various meanings, many of which not exempt from bias, "judicial activism" and "judicialization of politics" must first be properly defined and only then discussed in relation with my argument in this chapter. With "judicial activism" I refer to the overall detachment of judicial behavior from the traditional profile of passivity, non-interference, self-containment and impartiality toward a more engaged and purposivist frame of mind and pattern of choice and action. Therefore, the phenomenon where judges go beyond text and reaction to pursue purpose and action. On the other hand, I call "judicialization of politics" the overall increase in legal and judicial treatment of, control over and interference into issues traditionally belonging to rulers and legislators. Therefore, the phenomenon where issues traditionally assigned to the parliament or to the head of state are decided in the courts.

In the topics below I first examine judicial activism, its characterization and justification, criticizing some of the arguments most often used to defend it and leaving room for a more functional explanation. Then I repeat the same routine with the judicialization of politics, highlighting in this case some examples in the last decades and their gradual incorporation in the normal tasks jurisdiction is expected to perform. In the end, I offer my explanation, which is mostly functional, on both phenomena as one strategy of sabotage of democracy.

8.2. Judicial activism

Regarding the meanings of "judicial activism", Canon, in his now famous and accredited text on the subject[1], distinguished six thematic dimensions of the debate between activism and restraint, namely: (1) Majoritarianism: the degree to which policies adopted through democratic processes are judicially negated; (2) Interpretive Stability: the degree to which earlier court decisions, doctrines, or interpretations are altered; (3) Interpretive Fidelity: the degree to which constitutional provisions are interpreted contrary to the clear intentions of their

[1] CANON, Bradley C. *Defining the dimensions of judicial activism*. 66 Judicature 236 1982-1983.

drafters or the clear implications of the language used; (4) Substance/Democratic Process Distinction: the degree to which judicial decisions make substantive policy rather than affect the preservation of democratic political processes; (5) Specificity of Policy: the degree to which a judicial decision establishes policy itself as opposed to leaving discretion to other agencies or individuals; (6) Availability of an Alternate Policymaker: the degree to which a judicial decision supersedes serious consideration of the same problem by other governmental agencies. For my purposes here, this list is especially convenient. In what follows, I discuss dimensions from 1 to 3 under the label of judicial activism, while later I take on the dimensions 4 to 6 under the label of judicialization of politics. Although I know that dimensions 4 to 6 are not all that is to know about judicialization of politics, I believe they are aspects of judicial activism that are best examined in the broader context of the second phenomenon.

Let us examine the first three dimensions of the activism-restraint divide to find some general ground I believe to exist among them.

The first one is about majorities versus rights and procedures. Here majorities are taken to be the prima facie meaning of democracy, while rights and procedures are seen as elements that, while also relevant to democratic arrangements, tend to be illegitimately magnified by activist judges in order to limit or contain the expressions of the majoritarian will. Habermas has a well-known view on this divide, that might look like it solves the problem. According to Habermas, it is a false divide. On the one hand, the majoritarian will is only an expression of democracy as deliberative formation of shared opinion and will of a legal partnership among free and equal citizens if a set of rights and procedures secure the conditions for rational deliberation and legitimate formation of opinion and will. So they are complimentary, not contradictory: rights and procedures have in common with the majoritarian rule the goal to secure the legitimacy of opinion and will formation (Ch. 3 of FN). On the other hand, while bringing about rights and procedures to contain or counterbalance the majoritarian will, the judicial power is expected to reinforce a procedural and discursive meaning of the rights and procedures, one that secure conditions of pluralistic debate and give individuals and groups their voice to determine what is on their own interest and furthers their own autonomy (Ch. 6 and IX of FN). So it is not a way to make the judicial power's

views prevail over those of majoritarian instances, but rather of making the majoritarian instances more inclusive and deliberative.

But these critical-reconstructive approaches, successful as they may be in what they aim to accomplish, most certainly cannot be invoked to defend every possible judicial use of rights and procedures to make some counter-majoritarian view prevail. To limit ourselves to two landmark cases in American Law, consider, for example, Roe v. Wade (constitutionality of abortion, 1973) and Obergefell v. Hodges (constitutionality of same-sex marriage, 2015). In both cases, a right (privacy, equality) was combined with the reinterpretation of some concept or institution (person, marriage), so that, while the appeal to the right can be defended in the terms of Habermas's approach, the reinterpretation part is more difficult to vindicate upon the same ground. In Roe v. Wade, the constitutional implicit right to privacy as, among other things, control over one's own body, combined with the strictly constitutional meaning of person, interpreted by the Supreme Court as non-applicable to the unborn, resulted in the highly controversial, counter-majoritarian decision of the constitutionality of state laws permitting pregnant women to abort. Habermas's approach would maybe justify the argument of privacy as part of the individual's private autonomy, but wouldn't make any less problematic the argument of the unborn as non-persons, which is much closer to a judicial view prevailing over the majoritarian opinion and will. In Obergefell v. Hodges, an extrapolation of the equal treatment clause, combined with a more affection-centered reinterpretation of the institution of marriage by the Supreme Court, allowed for an also highly controversial, counter-majoritarian decision of the constitutionality of state laws permitting same-sex marriage. Again, Habermas's approach would surely justify the argument of equality as condition to the legitimate legal partnership, but wouldn't make any less problematic the argument of marriage as exclusively affection-centered, which is much closer to a judicial view prevailing over the majoritarian opinion and will. So even a critic of judicial activism convinced by Habermas of the complimentary and discursive character of the appeal to rights and procedures could still stand against both illustrated decisions on the ground of their being based in judicial reinterpretations of concepts or institutions in undeniable conflict with majoritarian opinions and wills. In this sense, Habermas's approach doesn't prove that some of the most commonly appointed examples of judicial activism are indeed legitimate and non-problematic. The problem with counter-majoritarianism remains.

So now we can redefine the first dimension of judicial activism in a way that escapes Habermas's critical-reconstructive rebuttal: The conflict between majoritarian will and right and procedures is that, in the name of rights and procedures, controversial, counter-majoritarian judicial views prevail against majoritarian ones, in a way that neither secure conditions of legitimate opinion and will formation nor contributes to a more inclusive and deliberative debate. What judges implicitly say in cases like Roe v. Wade and Obergefell v. Hodges is that what most citizens think and want about, for instance, persons and marriage is either irrelevant or wrong, in need to be replaced with some reformist view of the issue, no matter how controversial and counter-majoritarian it may be. Inasmuch as judges in these cases make their views prevail over majoritarian ones, without discursive or deliberative reasons to do so, they act in the exact way critics of judicial activism denounce as wrong and dangerous. So even if Habermas's discursive and deliberative reasons redeem some cases of judicial activism, others remain problematic even after those reasons are examined.

As for the second dimension of Canon's classification, namely the stability of precedent, three points are to be addressed from the start. One, that the doctrine of precedent allows for change, in the form of distinguishing and overruling, but the instability of precedent that counts as activist is something different. Two, that Habermas's defense of a reconstructive interpretation of law in view of each case justifies a certain degree of instability, but not the degree in question when the accusation of judicial activism comes to light. And three, that it is not contradictory to diagnose both the uniformization of jurisprudence and the instability of precedent as pathologies of procedural law.

Let's tackle the first point. The doctrine of precedent allows for change, in the form of distinguishing and overruling. Every system of precedent is governed by an explicit or implicit rule of stare decisis, meaning that current cases must be decided according to their binding precedents. Except in view of a good reason to the contrary, one must decide now according to the precedents of the past. However, two situations count as exceptions. One is distinguishing: If the current case and the precedent are dissimilar in important aspects, so that a different decision is justifiable, the judge may make a "distinguishing": she points out how the current case is different from the precedent and why it requires a different decision. The other one is overruling: A court may decide a current case in a way that overrules the former precedent, in

view of the realization either of some legal impropriety of the precedent or of some crucial change in the legal, social or cultural circumstances. So stability of precedent is not an absolute, since the very doctrine of precedent makes room for at least two legitimate forms of rupture.

But the instability of precedent that counts as activist is different. One form of rupture that the doctrine of precedent certainly does not allow for is that a judge deviate from precedent on the sole basis of her disagreeing with it. The case is relevantly similar to the precedent case: so no distinguishing is in order. The precedent had no legal impropriety, as well as no significant change of the circumstances took place since the precedent was fixated: so no overruling was necessary. The judge just considers the precedent a bad decision, or at least not as good as some alternative decision she would rather make to the case. So she breaks away from the precedent anyway and decides however else she sees fit. That is the kind of instability of precedent that critics of judicial activism denounce as wrong or dangerous. If the doctrine of precedent means anything, it means that judges are to decide according to precedents even when they find them poor or wrong. If interpreted any other way, judges are only to follow the precedents they agree with; the rule of stare decisis ceases to be mandatory, which means that no precedent is binding and no system of precedent whatsoever is in place. So judicial activism has to do with a particular form of instability of precedent: the one where neither distinguishing nor overruling are in order, founded on the judge's sole disagreement with the precedent.

Now the second point: precedent stability. In Ch. 5 of FN, Habermas follows Dworkin in charging legal interpretation with the task of reconstructing the existing law in view of each case. Habermas goes as far as saying that the legal security law can promise the citizen has nothing to do with predictability or stability, but rather with discursive rationality, normative coherence and legal appropriateness. If that is the case, then the disagreement-based precedent instabilities could be justified as episodes of reconstruction of the existing positive law that, in view of normative coherence and legal appropriateness, resulted in changes of the hitherto prevailing precedents. In short, not episodes of judicial activism, but rather of reconstructive interpretation. Law could not break a promise of stability of outcomes if it never made such promise to their citizens in the first place.

But such radical conclusion would be tantamount to abolishing the system of precedent altogether. As I explained above, the doctrine of

precedent means that judges are to decide according to precedents even when they find them poor or wrong. If every time a judge disagrees with what the precedent established she is allowed to reconstruct the existing positive law as a whole in view of the case, it means she is allowed to break away from precedent whenever she likes, or at least whenever she finds cogent reasons in law as a whole to come to a different conclusion. That would make the precedent no more than a previous case to be considered only as long as its decision is right and, therefore, not binding at all. Without binding precedents the very system of precedent would disappear. However reformist one takes Habermas's theory to be, he himself insists that it is critical-reconstructive, not reformist at all. So the obliteration of the precedents system cannot be one of the theory's intended effects. Some interpretation of the powers of reconstructive interpretation has to be made that agrees with the regular functioning of binding precedents in the legal systems where they exist.

Here's my proposal: Stare decisis is to be seen as a tiebreaker rule to deal with disagreement, securing a minimum of stability in legal outcomes while making room for justified exceptions. When Habermas says that the legal security law can promise to the citizen is discursive rationality, normative coherence and legal appropriateness, he doesn't mean that law utterly shies away from predictability and stability. Were that the case, law could not perform its social function of making the material, temporal and social generalization of normative expectations. What Habermas means is that law's commitment with predictability and stability doesn't hold at the cost of correction and appropriateness, but at the same time as them, which means that predictability and stability are neither just empty formalism nor absolutes that are never compromised. But, to my view, the room for compromising predictability and stability varies with the level of law application. It is major with constitutional interpretation, average with statutory interpretation and minor with precedent application. Allow me to explain why.

The room for novelty is major with constitutional interpretation because constitutions are open-ended texts, with a life of their own and in perpetual development, providing the judiciary with new powers to invent new rights, protections and limitations. They are expected to both reflect the political community's general agreement in a given moment and to serve as normative vocabulary for further demands, struggles and changes in years, decades or centuries to come.

It is average with statutory interpretation, because statutes are not just general agreements and normative vocabularies, but outcomes of exercises of public sovereignty. If constitutions provide that no citizen shall be deprived of life, freedom or property without the due process of law, statutes provide what counts as due process of law in each given time, with as much detail and precision as needed to the intricacies of practical enforcement. However, statutes are also general norms, crammed with universals and standards and designed to the ordinary and commonplace, lacking both sensitivity to the atypical and welcome to the unexpected. That's what discourses of legal appropriateness are for.

Nevertheless, the room for novelty is minor with precedents, because novelty is covered in advance: The method of distinguishing already makes room for considerations of legal appropriateness. If a case is atypical or an issue is unexpected, the magistrate is not constrained to enforce the unfitting precedent against her best judgment. She enjoys the power to show that the facts of her current case are sufficiently different from the previous decision and, thereby, to justify her not following a precedent otherwise binding. There's no obligation to impose precedents upon cases they are clearly inappropriate to, as long as the inappropriateness in question concerns material facts, not evaluative disagreement or unfortunate outcomes. That's why there's good reason to consider stare decisis with precedents as much more binding than the legality of statutes or the fidelity to the constitution: While those are prima-facie duties, stare decisis, having surpassed the distinguishing threshold, is an all-things-considered duty.

Now back to my aforementioned proposal: Stare decisis is to be seen as a tiebreaker rule to deal with disagreement, securing a minimum of stability in legal outcomes while making room for justified exceptions. Exceptions are considered justified when material facts distinguish far enough one case from the other. The precedent that secures a car dealership the power to repossess an overdue leased vehicle would have ludicrous applications to a shoe store coping with unpaid installments of cowboy boots. But it would be different if, in a case that also involves an overdue leased vehicle, the judge decided that, for a matter of justice (the debtor's losing of her car being too harsh a measure) or in view of particular consequences (the debtor's inability to support herself as an Uber driver), the precedent should not be followed and, therefore, the repossession not be issued. That would be a genuine infringement to stare decisis, the kind of breach of stability the critics of

judicial activism are within reason to complain about. The evaluative or consequential consideration of the current judge ties with the contrary opinion of the precedent's judge, calling for a serviceable tiebreaker. Stare decisis, asserting that stability be preferred in case of evaluative or consequential disagreement, is suchlike tiebreaker.

On that account, even a Habermasian theory, with its backing of reconstructive interpretation and legal appropriateness, would find solid grounds to not only champion a system of precedents, but also denounce breaches of precedent stability. Thus, if this is the facet judicial activism shows itself with, one can acknowledge that, as long as functional explanations are given to its latter-day prevalence, a diagnosis of this phenomenon as pathological is at least not entirely off the table.

There remains unaddressed, however, the third dimension of judicial activism: interpretive fidelity. Canon presents it as concerning the degree to which constitutional provisions are interpreted contrary to the clear intentions of their drafters or the clear implications of the language used. Upholding that this too is a pathology poses a seemingly impossible challenge to someone that just wrote that constitutions are open-ended texts. But I think I can handle the challenge quite nicely.

Allow me to introduce two examples taken from recent Brazilian Supreme Court's jurisprudential history. As far as content goes, one would be deemed as progressive, oriented to an equal-rights approach to marriage, while the other would be viewed as conservative, committed with a law-and-order approach to the presumption of innocence. On the other hand, as far as constitutional interpretation goes, both are instances where the Constitution's textual limits were disregarded and trespassed, allegedly in the name of pressing social demands of the new times. And nonetheless both are not the same.

First we have Brazilian Supreme Court's decision that, although the Constitutional text say that marriage "between a man and a woman" is protected, the right to marry be extended to all individuals, with no distinction between heterosexual and homosexual couples. Justices in the majoritarian stand justified their decision with both the change of times and social values and the narrative of the Constitution's higher commitment with equality and non-discrimination.

Second we have Brazilian Supreme Court's decision that, although the Constitutional text say that defenders not be punished until their last possible appeal is rejected, the presumption of innocence be

reinterpreted so that defenders should be punished after the rejection of their first appeal, however many appeals be pending in their favor. Justices in the majoritarian stand justified their decision with both the change of times and social values and the narrative of the Constitution's responsibility with procedural celerity and the fight against impunity.

To explain why the open-ended text argument would not legitimate both decisions, a left-oriented Habermasian would perhaps take the easiest path: Arguing that, since constitutions are supposed to give rights, not take them away, they are open to enlarge and extend rights (like the right to marry), but not to shrink and curtail them (like the presumption of innocence). That would be just fine, were not for the fact that the Brazilian Constitution (a) places both the right to marry and the presumption of innocence among the rights that cannot be changed (making both aforementioned decisions cases of unconstitutional change of the constitution) and (b) recognizes social and collective rights, like cultural self-determination and social security, as rights just as basic and unalterable as the classical civil ones (giving the defeated side of each case an argument equally grounded upon constitutional rights). With such considerations in mind, one would have to justify why one unconstitutional change of the constitution is acceptable and the other is not and why some basic rights (cultural self-determination, social security) can be diminished or remain limited and others cannot. And then the easiest path appears insufficient to give determinant reasons.

Here I believe that some sense of original commitment has to be brought to light. In order to do that, one does not need to incur in the mistakes and extremes of American originalism, making controversial claims about moral exceptionalism, historical predestination, privileged viewpoint or foundationalist metaphors of ships, masts and mermaids. It is sufficient to remind oneself of the dialectical nature of constitutions and how they maintain unresolved tensions between history and reason.

Constitutions are at the same time attempts to capture reason way beyond history, context and particularity (a repository of wisdom from the past in the form of a testament to the future, a declaration of the best achievement of mandatory universality so far), but also inevitably rooted in some historical, contextual and particular standpoint that, for as long as that specific constitution holds true, is going to be regarded as the best possible standpoint from where to look at the future and make basic political commitments. That is the second most important reason why constitutions are usually made right after ruptures like political

revolution, national independence or overthrow of autocracy: not only because a new institutional normality requires a new legal basis of legitimation and control, but also because the political community begins to consider the moment of that rupture as the privileged point of observation of the lessons of the past and the challenges of the future. If something happens that replaces that point of observation with another one viewed as better in quality (progress) or more realistic vis-a-vis disturbingly new circumstances (crisis), there is good reason to make a new constitutional agreement. But until there, having a constitution is also sustaining the conviction that the point of observation where the existing agreement was made keeps being the best available from where to look at basic questions. That is why a sense of original commitment is necessary, although in permanent tension with the open-ended nature of the constitution as invitation for future generations to take ownership of its text as meaningful to their believes, values, hopes and challenges.

That is also why an entire abandonment of that sense of original commitment can be seen as a type of pathology. Every constitution's attempts at reason are rooted in a contextual point of observation taken as better than others. It is greatly desirable that the new challenges of the future activate the open-ended process of constitutional reinterpretation, but it is certainly problematic that such reinterpretation come in the form of forgetting the original point of observation and embracing the exact opposite views and preferences that that original commitment explicated ruled out or fought against.

That, to my view, is the real difference between Brazilian recent reinterpretations of the institution of marriage and of the presumption of innocence: Not the their taking advantage of the open-ended nature of the constitution, which they do equally, but their contrasting attitudes towards the original commitment of Brazilian constitution. While the former maintains and furthers the original commitment with pluralism and non-discrimination, the latter betrays the original commitment with individual freedom and protection against arbitrariness, forgetting that the original point of observation was the overthrow of a dictatorship.

8.3. Judicialization of politics

What is common to dimensions 4, 5, and 6 of Canon's list? At the same time, a rights-based conception of policies and an idealized conception of courts. The rights-based conception is one where policies are not only a matter of interests, but also of rights (of the individuals, of

some groups, or of the whole of society) and duties (of the State), which enables the parties to lay up claim to policies in need of making and file complaints against policies made by the legislative or executive branches. That makes policies a legal matter. The idealized conception is one where the judicial power represents an impartial instance of decision-making and possesses a special language and argumentation capable of capturing the individuals', groups' and society's needs and interests in terms of rights and then make an official, executable and coercible decision about the duties of the State. That makes the judicial environment a privileged arena for policy making or enforcement. In my dismantling of the normative reasons in favor of the judicialization of politics (a phenomenon that roughly and approximately corresponds to dimensions 4, 5, and 6 of judicial activism), I have to address both such conceptions and explain why they convey only half-truths.

Allow me to introduce an example that takes some time to be properly exposed but hopefully pays off later on as a more concrete reference to the discussion. Say there is a neighborhood in a large city with severe problems of sanitation: Drainage system, sewage treatment, water supply and garbage disposal either don't exist or don't meet the minimal parameters of civility, and as a result many of the residents suffer with easily preventable diseases, contributing to the overcrowding of the local public healthcare center and to the increase of local mortality rates way above the national average. Say the following three facts are true: (a) the conditions of basic sanitation are not satisfied in that neighborhood; (b) the constitution provides that basic sanitation is a basic social right; and, finally (c) the constitution also provides that state government is the responsible for public policies of basic sanitation.

I suppose there can be no doubt that the state government should make and implement a public policy to give that neighborhood proper sanitation conditions. The remaining problem is how to make the state government do that when it has been inactive for a very long time. Now compare two hypothetical but credible political scenarios: Scenario A, with the regular representative-democratic approach and, in the end, utterly unsuccessful; and Scenario B, with the judicialization approach and, to some extent, fairly successful.

Scenario A: The board of the neighborhood residents' association drafts a formal complaint against the conditions of sanitation of the neighborhood and schedules one meeting with a member of the executive branch (the State's Secretary of Public Works, Transport and

Housing) and another with a member of the legislative branch (a state representative elected by distrital vote), both at the state capital. The State's Secretary receives them for the meeting, takes her copy of the complaint, listens to their concerns and demands and takes them to the State's Sub-Secretary of Public Works. She by her turn shows them the public works projects that the State's government already has with a view to that specific neighborhood and explains why there are not enough funds in the state's public budget to handle such an ambitious project all at once, while the funds needed to carry out the project in parts each month would be greater than the monthly expenses with the local healthcare center, disrupt local traffic and commerce in a virtually fatal way and not give the expected results before twenty-four months of implementation. That's why the State government cannot commit itself to doing anything more than it is already currently doing.

The board members give up with the State's government and invest it all with the state representative. The latter also receives them for the meeting, takes her copy of the complaint, listens about their visit to the State's government and schedules another meeting for the next week to tell them what she can do about it. In the subsequent meeting, she tells them that she requested and received copies of the public works project the State's Secretary of Public Works, Transport and Housing had, examined it with her team of assessors and consultants and came to the conclusion that it is promising and satisfactory enough to propose a public sanitation works bill to the State Budget Committee and, if approved, take it to the vote in the State Legislature. After three months of much bureaucracy, lobbying and negotiations, the State Budget Committee finally writes their report approving the public sanitation works bill and recommending it to the vote of the State Legislature. However, eight months after that, during the voting process, the public sanitation works bill is scheduled to be appreciated along with many other public works bills, including one of twenty new daycare centers all over the State and one of a new hospital in the State's capital downtown, which are the clear priorities of the Governor's parliamentary majority. In view of the concurring bills and thanks to some intervention of the State's Secretary of Public Works, Transport and Housing, the public sanitation works bill is defeated in the vote and excluded from the year's state budget. The neighborhood remains without basic conditions of sanitation and the rates of disease and death increase even more.

Boring, annoying and infuriating as Scenario A might look, it is not far from the truth of everyday politics and illustrates some of the many problems with representative democracy even in small states and even when no public corruption, corporation lobbying and party obstruction occurs. That's why the regular representative-democratic approach to these issues seems so unappealing in comparison with the celerity and effectiveness of judicial measures. To make the contrast clearer and more detailed, let's now examine Scenario B.

Scenario B: Frustrated with the results of their previous attempts, the members of the board of the neighborhood residents' association now decide to address the third and last branch of power, the judicial one. They schedule a meeting with one of the State's public prosecutors and consult with her about their chances in a prospective lawsuit against the State in order to obligate it to fulfill its constitutional duties of making and implementing sanitation public policies with a view to their specific neighborhood. She tells them that their chances are greatly depending on the judge to whom the case is to be issued, because the State's judges widely disagree about how social rights and State's duties concerning their implementation are to be interpreted, as well as what, if any, is to be the courts' role in guaranteeing the effectiveness of the constitutional provisions in these regards. They say they understand and accept the risk and sign a letter of representation authorizing the public prosecutor to file the complaint. Five weeks later, the complaint is filed.

Luckily, it is issued to one of the State's judges most committed with interfering in policy-making and so, after two years of repeated hearings, numerous documents, technical evaluations and external consultations, a struggle fought both in the courtroom and in the press, with much controversy and oscillation of support of public opinion, the judge of the case finally comes to her decision. She rules against the State, coercing it to include the sanitation public works bill in the following year's state budget and execute it in twenty-four months, under penalty of a daily fine in case of delay in starting or finishing the work as judicially mandated. Three more years follow in the appealing battles, with repeated injunctions suspending the effects of the first decision, until the national Supreme Court has its final say: The first judge's decision is not unconstitutional, but valid and mandatory. The State is ultimately condemned to do what it was always supposed to do but would probably never have done without a judicial shortcut to all the meanderings and difficulties of the regular functioning of representative

democracy. Twenty-four months later (eight years after the residents' association first meeting), the work is done, and the neighborhood is finally given the drainage system, sewage treatment, water supply and garbage disposal it always had the constitutional right to have.

Now we can return from what may have seemed an immense deviation of route from the initial argument. Taking this hypothetical but credible case as concrete reference, I can discuss the two background conceptions behind the judicialization of politics: the rights-based conception of policies and the court-centered conception of politics.

First I tackle the rights-based conception of policies, which is the main reason why the judicialization of politics usually doesn't look like an interference of courts in non-legal matters, but, as their advocates like to put it, just the fulfillment of the regular duty of the judicial power to make the promises made in the Constitution come true. As explained earlier, this conception views policies as a matter of legal rights and legal duties and, therefore, as a fairly legal matter.

A relatively easy way to problematize this conception would be appealing to the distinction between *stricto sensu* principles and policies found in Dworkin. Although Habermas has never explicitly stated that he recognizes Dworkin's two types of *lato sensu* principles, the distinction he normally makes between moral, ethical, and pragmatic arguments seems to indicate that at least a schematic classification of reasons is at play in his conception of deliberative politics. What Dworkin would count as a policy, that is, an argument with a political objective for the well-being, security or prosperity of the community as a whole, would probably fall either (less likely) into the ethical or (more likely) into the pragmatic categories in Habermas's own classification. As in Dworkin, they would contrast with deontological and universal considerations (moral arguments for Habermas, *stricto sensu* principles for Dworkin), although with the difference that for Dworkin the principles *stricto sensu* enunciate rights that protect individuals against the goals of the community (all rights in Dworkin are individual rights), whereas for Habermas the moral arguments concern what is equally good for all individuals when they assume each other's point of view. This difference, however crucial it may be in other regards, doesn't affect the general nature of Habermas's pragmatic arguments and Dworkin's policies. That's why in the following lines I try to translate, with due adaptations, Dworkin's arguments into Habermas's concepts.

Dworkin maintains that, due to the difference between *stricto sensu* principles (individual rights) and policies (communal goals of well-being, security and prosperity), the judicial power is at the same time in the best possible position to interpret and protect rights and in the worst possible position to choose and implement policies. Rights have a counter-majoritarian logic that requires them to be often protected against communal goals in very unpopular decisions, the type of which would hardly be made by a legislator pursuing reelection, but would way more easily be made by non-elected judges whose career remains unaffected every time they decide against the public will. On the other hand, policies have a majoritarian logic, since they are communal goals chosen from the many possible concurring goals individuals and groups within the same society might have. Such choice is more likely to be well made by an assembly bringing together representatives of the most diverse sectors of society, in which all have their voice and where majoritarian decisions require bargaining, negotiation and concession, than by a body of professional non-elected judges using their own experiences and opinions to determine what is good for the whole of the community. That's why, according to Dworkin, judges are required to decide on the basis of *stricto sensu* principles, but are prohibited to make decisions with a view to policies – a point kept unaltered throughout Dworkin's works and phases.

Although I am convinced that Habermas doesn't share Dworkin's reductive, aggregative, and utilitarian views of the parliament (which for Habermas is the institutionalized core of the public sphere itself, the filter and channel of communicative power generation), I also believe that some of Dworkin's argument for a division of argumentative labor can be saved from a Habermasian point of view. In that respect, I would argue that, in a deliberative democracy, a distinction is needed between arguments with prima facie universal acceptability in view of their deontological cogency (the prohibition of torture, the due process of law as condition to deprivation of life, freedom or property, the invalidity of coerced contracts etc.), and arguments whose cogency depends on a deliberative process where their acceptability is to be put to test against the background of shared values and competing interests (the amount of investments in the military, the convenience of a public education or healthcare system, the public funding of the arts and sciences etc.). Both types of cogency would be deliberative, but one with its deliberative acceptance reasonably presumed, while the other in need to be put to test. A distinction like this would be fairly tantamount to Dworkin's.

Since most cases of the judicialization of politics concern the effectiveness of rights of individuals or groups that require funds and actions from the State, they would more or less easily fall into the second category of the distinction above. In the concrete case of the sanitation public works I described earlier, the cogency of an argument in favor of investing public funds into giving that neighborhood its due basic conditions of sanitation is very possible, but cannot be presumed. It is but one possible goal of the community, whose priority would have to be put to test in a deliberative process, such as that in Scenario A of my example. A mandate from the judicial power for the State to put the sanitation public works in its budget and implement it in the following year no matter what, as in Scenario B, would mean transforming one of the community's possible goals in the finally elected goal without the deliberative process necessary to test its acceptability. It would be an artificial and illegitimate shortcut to deliberation, the very opposite of the judicial role in a procedural paradigm like that of Ch. 9 of FN.

Now, in order to finally come to our main point here: But what if the constitution provide that those goals of the community are actually basic rights whose non-implementation entails a disrespect to the human dignity of those affected? Would that make any difference? Does the adoption of the deontological language of rights and duties make the social demands contained in them to acquire presumed cogency?

To that my answer would be *no*. It is very true that Habermas's logic genesis of the basic rights in Ch. 3 of FN makes room for a set of social, economic, cultural and environmental rights (the fifth group) whose extent and implementation vary from community to community depending on many circumstances and contexts. So, in the referential example, a *general* right to sanitation is a social right of the fifth group, as such a basic right to be provided in the constitution and implemented by the State to some degree. But, insofar as the *specific* right to that public work of sanitation competes for political attention and economic funds with other goals (equally connected with constitutional rights), it doesn't mean that such specific right is suitable to judicialization.

This distinction between general and specific rights is not to be confounded with Habermas's distinction between unsaturated and saturated rights. Habermas explains that all the logic genesis provides is a list of unsaturated rights, that is, abstract entries that, although pointing to a certain idea, have yet to be concretized in more detail and limit by each community's political legislator. Both individual rights of

private autonomy and political rights of public autonomy are originally unsaturated in this sense in Habermas's list, which has no implication in their saturated forms not being suitable to judicialization. The saturated version of the right to freedom, to nationality, to due process of law or to voting are all suitable to judicialization, whereas, according to my explanation, even the saturated version of the social rights are not. So it is not their being unsaturated that makes them unfit to be judicialized.

What makes them unfit to judicialization is that they can only be realized by means of certain public policies, that always compete for attention and funds with other possible ones. So having the *general* right to sanitation is not the same as having the *specific* right to a *certain* policy of sanitation. Having the general right to sanitation is having the right that the State make policies concerning sanitation. If you consider Habermas's lesson about the co-originality of private and public autonomy, you can go one step further and say that having the general right to sanitation is also having the right to participate and interfere in the deliberative decision-making of what sanitation policy is to be made (as the residents did in my Scenario A). But, because of the same co-originality argument, having the general right to sanitation cannot mean having the right to skip the deliberative decision-making and determine what sanitation policy is to be made without public consultation or confrontation with other goals (as they did in my Scenario B).

So the mistake of the rights-based conception of policies lies in the fallacy that all basic rights are equally suitable to judicialization. They are not. Even if something is provided in the constitution as a basic right, as long as its implementation competes for attention and funds with other goals, its cogency cannot be presumed, that is, such implementation is first to be publicly deliberated in the institutional channels of democracy. Its alternative implementation by means of judicial mandate is an undemocratic and illegitimate shortcut.

Now I can deal with the court-centered conception of politics. As explained earlier, this conception views courts as an impartial instance endowed with a special language and, therefore, as a privileged arena for policy making or enforcement.

I argue against this view in three fronts. First, I reject the idea that the judicial power is impartial for policy-making, as well as the idea that an impartial arena is what policy-making requires in the first place. Second, I rebut the idea that the legal language is appropriate to policy-

evaluation, arguing that its mandatory-non-mandatory dichotomy is actually reductive and hurting to the political process as a whole. Third, I make some considerations on the idea that the legislative and executive powers are ineffective, claiming that the reason for most of what is seen as ineffectiveness is the democratic process of discussion, negotiation, bargaining and concession, whose absence from the judicial power only makes it more effective on the cost of being inherently authoritarian. Throughout my argument, I hope it becomes transparent that what hides behind that conception of politics is an autocratic depoliticization of politics, a non-intentional structural sabotage of democracy.

To begin with, the idea that the judicial power is an appropriate arena for policy-making because it is impartial suffers from two problems at once: supposing that the judiciary is impartial enough and that an impartial arena is what policy-making is in need of. On the one hand, the judicial power is not impartial as far as policy-making is concerned. Magistrates not only are one among many professional and institutional classes whose interests are at stake, but also are normally more connected with those that can afford repeated and longstanding litigation in their area of work and expertise (usually the State and big businesses) than with the remaining sectors of society, being more often than not unaware of the struggles and interests of those to whom they, as non-elected officials, hold no representation or accountability.

On the other hand, what policy-making requires is not so much impartiality, but deliberatively constructed partiality. After all, policy-making is almost always a matter of choice between alternatives, an activity where an impartial instance would take every goal as equally valid and, then, lack sufficient reason for taking one side over the other. Insofar as it involves choice, policy-making requires having preferences and, therefore, some degree of partiality. Now the difference between the partiality of the judiciary vis-a-vis that of, say, the legislative is that the former's partiality comes from having particular interests and connections, as well as from lacking sufficient information, while the latter's comes from its pluralistic composition, its representative role and its deliberative will formation. The partiality of the legislative is deliberatively constructed. That is what policy-making calls for.

In second place, there is something deeply mistaken in taking the legal language as appropriate to policy-evaluation. Policies have to do with majorities and minorities, commonality and difference, struggles and interests, competition and cooperation, resources and sacrifices,

importance and urgency – a multitude of practical evaluations and trade-offs to which law is usually blind and insensitive. Most legal matters are completely void of nuance and remain cloistered to the mandatory-non-mandatory dichotomy, that is both reductive and hurting to policy decisions. It is reductive because it strips away complexity and nuance by defining a political choice in terms of its being mandatory or not. And it is hurting because it may give the false impression that a policy aimed at a mandatory right is *ipso facto* a mandatory policy. It virtually converts multifaceted political debates into unidimensional exercises of administrative decision-making. That is why juridification is mentioned at the end of TCA as a type of systemic colonization of the lifeworld.

Now the last thing missing is providing some considerations on the endlessly repeated narrative that the legislative and executive powers are ineffective at making and implementing public policies of general interest in expeditious time. While proving otherwise, in view of so many disappointing examples the current political scenario has provided us with, would surely be close to impossible, there is something to be said about the implication that it would make judicial interference defensible as some sort of second-best case scenario.

For starters, it is helpful to distinguish between two difference causes of ineffectiveness. I call them the pathological problems of democracy and the normal complexities of democracy. Part of what renders legislative and executive powers so ineffective at policy-making is a series of distortions resulting from the influence of money and power over the decision-making process or from the prevalence of administrative structures over communicative sources. Those are the pathologies of democracy, to which, by the way, the judiciary power is at least as vulnerable as any of the other two. Maybe actually more vulnerable, for its non-elected and non-representative profile makes it even easier for magistrates to be carried away by social and structural influences without any sort of counterbalance. The idea of an entire branch of power comprised by officials whose expertise is purely technical and whose only concern is the best enforcement of law cannot be taken as nothing but an ideology. Sure, these pathologies need handling and reversing, but the way to do it is not by transferring power from the most to the least deliberative of the branches of power. The way to deal with them is by revivifying the channels of democracy and reinventing politics at a more socially engaging and meaningful level.

Aside from that, there is another series of difficulties that also contribute to make the legislative and executive powers less effective than they could be. But those now are not distortions or deviations, but the normal complexities of democracy. We live in societies with growing pluralism of lifeforms and worldviews, with limited potential of agreement and solidarity, with limited cultural and communicative resources to counter the effects of a post-industrial and globalized economy and of long histories of inequality, exclusion, marginalization, exploitation and domination etc., with competing parties, platforms and ideologies representing different classes, groups, interests and times. So the demands are many, and every new issue has to get in line and wait for its due time behind many others that were proposed before it. So the negotiations are slow and painful, with many ups and downs, advances and retreats, concessions both in the name of social consensus and on account of structural resistance etc. All of that with no guarantee of victory of one's agenda in the end and no guarantee of irreversibility of any victory one might have had along the way. This is the normal cost of democracy in complex societies. Limiting and frustrating as it might be, it is still our best non-violent, non-authoritarian alternative of how to live together and make collective decisions. Wanting to skip all that and jump right into legal and coercive enforcement of one's agenda to the detriment of others' is flirting with aristocratic or autocratic ideas.

That is precisely the note I wanted to end this topic with: That what hides behind the court-centered conception of politics is not only mistaken ideas about impartiality, language and effectiveness, but also yet another return of the autocratic desire for monologism and shortcuts, of depoliticizing politics and sabotaging democracy, something I intend to explore a little further in the last topic of this chapter.

8.4. Judicial activism and judicialization of politics as pathologies

As I am about to explain, judicial activism and the judicialization of politics are pathologies of a different nature. Differently from the diversification of jurisdiction and the uniformization of jurisprudence, they are not threats to the judicial procedure, but to democracy itself. They are still pathologies of the judicial procedure, in the sense that they manifest themselves in the exercise of jurisdiction. But instead of lessening the discursive elements of the judicial procedures as remedial discourses, they use the administrative power of remedial discourses to sabotage the relationship between law and democracy both one way and

the other. They make law less permeable to democratic control, whereas making democracy more permeable to the power of law.

On the one hand, judicial activism is pathological because it compromises the power of democracy to shape law and control its enforcement. If majoritarian decisions, binding precedents and stabilized interpretations are no longer good reasons for judges to limit their own discretion in determining, interpreting and enforcing the law, then the political and legal community has no power over what such judges do. It not only jeopardizes the institutional nature of law as generalization of normative expectations in a predictable, certain and stable manner, but also the dialogical and discursive character of judicial decision-making. One must remember that such a deficit of dialogue and discursivity was the reason why Habermas had to complement Dworkin's theory with interpretive paradigms and judicial discourse in the first place. The finding and application of legal appropriateness is not a monological and idiosyncratic task, but a collaborative effort of the legal community in general and the procedural parties in particular. Judicial activism takes jurisdiction back to the subjectivist problems most typical to legal realism but, to a lesser degree, also to judge Hercules.

On the other hand, the judicialization of politics is pathologic because it compromises democratic will-formation. Democracy is inherently deliberative because its process of will-formation requires discussion, bargaining and concession between competing views and agendas. This explores the range of political priorities, evaluations and trade-offs and allows for no alternative but decentering, learning and compromise in order to achieve majoritarian positions. Insofar as the judicialization of politics replaces all that with simplistic considerations about legality and feasibility, it contributes to juridification, that is both reductive and hurting to the democratic culture of a political community. It imposes technical and authoritarian logic to political processes that one should want to grow more democratic, not less.

Besides, although judicial activism and the judicialization of politics are not pathologies of judicial procedures, they would hardly be noticed without the concept of remedial discourses. If one sees the judicial procedure as an institutionalized discourse where the procedural rules carve out room for the logic of discourse to take place and govern the judicial decision-making, one would have a hard time figuring how a procedure at such a high level of discursivity could ever become any sort of threat to democracy. But once one accepts the more dialectical

nature of judicial procedures as remedial discourses, in a tense game of forces between communicative and administrative power, one can more easily see from where the antidemocratic potential might emerge.

Before finishing this section, I would like to address something that may seem like a contradiction of diagnoses. On the one side, I said in the topic about the uniformization of jurisprudence that the recent changes in procedural law are trying to reduce jurisdiction to more and more standardized decision-making. On the other side, I said in the topic about judicial activism that judicial decision-making is becoming more and more independent of majoritarian choices, binding precedents and stabilized interpretations, giving the judges the power to deviate greatly from what is expected from the existing law. If both phenomena be seen as general and concomitant, I contradict myself by claiming that jurisdiction is becoming predictable and unpredictable at the same time.

However, there is no contradiction. While some issues are seen as so repetitive and unimportant as to respond to a general pattern fixated in advance and then do without individual consideration, others are deemed so peculiar and important as to require special treatment that breaks with majoritarian choice, binding precedent and stabilized interpretation. It is yet another version of the dialectical process of massification with privilege, a process so usual and prevalent in modern societies that it hardly raises any question of contradiction. It even contributes to the same diagnosis of the stratification of jurisdiction according to functional considerations of priority and relevance.

Conclusion

Summary of the thesis argument

As a way of closure, after many chapters addressing individual topics, I would like to summarize my argument throughout the thesis.

In Chapter 1, I carefully explained why Habermas's approach to the judicial procedure emphasized only its discursive dimension and, therefore, fell short of an adequate critical-theoretical assessment. Habermas was especially concerned with the rationality of jurisdiction vis-a-vis the problem of legal indeterminacy and judicial discretion. He refused the solutions of legal hermeneutics, legal positivism and legal realism and embraced Dworkin's interpretive solution, thus having to deal with the monological and idealized burdens of a judge Hercules. His solution was to complement Dworkin's theory with interpretive paradigms and judicial discourses, which is the precise moment where he dedicates himself to proving that the rules of procedural law carve out room for the logic of discourse to take place and govern the judicial decision-making. So it is not so much that Habermas had a fully developed critical theory of the judicial procedure that claimed that it was exclusively discursive, but rather that he was mostly interested in one side of the issue, namely bringing its discursive elements to light in order to argue that legal argumentation is inscribed in the very logic of courtroom interactions. So a more complete and realistic critical theory of the judicial procedure was yet to be attempted.

In Chapter 2, I proposed a shift in the account to judicial procedure, emphasizing less the extent to which its organizational rules aim at a discursive logic (an end-centered approach) and more the extent to which its corrective and compensatory rules succeed in preventing or compensating for anti-discursive aspects (a practice-centered approach). If I saw the issue correctly, once one makes this shift of account, the judicial procedure begins to reveal itself as much more ambiguous and conflicted, with both discursive and anti-discursive elements and forces disputing for prevalence. This image is, to my view, much more realistic and suitable for a critical-theoretical approach.

In Chapter 3, I showed why the concept of institutionalized discourse cannot properly explain the game of forces between discursive and anti-discursive aspects in the judicial procedure. An institutionalized discourse is just a social-empirical embodiment of the idealizations of

discourse, one where the discursive elements suffer with limitations of reality and practicability, but don't really compete for prevalence against anti-discursive elements. There's limitation, but not conflict. After a brief explanation on the merits of armchair criticism, I then submit the judicial procedure to the test of whether its rules manage or not to correct and compensate against distortions of each of the main idealizations of discourse (freedom, equality, intelligibility, inclusion), coming to the conclusion that to a great extent they don't. Once the examination of the judicial procedure's failures to correct and compensate for distortions show that there actually are anti-discursive forces shaping the functioning of judicial procedures, it cannot but follow that the concept of institutionalized discourse is insufficient to provide a more complete explanation about courtroom interactions.

In Chapter 4, I argued that, to properly explain the game of forces between discursive and anti-discursive aspects in the judicial procedure, one needs to put aside the concept of institutionalized discourse and embrace a new category, that I call remedial discourse. A remedial discourse is an amalgam between communicative and administrative power, defined as an administrative routine that recurs to discursive elements for purposes of legitimation of its outcomes. I call it "remedial" for it is a second best alternative to discourse, a quasi-discourse that comes to play once the minimal conditions for a genuine discourse are unlikely or absent. It is inherently technical, coercive and authoritarian, but, insofar as it takes the appearance of discourse, it cannot but be internally domesticated by the very logic it struggles to dominate, triggering a dialectic conflict between discursive and anti-discursive forces. From that point forward in the work, I assumed that judicial procedures are remedial discourses.

In Chapter 5, I examined whether remedial discourses are a category that makes sense to employ from a critical-theoretical point of view that remains faithful to a Habermasian project. After arguing that they are all but inevitable in complex societies, I gave mixed answers to whether they improve or threaten private and public autonomy, coming to the conclusion that they do contribute to social emancipation in the limited sense how it is possible in institutional practices, especially if compared with alternatives more exposed to the influence of violence and social power. For a critical theory that limits itself to the scarce resource of immanent transcendence, choosing to be reconstructive instead of normative, it must be considered good enough to treat

remedial discourses as social interactions in whose ambiguity lies some potential of communicative rationality and social emancipation.

In Chapter 6, I began my time diagnosis of procedural law by explaining what such diagnosis means and why it is possible (its possibility being one of the main arguments in favor of adopting my concept of remedial discourse), then covering what I identify as the first pathology of procedural law, namely, the diversification of jurisdiction. After limiting the meaning of time diagnosis so that it fits my purpose and bringing to light some reasons why a general time diagnosis of procedural law is feasible, I speak of the diversification of jurisdiction, emphasizing how recent changes in procedural law throughout the world have favored alternative dispute resolutions like conciliation, mediation and arbitration. I reject the usual normative arguments on the basis of consensus and disposable rights and point out how this phenomenon, put in a projective picture, risks to create a stratification of jurisdiction according to functional assignments of relevance.

In Chapter 7, I covered what I identify as the second pathology of procedural law, namely, the uniformization of jurisprudence. I distinguish between horizontal (gathering of many actions to have one single decision), vertical (following of standards of decision-making fixated by higher courts) and external control (administrative agencies imposing deadlines, goals and criteria for how judges must decide cases), underlining how all of them respond to functional demands of celerity, uniformity and predictability on the cost of the individual consideration, cumulative learning and growing differentiation. These tendencies are all greatly helpful to the instrumental and functional demands of market economy and the bureaucratic State.

Finally, in Chapter 8, I covered what I identify as the third and last pathology of procedural law, a two-in-one phenomenon, namely, judicial activism and the judicialization of politics. Using Canon's six dimensions of judicial activism, I associate the first three with judicial activism in the sense I use and the last three with the judicialization of politics. In the case of judicial activism, I explain why breaches of stability against majoritarian choices, binding precedent and established interpretation can be seen as pathological despite the apparent support to them one could see in some of Habermas's ideas. Now in the case of the judicialization of politics, I attack the two conceptions behind the phenomenon: viewing policies solely as matters of rights and viewing courts as fit to policy-making. In the end, I argue that both phenomena

contribute to a strategy of sabotaging of democracy with a dangerous and ill-disguised ideology of depoliticization of politics.

So basically I replaced Habermas's idea of judicial procedures as institutionalized discourses with the concept of remedial discourses, defended the cognitive, practical and critical value of this concept from a critical-theoretical point of view and then used it to make a time diagnosis of some pathologies that have been revealing themselves in recent tendencies of procedural law in the Western world. My hope is that, even if my concepts are poorly chosen and developed and even if my time diagnosis is ill-founded, the thesis might at least call attention to the limits of Habermas's account of judicial procedures and the many advantages of a more complete and realistic take to the issue that goes past Habermas's text while maintaining his critical-theoretical spirit.

Shortcomings and perspectives

Although I am for now convinced that the investigation attempted in this thesis is not completely lacking in value and merit, I am at the same time well aware of at least some of its flaws and shortcomings. As I have no doubt that almost all of them are to be pointed and discussed by my thesis committee, I would like to go ahead and already address some of the problematic issues with the thesis. Most of them, as is going to become clear, are of methodological nature.

I took too long to notice that a critical theory of the judicial procedure would be much more convincing if deeply rooted in the history of modern procedural law in the Western countries, departing from the mixture of Roman and Germanic law in the Middle Ages and following each wave of rationalization in the ages of the Renaissance, the Enlightenment, the Codification and the Human Rights Movement post World War II. That would have been the perfect opportunity to differentiate between the evolution of procedural law in both the Civil Law and Common Law traditions, as well as to speak of the different national political saturations of Habermas's third group of rights of his logic genesis in Ch. 3 of FN. Here my academic deficit with legal history took its toll on the work: Had I had more training or familiarity with the history of procedural law and the thesis could have reached an important new level of depth. This history of the judicial procedure is missing in my thesis, and I know that it suffers for that.

Something similar could be said about the use of comparative law. Now I realize with much more clarity that what I wanted to prove about the recent changes in American, German and Brazilian procedural law could have been accomplished only by means of a more systematic presentation of the similarities and differences of these bodies of laws and a more detailed examination of how their procedural principles and institutes compare to each other in content and function, as well as an explanation of their respective judicial branches, their systems of appeal, of judicial review etc. Here once more my academic deficit with comparative law took its toll on the work: Had I had more training or familiarity with the methods and results of the comparison between different bodies of procedural law, my approach to the issue could have been much more systematic and persuasive.

Throughout the five-year term of my writing, I was never able to solve the conundrum between not using any secondary literature to support my empirical claims about procedural law and the judicial procedure or using secondary literature that only comes to the same conclusion I intended to defend by making use of concepts and methods rejected by (or contradictory to) Habermas's discursive and critical theory. Although I knew that a truly Habermasian approach would have incorporated at least some of their contributions in an adapted or reconstructed manner, I also suffered from the lack of Habermas's resourcefulness to overcoming traditional dichotomies and noticing opportunities to translate others' findings and achievements into a framework that functions to the benefit of his own ideas, instead of against them. Many papers and chapters that I read during these years influenced the ideas and claims I came to put on paper, but were not openly discussed or even referred to, because of the conceptual or methodological incompatibilities I was not ready to address and solve. This is why the thesis goes on and on for dozens of pages without as much as one literary reference, relying only in hypothetical scenarios, well-known facts and reasonable assumptions. That lack of dialogue with the over-abundant secondary literature on the subject is also a serious flaw of the text, and I have no problem in recognizing that.

That, together with the points where I should have been more thorough, like in the test of the judicial procedure vis-a-vis the idealizations of discourse (I should have extended the test to the purposes of discourse – cooperation, decentering, learning, consensus – and the validity claims – truth, correction, sincerity and authenticity) or

in the fitting of the concept of remedial discourse into Habermas's theory (I should have shown how such concept deals with the tension between facticity and validity and how the idea of administrative routines that use discourse for legitimation purposes is well argued for in TCA), are the basic issues I feel most compelled to bring to light.

All of those shortcomings are also, obviously, departing points for I or another researcher to better my work in the future. They would be my major concerns also were I in the process of converting this thesis into a book. Although many of the recent political events in Brazil, in the UK, in the US and in continental Europe make me doubt of the stability of the very idea of the rule of law and due process, rendering much of what is said in criticism to recent developments of procedural law, if not yet cosmetic and obsolete, at least a little off-target for the moment, I believe there is much in the thesis that would be helpful to a larger audience, whether to initiate a necessary discussion about recent changes in procedural law or to illustrate one more possible application of Habermas's discursive and critical theory to more concrete issues of contemporary law. If I truly take this objective to completion, I am evidently also committed with incorporating all the corrections and contributions of my thesis committee, who I very much look forward to listen to some weeks from now.

REFERENCES

ALEXY, Robert. *Theory of legal argumentation*. Trans. R. Adler and N. MacCormick. Clarendon Press, Oxford, 1988.

BAXTER, Hugh. *Habermas*: the discourse theory of law and democracy. California: Stanford University Press, 2011.

BAYNES, Kenneth. *Habermas*. London: Routledge, 2015.

CANON, Bradley C. *Defining the dimensions of judicial activism*. 66 Judicature 236 1982-1983.

DWORKIN, Ronald. *Law's empire*. Harvard University Press, 1986.

GOODE, Luke. *Jürgen Habermas*: Democracy and the public sphere. London: Pluto Press, 2005.

GÜNTHER, Klaus. *The sense of appropriateness*. Trans. John Farrell. Albany: SUNY, 1993.

HABERMAS, Jürgen. *Between facts and norms*: contributions to a discourse theory of law and democracy. Trans. William Rehg. Cambridge, Mass: MIT Press, 1996.

_____. *Moral consciousness and communicative action*. Trans. Christian Lenhardt and Shierry Weber Nicholsen. Cambridge, Polity Press, 1990.

_____. *The inclusion of the other*: studies in political theory. Trans. Ciaran Cronin. Cambridge, MA: MIT Press, 1998.

_____. *The structural transformation of the public sphere*: an inquiry into a category of bourgeois society. Trans. Thomas Burger. MIT Press: Cambridge, 1989.

_____. *Theory of communicative action* (vol. 1). Trans. Thomas McCarthy, Boston: Beacon Press, 1984.

_____. *Theory of communicative action* (vol. 2). Trans. Thomas McCarthy, Boston: Beacon Press, 1987.

_____. *Truth and justification*. Translated by Barbara Fultner. Cambridge, MA: MIT Press, 2003.

HEDRICK, Todd. *Rawls and Habermas*: Reason, Pluralism and the Claims of Political Philosophy. Stanford: SUP, 2010.

MCCARTHY, Thomas A. *The critical theory of Jiirgen Habermas*. Cambridge, MA: MIT Press, 1978.

REIMANN, M.; ZIMMERMANN, R. *The Oxford handbook of comparative law*. New York: Oxford University Press, 2006.

ROSENFELD, Michel; ARATO, Andrew. *Habermas on law and democracy*: critical exchanges. Berkeley: University of California Press, 1998.

WHITE, Stephen K. *The Cambridge Companion to Habermas*. New York: Cambridge University Press, 1995.