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Rule of Law and Judicial Discretion

Their Compatibility and Reciprocal Limitation*

ABSTRACT: The aim of this work is to throw some light upon the compatibility between the rule of law *desiderata* and the phenomenon of judicial discretion. In order to achieve this, first it is necessary to determine what we understand by the terms "rule of law" and "judicial discretion". In this sense, the conception of judicial discretion that is offered in this work takes into account the fact that this phenomenon is partly originated by the inevitable – and, in some cases, even desirable – partial indetermination of law. Thus, the main feature of judicial discretion is linked with a certain margin of freedom that judges have when deciding cases that have at least two justified possible courses of action. In addition to this, this work puts forward a notion of the rule of law *desiderata* and characterizes the latter as ideals that: (i) aim at serving valuable purposes, (ii) admit degrees of accomplishment, as it is impossible – and, in some cases, even undesirable – to fulfill them either completely or to their greatest possible extent. Based on these notions, this work intends to demonstrate that if the rule of law *desiderata* are understood as requirements that are not always meant to be fully accomplished, and that even in some cases should not be carried out to their greatest possible extent, then they can be compatible with the phenomenon of judicial discretion.
Keywords: Rule of law, judicial discretion, arbitrariness, indetermination of law.
Schlagworte: Rechtsstaat, richterliches Ermessen, Willkür, Unbestimmtheit des Rechts

I. Introduction

One of the most widely debated legal concepts over the past few years has been the one of rule of law or *Rechtstaat*. On the one hand, the discussions around this notion were triggered after the end of World War II by the crisis experienced by the continental and nineteenth-century version of the *Rechtstaat*, which had intended to control the state monopoly of legal production merely with some formal requirements for the enactment of laws, as these were demanded to be general, non-retroactive or prospective, clear,

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promulgated, etc. More specifically, these debates arose around the processes of political reorganization carried out by several European nations, which led their systems from a purely legal or *formeller Rechtstaat* to a constitutional state or *materieller Rechtstaat*, as constitutions incorporated fundamental rights with direct application and mechanisms to control their abidance.[1]

On the other hand, the English and American notion of the rule of law resides in a legal tradition (common law) in which the production of law was not monopolized by the state, but could be found in custom, tradition and in reasonable or rational principles that can be deduced from the judges' decisions.[2] Taking into account these distinctive features, the debates related to the notion of the rule of law seek to establish if the latter should be mainly circumscribed to the ideas that establish that: (i) laws should be elaborated in a general manner, (ii) laws should be previous to the cases they regulate, (iii) cases must be solved in ordinary courts, and (iv) that everyone – public servants included – are subject to the "superiority of the law" – as Dicey said[3]; or if the notion of the rule of law also includes elements such as the individual rights, the democratic forms of government[4], and even – as some suggest – the social rights[5].

A contemporary and concrete challenge that the notions of constitutional state and rule of law face is related to the margin of discretional power with which judges – especially those who have competency in constitutional matters – solve some of the conflicts that are brought before them. Naturally, in order to establish the extent to which judicial discretion can be a challenge for the rule of law, previously we ought to clarify what we understand by the terms "judicial discretion" and "rule of law".[6]

Although there are various conceptions about each one of these notions, and for the sake of understanding the discussion before us, it is possible to anticipate what is understood in this work when referring to discretional decision. A discretional decision

1 Cf. Ernst W., Böckenförde, Entstehung und Wandel des Rechtsstaatbegriffs, in Ehmke, H., Schmid, C. and Scharoun, H. (eds.), *Festschrift für Adolf Arndt*, Europäische Verlagsanstalt, Frankfurt, 1969, 53–76.

2 Citing a comparison Tocqueville made between the English and the Swiss systems, Dicey notices that one of the characteristics of the rule of law in the United Kingdom is that it is found in the custom rather than the law. Cf. Albert V. Dicey, *Introduction to the Study of the Law of the Constitution*, Indianapolis, Liberty Classics, 1982, 108 and 115.

3 In Dicey's words, (i) "no man is punishable (…) except for a distinct breach of [preexisting] law established in the ordinary legal manner" (110); and (ii) "not only that with us no man is above the law, but (what is a different thing) that here every man whatever be his rank or condition, is subject to the ordinary law (…) and (…) ordinary tribunals". Ibid, 114.

4 Dworkin is one of the main authors who uphold this understanding of the rule of law, and even explains how it is possible to solve the tension within a notion of rule of law that is observant of individual rights and, at the same time, of democracy as a form of government. Cf. Ronald Dworkin, Political Judges and the Rule of Law, in *A Matter of Principle*, Cambridge, Mass., Harvard University Press, 1985, 9–32.

5 For a systematization of the formal and substantive proposals of the notion of rule of law, cf. Brian Z. Tamanaha, *On the Rule of Law. History, Politics, Theory*, Cambridge, University Press, 2004, Chapters 7 and 8 and Paul P. Craig, Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework, *Public Law* (1997), 467.

6 On the connection between the concepts of rule of law and of the discretion of the government, cf. Peter M. Shane, The Rule of Law and the Inevitability of Discretion, *Harvard Journal of Law and Public Policy* 36 (2013), 21 ss.

consists in choosing a certain course of action when there are, at least, two possible and justified ways of acting which are mutually exclusive, and between which the law does not provide any reasons that make one of those options more correct than the other(s). From this concept of judicial discretion, it is by far clearer to identify which can be the challenges this phenomenon can pose to the rule of law.

The main challenge judicial discretion presents to the rule of law can be expressed in the following question: when judges decide a case discretionally, do they act "subject to the law", "by the law", or "under the rule of law"? This inquiry can be formulated from a political perspective in the following way: when judges decide cases discretionally, do we encounter ourselves before the rule of law or before the rule of judges? The need to deal with this issue becomes more urgent if we accept, as most legal theorists do, that some margin of judicial discretion is inevitable.

In order to answer these questions the following definition of the rule of law requirements or *desiderata* will be provided. According to it, the rule of law *desiderata* are ideals that (i) aim at serving a valuable purpose, and (ii) admit degrees of accomplishment, as it is impossible to fulfill them completely and, in some cases, even undesirable to carry them out to their greatest possible extent. This work expects such a definition of the requirements of the rule of law to be flexible enough to be compatible with the notion of discretional judicial decisions.

In addition, it is expected that the explanation of the compatibility between the rule of law and judicial discretion will become useful in order to identify some of the limits of judicial discretion and, at the same time, to correct some naïve conceptions of the rule of law.

II. The Rule of Law and the Concept of Law

In order to comprehend the concept of the rule of law, one of the first issues that must be elucidated consists in determining whether it is an ideal that legal systems aspire to fulfill or a set of minimum requisites that must be fully accomplished by every legal system.

If the rule of law was considered to be a conceptual requirement of disjunctive observance, the connection between the concept of law and the rule of law would be such that the social practices which do not fully accomplish those requirements could not be considered as law.

Those who support this definition of the rule of law often circumscribe the content of the requirements of rule of law as much as possible, probably to avoid limiting too much the scope of the concept of law. In this sense, Guastini states that the content of the rule of law only alludes to the fact that "any state act whatsoever should be subject to the law".[7] Also, he explains that such a conception of the rule of law (named *rule by law* by some authors[8]) – besides being a conceptual requirement – is merely formal o moral-

7 Cf. Ricardo Guastini, Implementing the Rule of Law, *Analisi e diritto* (2001), 95.
8 Cf. Tamanaha (footnote v), 92–93.

ly neutral, as it says nothing about the content of law. Moreover, he notices that in order for this requirement to have practical consequences, there must be rules that direct state acts as well as the authorities that control that those rules are respected.[9]

This kind of conceptions of the rule of law is so minimal that their explanatory capacity is reduced to the obvious or the tautological. Kelsen is aware of this and consequently acknowledges that if the state or government is understood as a legal system – as he proposes – then the concept of rule of law is merely pleonastic. This is because if the state solely exists in its acts, and those acts are carried out by individuals and attributed to the state by laws, then it is obvious that every state act is ruled by laws.[10] On the contrary, if the rule of law is depicted as an ideal instead of a minimal requirement, we must ask ourselves two questions: (i) which is the relationship between the concept of law and the ideal of the rule of law?, and (ii) does considering the rule of law as an ideal imply acknowledging that it has a moral content?

Most authors that deal with the issue of the rule of law often present it as an ideal, a value or a standard of excellence, and not merely as a minimum disjunctive requirement of every kind of law. In this sense, Raz states that the notion of the rule of law refers to the idea that the law "must be capable of guiding the behavior of subjects".[11] To achieve this, the law must have certain characteristics that constitute the requirements of the rule of law. In particular, the rule of law demands laws to be prospective, general, clear and relatively stable. The rule of law also requires that the making of particular rules is guided by general rules which prove the characteristics mentioned before. Furthermore, according to the rule of law, courts must be independent, easy to access, impartial, respectful of the parties' right to be listened, and they should have the power to revise or control that the other state powers meet the requirements of the rule of law, etc.[12] Nonetheless, it is not necessary for a set of rules to accomplish all of these requirements in order to be considered a legal system. "Conformity to the rule of law is a matter of degree. Complete conformity is impossible (some vagueness is inescapable) and maximal possible conformity is on the whole undesirable (some controlled administrative discretion is better than none)".[13] On the other hand, and according to Hart, in order to form the most basic (judicial) institutions of a legal system, rules should be minimally clear, prospective and general.[14] Moreover, Raz explains that these standards of excellence are morally neutral, since they do not guarantee that the rules, which respect the latter, will be justified.[15] It is not difficult to notice that, in this sense, even a tyrannical government can respect the requirements of the rule of law.

9 Cf. Guastini, (footnote vii), 95.
10 See Hans Kelsen, *Pure Theory of Law*, Translation to English of the second edition by Max Knight, New Jersey, The Law Book Exchange, 2005, 313.
11 Joseph Raz, The Rule of Law and its Virtue, in *The Authority of Law*, Oxford, Clarendon Press, 1979, 214.
12 Cf. ibid, 215–219.
13 Ibid, 223.
14 Cf. ibid, 224.
15 Cf. ibid, 226–227.

However, what defines the moral content of a certain set of requirements is not that they guarantee a good result, or a good use of the laws that respect the requirements mentioned above, but that they pursue a valuable end. In this case, the confusion of those who deny this orientation of the requirements of the rule of law might be due to the fact that they presume that the only specifically moral aspiration law has is to be fair. As a result, when proving that such purpose is not necessarily guaranteed by the requirements of the rule of law, they consider the latter to be morally neutral.

The weakness of this presumption resides in not being able to notice that the immediate objective of the requirements of the rule of law is not to guarantee justice. Instead, the aim of the rule of law *desiderata* is to accomplish other valuable purposes that constitute a necessary – though insufficient – condition for the justice of the laws that respect the requirements of the rule of law.[16] Specifically, the aim of these requirements is not only that rules are more effective in their capacity to guide and coordinate conducts, but mainly that they do this in a certain manner: (i) by guaranteeing some *reciprocity* between the authority and those who respect it, (ii) by assuring a certain type of *impartiality* among those who apply the law, and, as a result, (iii) by *respecting* in some manner human autonomy. And this is sought by assuring the foreseeability of laws, the separation of state powers, and the rule of law, among others. The self-discipline required by the rule of law whenever it demands the authority to obey the rules and processes established by law implies the values of reciprocity, impartiality, and ultimately, the respect for human autonomy.[17] All this is despised by a tyrannical government. That is why it is a mistake to conceive the rule of law merely as a technique either for good or for evil, depending on how it is employed. Actually, the rule of law is so valuable in itself that many times it has been presented as a limit to political maneuvers, in order to restrict arbitrary governments. More specifically, the rule of law has been perceived as a way to prevent the ruling party from exerting their authority in order to obtain benefits for themselves or for their party.[18] Nonetheless, the rule of law *desiderata* are just a part of the requirements of justice; they do not guarantee every aspect of common good – in fact, not even its substance – since those who do not seek common good can still adhere to the values related to the rule of law to avoid losing popularity, for instance.[19] In the end, the key to understand that the requirements of the rule of law are not neutral is not found in defending that their compliance guarantees justified laws or judicial decisions, but in noticing that the absolute denial of such requirements ensures unjustified results. In other words, a certain degree of respect for the requirements of the rule of law can be considered as a necessary – but insufficient – condition for laws and judicial decisions to be justified.

16 Cf. Jeremy Waldron, Rule of Law in Contemporary Liberal Theory, *Ratio Juris* 2 (1989), 93–94.

17 Cf. Lon L. Fuller, *The Morality of Law*, New Haven, Yale University Press, 1969, 39–40.

18 In this sense, Endicott affirms that the arbitrariness of a government cannot be understood as its inability to absolutely curb the conduct of citizens through the law, or as its unfitness to absolutely guarantee its coherence, clarity or foreseeability, but as a way of acting that is contrary to the reasons or objectives of the laws. Cf. Timothy Endicott, *Vagueness in Law*, Oxford, Oxford University Press, 2000, 186 ff.

19 Cf. John Finnis, *Natural Law and Natural Rights*, Oxford, Clarendon Law Series, 1980, 273 ff.

However, isn't the dissent over the moral neutrality of the rule of law *desiderata* actually a disagreement on the concept of law? According to Viola, depending on the purpose given to law, the latter will be explained only by a set of morally neutral or merely formal characteristics – that are referred to the origin, formulation and time dimension of law – or, on the contrary, it will require the adding of some substantial or moral features (i. e., certain contents or, in general, the consideration of its justice).[20] Along these lines, Dworkin supports a material conception of the requirements of the rule of law that does not allow the distinction between the rule of law *desiderata* and the requirements of justice. In this sense, Dworkin connects this vision with an understanding of the law according to which citizens have moral rights and duties with each other and political rights before the state.[21]

At least there are two reasons why it is more explanatory not to equate the concept of the rule of law with the concept of law. First, because the concept of the rule of law becomes undistinguishable from the idea of law and, as a result, it loses its own explanatory capacity. The second reason is that it is more enlightening to conceive the concept of the rule of law as a part – thus, that is not complete – of the concept of law, since in this way it can help spot the tensions between the formal and substantial elements that constitute law, instead of hiding them behind an only concept of law that does not distinguish the different elements that define it. In Section IV, we will go over these tensions and some ways in which they can be overcome.

III. Judicial Discretion and the inevitable – and even desirable – partial Indetermination of Law

In general, the concept of "discretional decision" refers to different issues: on the one hand, to the prudence or good sense that must accompany a decision; on the other, to the judgement or the free will such decision admits.

In particular, the notion of "judicial discretion" can also be understood in different ways depending on the context in which it is used. What the general and the specific notions of "discretion" and "judicial discretion" have in common is that they are both employed when someone must make a decision which is not completely regulated, but somewhat oriented by some kind of normative rule of conduct.[22]

Dworkin was one of the first authors who distinguished some of the senses in which judicial discretion can be addressed. Specifically, he differentiates between:

- The discretion that is necessary when the rule that must be applied cannot be mechanically applied, as it requires some kind of judgement.

20 Cf. Francesco Viola, *Ley humana, rule of law y ética de la virtud en Tomás de Aquino*, Translation by C. I. Massini Correas, unpublished in Spanish, 9.

21 Cf. Dworkin (footnote iv), 11–12.

22 Cf. Ronald Dworkin, *Taking Rights Seriously*, London, Duckworth, 1977, 31–33.

- The discretional power the final authority has in an issue when making a decision that cannot be revised or annulled by another authority.
- In Dworkin's words, the "strong" discretional power a judge would have when, in a certain concern, his decision is not completely bound by the standards established by another authority.[23]

The meaning of judicial discretion this work adopts is related to this last definition. More specifically, judicial discretion is understood as a voluntary decision which consists in choosing a certain course of action when there are at least two *justified* and possible ways of acting that are mutually exclusive and between which the law does not provide reasons that make one of those courses of action more correct than the other(s). This type of discretion is often characterized as a "choice between open alternatives".[24] This supposes a certain[25] margin of autonomy[26], freedom[27] or lack of control[28] when determining the result of the decision, which cannot be based in the standards imposed by another legal authority[29]. However, this margin of freedom, which is given to who normally decides, is complemented with the duty judges have to solve all controversies.[30] Moreover, although judicial discretion implies the making of a choice, this does not mean that such choice can be considered as arbitrary or irrational.[31] As Hart states, when law is indeterminate and, therefore, a judicial decision must be discretional, the judge must apply his power of creating law, but he must not do so arbitrarily: that is to say, he must always have some general reasons that justify his decision.[32] In this sense, it can be said that when judges decide discretionally, they do not do it following no justification whatsoever, as they would if they tossed a coin, leaving the result to its fate.[33] Instead, as Waluchow

23 Cf. Ibid, 33–39.

24 Cf. Herbert L. A. Hart, *The Concept of Law*, Oxford, Clarendon Law Series, 1961, 127. Emphasis added.

25 Bix emphasizes that the freedom granted by judicial discretion turns out to be very limited. Cf. Brian Bix, *Law, Language, and Legal Determinacy*, Oxford, Clarendon Press, 1993, 27.

26 Cf. Frederick Schauer, *Playing by the Rules*, Oxford, Clarendon Press, 1991, 222.

27 Endicott highlights this aspect of judicial discretion and defines it as the "power to make a decision, without being obliged to choose a result in particular". Cf. Timothy Endicott, Raz on Gaps-the Surprising Part, in L. Meyer, S. Paulson y T. Pogge (eds.), *Rights, Culture, and the Law*, Oxford, Oxford University Press, 2003, 110.

28 Waluchow defines judicial discretion in a negative way, by suggesting that it is related with the lack of a standard that "controls" or "intends to control", that is, that determines the solution of a case. Cf. Wilfrid Waluchow, *Inclusive Legal Positivism*, Oxford, Clarendon Press 1994, 195 ss.

29 Cf. Marisa Iglesias Vila, *El problema de la discreción judicial*, Madrid, Centro de Estudios Políticos y Constitucionales, 1999, 32–33; and Dworkin (footnote xxii), 32–33.

30 In this sense, when developing the thesis of judicial discretion, Hart points out that a judge will have to decide discretionally only if he "must reach the decision of a [hard case] on his own and neither restrain himself from judging nor (as Bentham defended) refer the issue to the legislative branch". Herbert L. A. Hart, El nuevo desafío al positivismo jurídico, *Sistema* 36 (1980), 5–6.

31 Cf. Hart (footnote xxiv), 127.

32 Cf. Herbert L. A. Hart, Postscript, in *The Concept of Law* (second edition), Oxford, Clarendon Press, 1994, 273 (emphasis added).

33 Raz complements what Hart expounds by stating that "even when judicial discretion is not limited or guided with a specific direction, courts are still *legally limited* to decide what they think is best according to their *beliefs or values*. If they don't, if they adopt an *arbitrary* decision, for example, by tossing a coin, *they*

suggests, when judges decide discretionally they seek a reasonable answer that develops and expands law in a reasonable and defendable – but not necessarily unique – way.[34]

In short, a discretional decision can be characterized as obligatory, impartial and limited. In this way, judicial discretion can be categorized as a relative – that is not absolute—and negative—which can only choose one course of action among a limited group of possible alternatives— freedom.[35] Besides, judicial discretional decisions are not considered to be arbitrary ways of acting. In other words, since we are dealing with a judicial decision, a discretional decision must be justified and, therefore, must always be based in general reasons.[36]

Having understood judicial discretion in this sense, it is still necessary to establish the reason why this phenomenon occurs. With this aim in mind, the attempt of this work is to show that judicial discretion is in part originated by the inevitable – and even in some cases desirable— partial indetermination of law. More specifically, as legal theorists have awakened from the noble dream of formalism, they have acknowledged the existence of legal gaps and conflicting rules in legal systems, and they have become aware of how vague the language employed by law results in many cases.[37] Judicial discretion is the unavoidable consequence of the partial indetermination of law. Concretely, it is the result of legal indetermination, which is usually complemented by a duty that is expressly included in every modern codification and that imposes judges to solve every case that falls under their competency.[38]

Together with the acknowledgement that the mechanical application of the law is an unrealizable task, since it is unfit to offer a unique answer to every single conflict, a new conception of the judicial branch has arose. Indeed, it has been thought that it may be desirable to have courts that are capable of completing legal insufficiencies, moderating the severity of laws and protecting the citizens' rights. Put differently, the discretion judges nowadays have to decide is not only the product of the relative and inevitable indetermination of law, but also results from the fact that contemporary constituents

are violating a legal duty. The judge must always invoke some general reasons. He has no discretion when the reasons are dictated by law. He does have discretion when law demands him to act based on reasons the judge thinks are correct, instead of imposing his own standards". Joseph Raz, Legal Principles and the Limits of Law, *Yale Law Journal* 81 (1972), 847–848. Emphasis added.

34 Waluchow (footnote xxviii), 218. Emphasis added.

35 Cf. Bix (footnote xxv), 27. From this idea, some authors have spoken about a "zone of reasonableness" within which judicial discretional decisions must be made. On this topic, cf. Iglesias Vila (footnote xxix), 53–56.

36 These reasons at least compel judges to act in the same way as long as the circumstances are similar. Cf. ibid, 58.

37 Some of the main ideas of this critique can be found in Juan B. Etcheverry, Discrecionalidad judicial. Causas, naturaleza y límites, *Teoría y Derecho* 15 (2014), 150 ff.

38 In some authors' opinion, the existence of this duty is precisely what connects the lack of an only correct answer, typical of the indetermination of law, with the idea of judicial discretion. Cf. Luigi Lombardi Vallauri, *Corso di Filosofia del Diritto*, Padova, Cedam, 1981, 40–41.

and legislators have perceived that sometimes judicial discretion is better than excluding every kind of uncertainty at any cost.[39]

As a consequence, it has been generally admitted the need to incorporate principles (e. g., the child's best interest standard) in order to cope with the logical defects of the legal system. In this way, legal communities have preferred to reckon the fact that some cases may not have a completely determined legal answer, and to grant judges discretional powers that are at the same time guided by principles, so that courts can decide cases by taking into account their particular circumstances, instead of forcibly applying a law to cases that have not been foreseen by it.[40]

What is more, institutional designs have increasingly been incorporating principles, not only to overcome the so called logical defects of the legal system, but also to protect the citizens' fundamental rights (v. g., the rights to life, honor, freedom, etc.).[41] These principles function as a set of criteria that allow determining the legal validity of the rest of the laws. Thus, the interpretation and the application of these principles require a kind of practical reasoning that cannot be merely formal or non-evaluative.[42] This is because principles tend to be general and abstract and do not have a specific legal consequence. Besides, principles usually have a dimension of "weight and importance" due to which they cannot be applied in an "all or nothing" fashion.[43] Instead, principles admit different degrees of accomplishment or compliance. Due to this characteristic, when applying any principle, a judge can be presented with diverse possible alternatives among which he will have to choose in a discretional way.

39 Some authors, such as Endicott, observe that even though legislators aim at elaborating precise laws, the need the latter have to regulate a vast variety of cases many times leads them to be formed by abstract standards and, therefore, to be vague. Also, these legal theorists notice that due to the fact that law is systemic and must be interpreted, precise formulations do not always guarantee the preciseness of the laws. Last but not least, these authors stress the idea that it is unwise to elaborate only precise laws, since they can generate more arbitrariness than the one they try to avoid. Cf. Timothy Endicott, Law is Necessarily Vague, *Legal Theory* 7 (2001), 377–383.

40 Cf. Herbert L. A. Hart, Postscript, in *The Concept of Law* (second edition), Oxford, Clarendon Press, 1994, 251–252. In essence, this is considered to be an advantage as it allows laws to be "reasonably" interpreted when they are applied to cases that have not been foreseen by the legislator. Cf. Bix (footnote xxv), 8.

41 Juan B. Etcheverry, La práctica del Derecho en tiempos del neoconstitucionalismo, *La Ley* 2011-A-2.

42 In a recent work, Zambrano deals with this issue. Cf. Pilar Zambrano, *La inevitable creatividad en la interpretación jurídica. Una aproximación iusfilosófica a la tesis de la discrecionalidad*, México, UNAM, 2009, *passim*.

43 Cf. Dworkin (footnote xxii), 24–26. On the distinction between principles and rules see, among others, Juan Cianciardo, Principios y reglas: una aproximación desde los criterios de distinción, *Boletín Mexicano de Derecho Comparado* 108 (2003), 891–906.

IV. The coherence between the Rule of Law and Judicial Discretion

1. Tensions

Having understood judicial discretion in this way, it is now interesting to determine to what extent such discretion weakens the ideal of the rule of law. In order to achieve this, we will briefly go over each one of the requirements or *desiderata* of the rule of law which have been most widely accepted among legal theorists nowadays. In this sense, it is usually accepted that the rules which intend to guide human conducts with the aim of ordering social life (i) must inevitably have a minimum degree of *generality* in relation to the people and situations to which they are applied; (ii) must be *promulgated* in order to be known by those whose conducts the rule intends to guide; (iii) must be *prospective* or non-retroactive; (iv) must be clear and precise (though this does not suppose that all rules must be precise to their greatest extent, leaving no room for legal principles or standards); (v) must be coherent with one another; (vi) must enable their observance; (vii) must have some sort of stability that allow them to be known by citizens; and (viii) must be applied and obeyed by the public authority.[44]

All these requirements must be regarded not only by legislators or laws, but also by the state's institutions and processes, as the rule of law *desiderata* actually refer to the qualities they should possess. What is more, some of these attributes can only be assured by judges. This is why courts must also direct their acts according to these requirements. Particularly, judges must bear these *desiderata* in mind whenever interpreting and applying law. Some authors even propose a series of additional *desiderata* which are specific of the judicial activity: independence, public procedures, power of judicial review, accessibility.[45]

Taking into account the explanation of the phenomenon of judicial discretion carried out above and this review of the rule of law *desiderata*, it is possible to see that: (i) judges can decide some cases discretionally because it is inevitable – and in some cases even desirable— that legal regulations are not always absolutely specific, precise and clearly defined; (ii) discretional judicial decisions are not based in general rules that solve in one only possible way the case that the court must decide; (iii) discretional judicial decisions can be considered not to be fully prospective if they determine a solution that was not clearly provided by the general rules which existed before the case; (iv) discretional judicial decisions may not be entirely or absolutely foreseeable; (v) even though they do not necessarily disobey or stop applying legal rules, discretional judicial decisions have a certain margin which is not controlled legally and, consequently, in these cases there cannot be a perfect congruence between the actions of public servants and the law.[46]

44 Cf. Fuller (footnote xvii), 46–91.
45 Cf. Finnis (footnote xix), 271.
46 Cf. Fuller (footnote xvii), 33 ff.

2. Compatibility and reciprocal limitation

The existence of these tensions between the requirements of the rule of law and judicial discretion does not imply that they are necessarily incompatible. On the contrary, these tensions are rather a proof of the limits the rule of law and judicial discretion have. An explanation of judicial discretion as the one that has been put forward in this work, which portrays it as a phenomenon that is – to some extent – inevitable, reveals some of the irremediable limits the rule of law has: it is not always possible to comply its demands of congruence, precision, generality, the possibility of being prospective, etc. In turn, understanding that the legal indetermination that leads to judicial discretion is in some cases preferred by the constituent or by the legislator over the possibility of trying to exclude every uncertainty at any cost, also helps us comprehend why it is not always desirable to carry out the requirements of the rule of law to the fullest attainable extent. An explanation of the rule of law *desiderata* as a set of ideals or standards of excellence of gradual compliance enables an understanding of the scope of the rule of law. What is more, an elaboration of this kind allows reckoning that it is impossible to fully accomplish the requirements of the rule of law and, sometimes, even undesirable to fulfill them to their fullest possible degree.[47]

Fuller was totally aware of this. In his opinion, in those cases in which the law does not provide a clear solution and, therefore, judges have some kind of discretional power, the idea would be not to create a new law but to seek the sense or the purpose of the laws that imperfectly regulate the case, so as to produce an answer that is faithful to that purpose. Thus, complying with the rule of law *desiderata* is presented as a cooperative task carried out both by legislators and judges and other public servants. In this undertaking, those in charge of interpreting the law must do this job in such a way that their mission has a sense; and, at the same time, legislators should not impose senseless tasks to those in charge of interpreting the law.[48]

In order to explain the compatibility between judicial discretion and the requirements of the rule of law, it is necessary to understand the ultimate purpose of each of such requirements and their ability to fulfill that purpose. In this sense, it has been noticed that a minimum respect for the *desiderata* is a necessary – though insufficient – condition to justify the different types of regulations and judicial decisions. This is because the *raison d'être* of the rule of law is to assure just a part of the requirements of justice. More specifically, the rule of law intends to guarantee that part that has to do with the promotion of a certain type of coordination that can help prevent and solve conflicts in a way that guarantees some sort of reciprocity in the cooperation between the citizens and the authority, entailing the respect for human autonomy and for the impartiality in the resolution of disagreements. In this sense, the requirements of the

47 Cf. ibid, 41.

48 Cf. ibid, 81–91. In this sense, Endicott suggests coordinating the requirements of the rule of law that seek to avoid legal arbitrariness by defining the latter as a way of acting that is contrary to the reasons or the purposes of law. See. *supra* note xvii.

rule of law can be understood as *means* or instruments to reach the purpose of justice. However, they are also a part of the purposes of justice and of common good.[49] That is why the rule of law *desiderata*, as long as they integrate a part of the purposes of law, are presented before legal reasoning as *principles* or *sub-principles* that orient it.

On the other hand, given that the rule of law is a necessary – but insufficient – condition for justice, there can also be tensions between the requirements of the rule of law and justice. An example of this happens when a legal regulation solves a case unfairly, either because it aims at obtaining an arbitrary result or because it leads to a result that is absurd or contrary to the objective of the regulation when applied to a particular case. In these cases, the rule of law *desiderata* should only be fulfilled in the degree in which their *raison d'être* is not affected. In this sense, only an explanation of the *desiderata* that acknowledges their moral content and their limitations – as this work does – is capable of perceiving both their importance and the limits they have when being applied and, thus, of explaining the gradual nature of their observance.[50]

In turn, it is key to remember that although judicial discretion always entails a margin of freedom or autonomy when deciding the solution in order to complete the insufficiencies of law, moderate its severity and protect the citizens' rights; the judicial discretional decision implies a *limited* choice among a group of possible and fair alternatives, which are all justified by general reasons. Specifically, such discretional power is limited to solve only the particular type of case that is brought before the court, as well as it is oriented by the meaning of the normative texts, the rules of interpretation related to said texts, the guiding purpose of the normative text that provides it with meaning, the precedents that have dealt with similar kinds of cases and by the legal principles and standards – including those of the rule of law! – that capture to a great extent the sense or meaning of all legal practice.[51]

As it has been stated, the rule of law *desiderata* require the judicial branch: (i) to be accessible in order to solve the conflicts that are assigned to them; (ii) to carry out their functions independently; (iii) to make their decisions and the processes through which they reach those decisions public; and, mainly, (iv) to solve controversies by applying the rules, principles, standards and every normative material of the legal system they in-

49 Cf. Maris Köpcke Tinturé, Desafíos del rule of law, Anuario de Derecho Constitucional Latinoamericano 20 (2014), 597–598.

50 Solum states that equity is reconcilable with the rule of law, based on a study of legal activity from a virtue-centered perspective (virtue jurisprudence). From this perspective, the author notices that a part of the characteristics of virtuous judges consists in the ability to spot the distinctive features of a case that justify a different treatment from the one given to other cases. Specifically, such ability is typical of prudent judges. Further, Solum adds that prudent decisions are actually more predictable and equitable than the ones who stick to the words of the law. Cf. Lawrence Solum, A Virtue-Centered Account of Equity and the Rule of Law, in C. Farrelly y L. Solum, *Virtue Jurisprudence*, New York, Palgrave, 2008, 160–161. Also on the tension between the rule of law and equity, see Paul Yowell, Legislación, *common law*, y la virtud de la claridad, *Revista Chilena de Derecho* 39 (2012), 482 ff.

51 Waldron explains that a literal or technical interpretation of a regulation that is not clear enough does not necessarily offer more predictability (and is consequently more observant of the requirements of the rule of law) than another interpretation that identifies the underlying principle of the regulation and relates it to the rest of the legal principles. Cf. Waldron (footnote xv), 92–93.

tegrate, instead of merely deciding in accordance to their own criteria or interests. Along these lines, the requirements of the rule of law presuppose a system in which powers are divided, and according to which the constituent and legislative powers are the ones mainly in charge of the making of law.[52] Therefore, these *desiderata* demand that the determinative/creative function judges perform when deciding cases discretionally shall be as exceptional as possible. That is to say, judges employ their discretional power only when, in order to decide, they must choose a certain course of action among at least two justified and possible ways of acting that are mutually exclusive and between which the law does not offer reasons that make one of them more correct than the other(s).

In the end, and as it has been seen, although all of the elements that limit and guide a judicial decision cannot fully attain the elimination of some margins of freedom[53] – and, as a result, discretional judicial decisions are not completely directed or controlled by law – this does not imply that this kind of decisions are not subject to law. Precisely, the problem in these cases is that law itself is unable to control every possible decision judges can make, though it *can* radically limit the available options. Therefore, even though in some cases law is unable to guide absolutely each and every one of the steps that lead to a judicial decision, this does not mean that it is incapable of guiding many of those steps. The fact that it is clear who must solve a conflict, as well as the procedure that must be followed, the interpretative possibilities among which the judge can choose, how such possibilities shall be oriented according to the purpose of the legal regulation that must be applied and to the legal principles and standards in force, etc., etc., is a sufficient and tangible proof of what has been said. At the same time, as judicial discretion does not leave judges without guidelines, limits and directions when making decisions, it does not necessarily seem to eliminate the reciprocity between citizens and the authority, or the respect for the autonomy and impartiality the rule of law aspires to achieve.

V. Conclusions

In conclusion, the explanation of the compatibility between the rule of law and judicial discretion that is offered in this work intends to serve a double purpose. First, it aims at marking some boundaries to judicial discretion. In this sense, the link between the latter and the rule of law can help us notice that every judicial decision entails a choice that is obligatory, non-arbitrary (or not founded only on the judge's own criteria or interests), circumscribed to one particular case and oriented by the meaning of normative texts, by the rules of interpretation related to those texts, by the purpose that provides the normative text with meaning, by the precedents that have dealt with similar types of cases

52 Cf. Yowell (footnote l), 505.

53 For a defense of the idea that it is not possible to completely eradicate judicial discretion even if one adopts the viewpoint of the *fair* answer when solving a case see Juan B. Etcheverry, De la respuesta correcta a la respuesta más justa. La intensidad de la tesis de la respuesta justa en las distintas etapas de la decisión judicial, Buenos Aires, unpublished, 2015.

and by legal standards and principles, which capture to a great extent the sense or meaning of all legal practice. But mainly, every judicial decision should be respectful towards the principles of impartiality and judicial independence. In second place, the ideas this work has reflected on can be used to correct some naïve conceptions of the rule of law that consider the latter to be merely a minimum conceptual requirement or an ideal of gradual observance but with a morally neutral content: in short, a sheer technique for good or for evil. As we have seen, even though these requirements do not guarantee the existence of regulations that lead necessarily to justified decisions, the self-discipline demanded by the rule of law implies the values of reciprocity and of respect towards autonomy and impartiality. Although the respect for such values is not a sufficient condition for the justification of legal regulations, it does constitute a necessary condition.

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