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Martin Bohmer

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Cover Page Footnote

Director of the Law Area, Universidad de San Andrés; Director of the Justice Area, Centro de Implementación de Políticas Públicas Para la Equidad y el Crecimiento. I could not have completed this essay without the help of Sara Niedzwiecki and Celeste Braga. Many of the observations that polish the broad reasoning that I try to defend here came up in conversations with Paola Bergallo and Gustavo Maurino, who I especially thank. The accurate observations of Mariano Fernández Valle, to whom I am also grateful, were properly included.

EQUALIZERS AND TRANSLATORS: LAWYERS' ETHICS IN A CONSTITUTIONAL DEMOCRACY

*Martin Böhmer**

INTRODUCTION

Lawyers' ethics change. Many would agree on this statement. The content of their moral obligations, some would claim, varies along with the different necessities of the lawyer's different clients. And as those necessities change, the lawyer's commitments to truth and justice are forgotten in order to make space for the defense of any interest the new client brings to his or her office. Democracy, politics in general, has no place in this picture. It amounts to nothing more than a particular process of lawmaking that provides lawyers the basic raw material to do their job. In what follows I propose a different view of the practice lawyers have to embody, while at the same time acknowledging that, in fact, lawyers' ethics do change.

I. A DEMOCRATIC PROPOSAL

A few decades ago, an important part of humanity decided we should live together in accordance with an ideal that asserts that the best public decision is the one taken unanimously by everyone who is potentially affected by it, and only after discussing all the relevant information available and evaluating the best arguments their deliberative ability allowed them to express.

What moral theory, both from a metaethical and a normative ethics perspective, may arise from recognizing this fact? What, if any, political theory may arise from this moral theory? What, if any, theory about the role of law may arise from this political theory? What, if any, theory about the role of judges may arise from this theory about the role of law? What, if any, theory about the role of lawyers may arise from this theory about the

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role of judges? And what, if any, theory about the teaching of law, about the role of professors, and about the schools of law may arise from these theories about the role of judges and lawyers?

This essay answers the second-to-last question, avoids the last one and makes good use of the answers Carlos Nino gave to the remaining four. Thus, I will try to show the power of his thought and how grateful I am for his contribution. Neither is in doubt, only my ability to make them clear.

A. *Ideal Deliberation*

1. The Human Predicament

If one believes that human beings are an experiment of the gods, it seems clear that, at this moment, we do not have conclusive reasons to evaluate this positively or negatively. We have been close to self-destruction and we have also developed practices of which we can be proud. In any way, we would have, like Job, reasons for complaint. In fact, the experiment of which we are the object is as cruel as the bet between God and Satan in the Book of Job. The experiment[1] consists of placing us on a planet that lacks the necessary resources to allow our lives to unfold in the way we would desire. Because of this, we have no other alternative but to coordinate our actions or destroy those who try to stand between us and the goods we need to satisfy our desires. However, our abilities to perform one thing or the other are, like all human resources, limited. Besides being limited, our strength and intelligence are relatively equal, as well as our ability for empathy and collective coordination.

2. Metaethics: Modern Moral Discourse

What makes us an experiment that has not yet failed is the fact that we have achieved, from time to time, the creation of rules that allow us to coordinate our efforts and collaborate instead of increasing conflicts and trying to conquer one another.

When the principle of authority is questioned as the regulating principle of the game of public decisions, a new game, called the moral discourse of modernity,[2] is created. The arguments we use in this game have some specific features. These features include: generality (in the sense that I cannot say, for instance, that something is right because it is convenient for a certain person); universalizability (in the sense that I have to be willing to make my judgment universal, including against myself); a certain agreement on evidence (the idea about how we understand that a fact takes

1. Carlos Santiago Nino quotes Geoffrey Warnock's *The Object of Morality* when referring to these circumstances as "'the basic human predicament.'" CARLOS SANTIAGO NINO, THE ETHICS OF HUMAN RIGHTS 66 (1991) [hereinafter NINO, HUMAN RIGHTS] (quoting G. J. WARNOCK, THE OBJECT OF MORALITY 23–26 (1971)).

2. *See* CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY 47 (1996) [hereinafter NINO, DELIBERATIVE DEMOCRACY]; NINO, *supra* note 1, at 71–72.

or does not take place, and, correspondingly, the need for some procedural or intersubjective verification of this fact); and publicity (I cannot say something is right in accordance with a principle I cannot make explicit).[3]

However, in this moral discourse of modernity, we generally assume that it would be good for every participant in the discussion to have the same level of information, the same level of rationality, and the same ability to persuade. This is why the level where the moral discourse of modernity takes place is ideal. Ideally, the way in which the moral discussion is carried out implies that the group of individuals involved in the solution of the case can hold a discussion having the same level of rationality, of relevant information, and of persuasive ability. And if these individuals end up unanimously agreeing, it seems that this reason over which everyone unanimously agrees is better than the decision made by only one person without all the information, and without rational arguments.[4] Therefore, in this outline, the ideal of rational moral deliberation is being all present, having as much information as possible and the same ability to imagine rational arguments, and being able to persuade using the same kind of rhetoric.

Now, if that is the ideal—if that is the regulating principle that we should all obey when entering into public discussion—there are things we cannot say unless we violate the very thing we are doing. This is what Nino calls a "pragmatic inconsistency."[5] In a moral discussion, those who discuss assume some things; otherwise, they would not be discussing, or at least would not be discussing in that particular way. And if things are said that are in conflict with the premises of the practice, their discourse becomes inconsistent, giving those premises their critical ability.

Once we agree with this metaethical move, we are trapped inside the game. The undeniable existence of alternative and overlapping moral schemes in a specific time in history does not invalidate the fact that the only way to argue is with the guidelines offered by a certain discourse. Beyond that discourse, it is impossible to speak; beyond any discourse there is only silence, violence, or luckily, mere indifferent tolerance. In this sense, the idea I develop is classified as conceptual relativism. The argumentative correction depends on the discursive game we are playing. From an external point of view, the argument is relative; from an internal point of view, the argument aims to become true.

3. *See* NINO, DELIBERATIVE DEMOCRACY, *supra* note 2, at 122; NINO, HUMAN RIGHTS, *supra* note 1, at 93–94.

4. NINO, DELIBERATIVE DEMOCRACY, *supra* note 2, at 127–28; NINO, HUMAN RIGHTS, *supra* note 1, at 248.

5. NINO, DELIBERATIVE DEMOCRACY, *supra* note 2, at 27; NINO, HUMAN RIGHTS, *supra* note 1, at 12.

3. Normative Ethics: Moral Principles

Thus, once we agree, even in an implicit manner, to belong to a community that develops the moral discourse of modernity to diminish conflicts and increase coordination, we should accept—if we do not want to be considered pragmatically inconsistent—that some moral principles arise from the premises of the ideal discussion.[6]

First, the personal autonomy principle: it is of great value that each individual can freely decide how to develop his or her life. What proves that this is a moral principle underlying the deliberative practice is that, if I discuss, or morally deliberate with somebody else, it is because I believe the other person has the ability to elaborate arguments of his or her own and also the ability to understand and critically evaluate mine.[7]

Second, the inviolability principle: one's autonomy should not be increased by diminishing the autonomy of others. Thus, if I speak to everybody else, I cannot make use of them; if I speak, it is because they are not an instrument of my autonomy; I have to respect their will to do different things from the ones I would want them to do. [8] The master does not discuss with his slave.

Third, the principle of dignity: the will of others should be respected even if this implies a decrease in one's own autonomy. It is in this way that we can agree on a bilateral contract. We can only increase our autonomy by diminishing the autonomy of others—if they allow it. This conclusion is deduced from premises of deliberation, for if I will not take what the other person tells me seriously, why would I be speaking with him or her?[9]

However, this ideal moral deliberation is, just that—an ideal; it does not exist in the real world. This is due to at least two reasons. First, because, as I mentioned before, in the ideal deliberation, all those affected by the result of the discussion are present, which, most of the time, becomes impossible when the subject is relevant enough and affects a lot of people. Second, ideal deliberation does not exist because it requires unanimity; that is, it requires that we have enough time so that all of us who are interested try to persuade one another until a consensus is achieved, at least temporarily. And this cannot happen in reality either, because we typically have neither the time nor the ability to achieve those agreements. Not to mention other reasons such as asymmetry regarding the access to relevant information or the rhetorical inequality of the participants—that I refer to later.

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6. *See* NINO, DELIBERATIVE DEMOCRACY, *supra* note 2, at 46–47.

7. *See* NINO, DELIBERATIVE DEMOCRACY, *supra* note, 2, at 48–50; *see also* NINO, HUMAN RIGHTS, *supra* note 1, at 129–85.

8. *See* NINO, DELIBERATIVE DEMOCRACY, *supra* note 2, at 50–51; NINO, HUMAN RIGHTS, *supra* note 1, at 186–228.

9. *See* NINO, DELIBERATIVE DEMOCRACY, *supra* note 2, at 51–53; NINO, HUMAN RIGHTS, *supra* note 1, at 164–85.

4. Political Philosophy: Deliberative Democracy

We now find ourselves leaving the implications of normative ethics of the metaethical position assumed by the deliberative ideal to dwell on its translation to reality; we are now in the kingdom of political theory. Are these flaws of real deliberation reason enough to reject it? Let us remember that the deliberative ideal is a critical ideal, its purpose is not to describe reality, but to reveal the normative principles of a social practice that have the ability to evaluate actions. This is why the deliberative ideal constitutes a positive utopia[10] with the capacity to suggest and criticize courses of action.

The political proposal of this moral theory consists of presenting a system of government that can get close to this moral ideal. This form of government is a modern creation known as a constitutional democracy. In other words, in the level of reality, democracy is the best option to make this ideal effective; it is the imperfect political substitute of modern moral deliberation.[11] Thus, democracy reproduces certain conditions of impartiality that make it possible for this political system to help us make better decisions than any other process of collective decision making.

These conditions, among others, are implied by the fact that we all have an equal opportunity to take part because we have enough information and because there are certain argumentative conditions that force us to deliberate and, in this way, reduce the use of violence, avoid factual errors, and allow time to ponder the consequences of a given decision appropriately. Hence, these conditions of impartiality (which lead to the existence of different levels of democracy even if there is a minimal threshold under which we can affirm that a decision is not democratic) give us reasons to believe that the adopted decision has more chances of being the right one than any other taken by another procedure.[12]

B. *Real Deliberation: Democracy Failures*

Democracy tries to approach ideal deliberation by creating the best political arrangements so that as many opinions as possible are expressed, so that the best arguments are heard (in accordance with the culture and the imaginative capacity available at that moment in that specific society). Thus, decisions are made with the highest possible level of agreement (when unanimity is not a possibility), taking into consideration as much relevant information as possible.

Therefore, since democracy is only a substitute to ideal moral deliberation, what makes it imperfect generates several problems. In the first place and regarding the creation of public policy, which takes place at

10. *See* NINO, DELIBERATIVE DEMOCRACY, *supra* note 2, at 47.

11. *Id.* at 146–47; NINO, HUMAN RIGHTS, *supra* note 1, at 244.

12. *See* NINO, DELIBERATIVE DEMOCRACY, *supra* note 2, at 147–49; NINO, HUMAN RIGHTS, *supra* note 1, at 22–55.

the legislative level, we find that the problem of representation arises,[13] given that not all of us can be present at the process of deliberation. Secondly, the majority rule problem: since we do not have enough time for unanimity, we have to vote at a given time, and we do so by using the majority rule.

The problem is that since there are representatives who decide by majority rule, or that the representatives came to be so in a less than perfect way, there may be individuals or groups that should be present in the deliberation, because their interests might be affected by the results, but are left out of the democratic discussion. These representation problems require the creation of adequate political party systems, electoral mechanisms, mechanisms of parliamentary design, guarantees of freedom of several expressions, and access to information. The deliberative ideal has a great capacity for proposal and criticism of the fundamental institutions of democracy, evaluations and proposals to which I now turn.[14] No matter how well designed they could be, these mechanisms do not remove the threats of the majority rule.

One of those threats is the possibility that the decisions taken by real democracy—the majorities that managed to win the democratic game—violate the rights of individuals or groups, in which case they would be violating the premises by which we justify the democratic system (the moral principles assumed in the ideal deliberation that justify the existence and respect of those rights).

C. *A Constitution*

In view of the failures brought about by real democracy left to its own, it is necessary to create an agency that defends the democratic procedures (making them more deliberative) and the substantive principles of the system, that does not depend on the will of the majority. We need someone to protect the rules of the game of deliberative democracy in a countermajoritarian way—by taking a position against the majority without being politically punished for it. The most important of these mechanisms is the judiciary, whose role is even more relevant when judges have political power because they exercise the constitutional countermajoritarian control par excellence.

However, this countermajoritarian instrument must be justified since, at first, it appears to be opposed to the principles of deliberative democracy.[15]

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13. NINO, DELIBERATIVE DEMOCRACY, *supra* note 2, at 171–75. Note that, for the deliberative conception of democracy, representation is a problem, in contrast to, for example, the pluralist conception of democracy, for which representation constitutes an advantage. *Id.* at 146, 171.

14. *Id.* at 144–86.

15. The idea that only one person alone believes he or she understands the principles of a constitution better than the people's representatives seems to be very distant from the deliberative ideal of self-government, where all the interested parties participate in the process of collective decision making.

We would certainly all find unattractive the idea that judges are the governors in a democracy, and we would think that it is the people who should govern. But we also hope there is someone who exercises some kind of control over the decisions made by the people, particularly to make sure that the principles that make us want to live in a democratically controlled political community are respected. Thus, tension arises from the idea of democracy, inapposite to the idea of a constitution.

A deliberative point of view of democracy justifies this role of judges, underlining that, just as in economic theory, where state intervention is justified when the market fails (to regulate monopolies, for example), in the deliberative tradition, the countermajoritarian agency is justified when democracy fails.

We then find what Nino calls the exceptions to the unrestricted respect of the popular will.[16] These exceptions are, in principle, two. First, the protection of the principles. This implies that, although we defer our judgment to the decision made by real democracy when it works reasonably, if real democracy evidently violates these principles that are assumed by the ideal moral deliberation, then judges must intervene.[17]

Second, the protection of processes, that is, the control of rules that restrict or distort the processes that allow democracy to produce legislation justified by deliberation. This would be the case, for example, if electoral districts were arranged in a way that systematically benefited the same group. If that happens, it is reasonable to think that judges should get involved, even though the rule does not violate substantive principles, for the rules of the game (which are the ones that let us say that what emerges from this game is democratically justified) are being broken. Given the two exceptions and in terms of the role of the judges, we can say that the role of judges is to (a) preserve a justified (read: principles) (b) game (read: processes).

There is, however, a third problem. It is still possible for a judge in one province to think that a rule violates principles while another judge in another province thinks it does not; for a division of the intermediate court to think it does and another one to think it does not; for the highest court as presently composed to think it does and in the future, with a different

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> Judges, particularly those in higher courts, such as a supreme court or a constitutional tribunal, do not generally enjoy a direct democratic origin, since they are not elected by popular vote. Furthermore, these courts are not typically subject to a periodic renewal of their mandate, nor do they respond directly to public opinion and discussion.

Id. at 187–88. In this way, "doubt arises as to why the judiciary—aristocratic organ—should have the last word in determining the scope of individual rights, conflicts of powers between the branches of government, and the rules regarding the democratic procedures. . . . Alexander Bickel labeled this problem 'the *counter-majoritarian difficulty.*'" *Id.* at 188.

16. They are exceptions, for if real democracy had a game as close to ideal deliberation as possible, one would try to prevent countermajoritarian agencies from intervening.

17. In Argentina, for example, obvious violations of principles would refer to violations of the Constitution, since principles in general are expressed in constitutions that make them explicit, such as the principle of equality or of autonomy. CONST. ARG. §§ 16, 19.

composition, to think it does not. The system seems attractive insofar as the instrument with which the judges modify democratic decisions when they violate principles or processes, or respect them in the opposite case, is consistent.

We thus find a third exception with which judges may justify their interference in majoritarian deliberation, given that they must also maintain and protect the consistency of the language with which they express themselves. Thus, to honor a constitution means preserving the social hermeneutical practice it consists of while improving in accordance with the values that each generation understands are expressed in society's basic institutional agreement.

This is how constitutional democracies create countermajoritarian mechanisms with the purpose of preserving: (a) the rights on which the system is founded, (b) the rules of the democratic game, and (c) the consistency of the language that makes the game possible in time. The judiciary is an institution (not necessarily the only one) designed to play the difficult part of protecting these principles and, at the same time, of respecting the agreements reached by the democratic processes, understanding that its countermajoritarian role must always be in tension with the respectful deference owed to the will of those who reached broader agreements.

So far the inertial powers of Nino's thought enlighten us so that we can see where this path leads us.

II. THE ROLE OF LAWYERS

A. *Failures of Judicial Deliberation*

The ideal of deliberation has no reason to be limited to the legislative or administrative bodies. There are other political fora in which to act. Courts are one of them. In the courtrooms, people discuss the way in which democratic agreements are applied to their specific problems, and certain officers, such as the judges, assume their role as arbiters in those controversies. Thus, when deciding them, they have the triple opportunity to: (a) polish the arguments provided by the legislature in favor of the general rules for that particular case; (b) protect the premises of the deliberative game in which the democratic system exists by offering a second opportunity to those who lost in the part of the game where the rule of the majority governs; and (c) continue the construction of the language of law, preserving its meaning and improving it in accordance with the changing ideas regarding the principles that give it its value. The first task is nothing but the continuation of the legislative function, the application of general prescriptions to specific cases, and the exemplification of a general law. The second, the exercise of the countermajoritarian control, is generally executed in occasion of the first one and in an exceptional way. The last one is a permanent concern assumed as a tension between past and

present, preservation and change, in which judges must feel uncomfortably at ease.

Thus, deliberation also takes place, though in a very different way, in the sphere in which the rule is applied and not only in the sphere of its creation. In the judicial process, a part of what happens in the majoritarian discussion is repeated, given that it also represents a sphere of public deliberation that aims at finishing the conversation only when the best argument has silenced the other party's voice. In this way, a deliberative process can determine (a) how to distinguish general mandates, (b) whether a democratic rule falls or does not fall within the exceptions regarding the unrestricted respect of the general will, and (c) in what way the tension between tradition and reform can be resolved within the particular case.

It is easy to understand that this task is impossible to carry out by only one person alone. The principles on which democracy is based reject the elitist approach of thinking that such an important task can be successful without the benefit of the presence of those interested in the result of the decision. Thus, the role of people, different from the judges in the judicial discussion, becomes meaningful. It is no longer only the judges who gather information, ask, and deliberate among themselves, but also the people (who are by definition the ones that can encourage deliberation wherever it takes place) who start the judicial apparatus (given that judges do not act on their own initiative), bring the arguments and the proof, and go back to deliberating because they do not agree with what laws require from them or because they state that, even when the mandate is clear, democracy failed in the protection of rights, or distorted the good performance of the democratic processes, or did not take into account the subtle construction supposed by the careful process of respect and improvement of a constitution.

The deliberative process in court is, however, different from the deliberative process in the majoritarian bodies. In fact, in court, conversation is regulated in detail and coordinated by an arbiter who is impartial regarding the interests and has, as I mentioned before, a very specific role to carry out, a role that has been translated to detailed rules and that we can summarize in the idea that judges must "apply the law."

In a court, the ideal decision is achieved after a deliberative process in which the best argument prevails, constrained by the (legal) restrictions that limit the function of the judge. In this framework, in which judges listen to the good (legal) arguments and decide based on the good (legal) arguments, for the law in general to develop, the parties to the controversy must make an effort to bring to the judges the best arguments available in society at that moment regarding the way in which the rules must be interpreted and applied, subject to the tensions that make a constitutional democracy work.

However, just as real democracy fails because it does not coincide with ideal democracy, insofar as representatives do not coincide with those affected and as majorities do not guarantee the same decisions that would have been taken unanimously, real courts are also subject to failures that prevent them from creating an ideal deliberation. One of these failures is

the complexity of the language of the law and the fact that the best arguments tend to lie in understandings that, for reasons that I later discuss, are only shared by the members of the legal community, thus excluding the rest of the citizens from this important conversation.

This failure is generated by an imbalance between the actors regarding their capacity to generate the best argument to persuade the judge, which creates the risk that the decisions that are made in court do not contribute to fulfilling the fundamental role that countermajoritarian bodies have in a constitutional democracy, since it would not be the best argument but the best arguer who won. It is because of these reasons that constitutional democracy creates a figure that functions as a mediator between the individual interests and the public interest: the lawyer.

1. Lawyers as Rhetorical Equalizers of Their Fellow Citizens

It is this dilemma, in which the deliberation in court should make the best arguments prevail (and therefore be open to the contribution of as many people as possible), but in which, however, the best arguments only emerge out of complex agreements and subtle compromises among the ideals of the constitutional democracy, where democracy calls a particular professional class to mediate between the judiciary and the citizens.

I will use an analogy between lawyers and their classic predecessors, the sophists, to better understand the role we believe lawyers should have in a constitutional democracy. This analogy is useful as long as it illustrates the complex connection between democracy and judicial deliberation, and the paradoxical need of restricting the access of many to deliberation on their rights to defend a system based precisely on the value of widespread deliberation.

Lawyers are recognized as the heirs of Greek sophists and that is the reason why their activities, in the way they have been described in the platonic dialogues—that is to say the defense of any cause for money, the ability to produce arguments in favor of a certain interest one day and of the opposite interest on the following day, and the disregard for the search for truth—are Socratic disgraces of which the legal profession still bears the burden. Thus, it seems important to return to these questions to redefine them in the framework of contemporary deliberative democracy.

In the dialogue we know as *Gorgias*,[18] Socrates draws a fruitful comparison. He asserts that there are arts corresponding to the well-being of the soul and of the body. Thus, politics, and within it, legislation and justice, are to the soul what gymnastics and medicine are to the body. Legislation keeps the political body, the *polis*, healthy and in good condition, just as gymnastics keeps our body fit. Justice intervenes after the occurrence of damage, trying to restore the equilibrium that the *polis* had, just as medicine does with a sick body. However, these arts may be

18. PLATO, GORGIAS (Robin Waterfield trans., Oxford Univ. Press 1994).

corrupted when the human being chooses to listen the voice of flattery. Thus, between gymnastics and cosmetic art, "men who had no more sense than children,"[19] Socrates states, will choose an easy expedient of makeup to the hard discipline of physical exercise, and between the art of medicine and the culinary arts, they will choose the tasty dish and not the bitter medicine. Finally, Socrates concludes his explanation asserting that the sophistic art and rhetoric are to politics (to legislation and justice) what cosmetics and culinary arts are to gymnastics and to medicine: mere sham conceived by flattery.

The dialogue must tend to the search for truth; rhetoric, on the contrary, corrupts the dialogue turning it into a mere means of persuasion, that is, of imposition of the will of the stronger over the weaker. Sophists, when promoting this corrupt way of the democratic dialogue, increase the arbitrariness of the powerful and prevent the *polis* and each of the citizens from becoming better.

However, some context can show another perspective. In democratic Athens, sophists taught rhetoric to their fellow citizens because rhetoric was needed to persuade other citizens and win in the *agora*. The life and death of everybody depended on the task of persuading others, as Socrates himself could experience when unable to convince his fellow citizens—although for a few votes—that the accusations against him were false.[20] Not only legislation but also judicial decisions were solved by public deliberation among the Athenians and the destiny of the first democracy mankind has known depended on the decisions that emerged from the persuasive ability of these few hundred people. This is the crucial importance of the role of sophists, the one that gave them the public prominence that Socratic dialogues could not hide. But the mere fact that the sophists had a democratic reputation cannot justify the role of rhetoric in a democratic system; therefore it requires going back to the mechanics of the rhetorical dialogue to find a way of justifying their work.

If public deliberation is the source of political and judicial decisions, then it is also the mechanism that is preferred to reach the best decisions. If they had rejected the dialogue as the last source of certainty, the Athenians should have deferred their most important decisions to some other authority. From the absence of this superior court, it follows that deliberation guaranteed them the best possible decisions. Consequently, the rules that define it should have been aimed at sustaining this epistemological definition of the Athenian people.

A bad decision is the result of poor deliberation, and poor deliberation allows weak arguments to remain unrefuted. The role of sophists was to teach precisely how to raise arguments and to expound on them in a persuasive way, but mainly their role was to teach this technique (the art of

19. PLATO, GORGIAS (Benjamin Jowett trans.), http://classics.mit.edu/Plato/gorgias.1b.txt (last visited Feb. 25, 2009); *see also* PLATO, *supra* note 18, at 32–34.

20. PLATO, THE APOLOGY (Charles W. Eliot ed., Benjamin Jowett trans., P. F. Collier & Son 1909).

playing with the rules of public deliberation) to all the citizens. From the universal training of the players on the subtleties of the art of deliberation it follows that the game grows in sophistication, and that the most blatant errors in reasoning—the rhetorical fallacies—will be quickly detected, to the pleasure of the opponent and disgrace of the speaker who tried to introduce them as legitimate arguments. From the fear of this possibility, which grows as the best instruction from sophists is extended to everybody, follows the decision to avoid the use of weak arguments and the incentive to develop the best reasons to make the silence of the opponent signal the victory until a new speaker comes up with a better argument.

So far, we can assume that the rhetoric bet of the sophists consisted in the fact that, if all the Athenian citizens had the same level of rhetoric or at least rhetorical inequality was not decisive, the democratic discussion would be closer to ideal deliberation, since fallacies would be neutralized because speakers would prevent themselves from expressing them in front of an audience expert in the art of rhetoric.

Going back to our argument, political philosophy has recently focused again on dialogue regarding its ability to produce, discover, get closer, or give greater guarantees than other methods of placing us before what we could call "moral truth." This return to dialogue has overcome many situations among which the restoration of democracy, equality among citizens, and the value of persuasion are worth mentioning. In fact, the critique of representative democracy and the proposals to bring it closer to face-to-face deliberation between those affected by the decisions of the game are an instance of this trend. And the idea of decentralization that federalism brings about, the principles of proportionality and representation of the electoral systems, the trials by jury, community justice, and the alternative systems of conflict resolution are some of the clearer examples. Chief among them is the idea that as the number of voices included in the dialogue increases—with the purpose of persuading others who do not share the same interests on the correctness of proposals (thus increasing the relevant information and the number of arguments)—the more impartial deliberations will be. Therefore, there will be more reasons to believe one must act accordingly.

Nino has also reminded us that representation and the rule of the majority are an obstacle to the deliberative ideal since they move us away from the ideal of the presence of all those affected and away from unanimous decision. What I want to point out now is another problem that threatens deliberation and that brings us nearer to the role of the sophists. The problem we refer to is the rhetorical inequality of those who participate in deliberation. In fact, if the solution of a conflict depends on the rhetorical effectiveness of the parties, the lack of equality produces the unwanted result of the best argument failing to always prevail, violating an obvious rule of ideal deliberation that consists in excluding the fallacies and the modulation of discourse as valid arguments in discussion. The rhetorical abilities of the participants are irrelevant in ideal deliberation.

However, it is clear that in real deliberations—on which the interests and rights of citizens in real democracy depend—the unequal rhetorical ability of the participants produces the unwanted result of making fallacious arguments prevail, thus allowing the will of those who lack the best arguments to prevail. Sophists understood this failure of deliberative market in Athenian democracy and tried to solve it by offering their services to every citizen that required them, with the purpose of improving their rhetorical skills. The objective was to equalize deliberation in the *polis*, ensuring at least that the rhetoric of the speakers did not turn to the easy use of fallacious arguments, since, among good rhetorical speakers, weak arguments are easily detected, and one runs the risk of being embarrassed in public. Thus, with the previous mutual censorship of rhetorical cheating, it is expected that the arguments that remain are the best that a community can imagine at a given moment.

This is the professional heritage of lawyers, one of the roles they play in deliberative democracy: being the rhetorical equalizers of their fellow citizens and making sure that social conflicts are solved by resorting to the best argument their community has been able to express. This is why modern states tend to give them the privilege of the monopoly over rendering justice, and to restrict the access of citizens in general to judicial deliberation with the purpose of assuring their equality.

That being said, a final note: lawyers are not really necessary in all instances in which we are accustomed to requiring their presence. In fact, insofar as the subject in discussion does not permit a rise to complex questions in which what I have called public interest may be at risk, and as long as the parties have relatively equal rhetorical skills, the justification for the existence of lawyers as translators and equalizers disappears. Thus, it is not only permissible but necessary to leave lawyers out of these circumstances. Some examples are community justice and noncontentious procedures in which the absence of lawyers increases the possibility to access the justice of citizens in general.

2. Lawyers as Translators from the Language of Private Interests to the Language of the Public Interest

In this particular form of political dialogue in constitutional democracy, judicial deliberation, citizens are confronted with unequal instruments, since they do not know to the same extent what statutory law demands, they do not have the same information about all the relevant facts, they have uncontested prejudices, and they do not know how to articulate their arguments in a persuasive way. It is precisely because they have unequal information and rhetorical abilities that they need representatives—lawyers—to provide them the weapons with which to fight the deliberative battle in a fair way.

This deliberative battle has relatively well-defined rules. The dynamics that include the judge, two lawyers, and two parties is a very interesting

deliberation, and very different from the political deliberation that takes place in a deliberative council or in the national legislature. In the former, two citizens turn to the judicial institutions because they have a problem of normative interpretation. Each believes that the law admits he or she is right, but law is, however, a very complex practice formed by facts and rules and is a far cry from an oracle or a infallible and precise computer. The person who decides is, all things considered, one person, the judge, who is not known in advance but it is assumed to have some interesting institutional features that result in a negative rule of the game: judges are not interested in the client's interests, that is, they cannot be persuaded with arguments based on personal interests, needs, or desires, so these types of arguments are left out of judicial deliberation. Judges are there to interpret what the law says, and in that sense they are representatives of the public interest. The arguments that cannot be expressed following the requirements of modern deliberation—for example, generality and universalizability—are not in the interest of those who must decide the complex network of mandates that constitutional democracy imposes on them.

In fact, judges want to know how to exemplify the majoritarian decision in the case in question, or if they should disregard the popular mandate because in such a case the principles on which the system is founded or the rules on which the democratic decision is based are at stake, or if they should repeat what they have said before in a similar case, or if there are arguments to modify those previous decisions. Judges force lawyers to express arguments that persuade the judges that the lawyers' clients are backed by the best arguments—those that the judges would adopt to carry out their task with wisdom, taking into account that the procedure is public and that their arguments would be refuted by the lawyer representing the opposing party.

Thus, lawyers must decide diverse and complex questions. First, they must seek to protect the interest of their clients, which is many times difficult to determine. In fact, is the client's interest the one he or she manifests, or the one the lawyer believes it should be? If the client is not an individual but an association, is the client's interest the interest of the board of directors, of the shareholders, of the employees, of the consumers, or of society in general? Second, once the client's interest is clear, lawyers must place themselves in the client's place and decide what the best arguments in his or her favor are. Third, they must leave the client's place, put themselves in the opposing party's place, and imagine the arguments that they would use if they were the opposing lawyer and—since ideally they do not know the opposing lawyer—they must decide what would be the best argument the opposing lawyer could express. The second and third steps must be repeated as many times as necessary, similar to chess where the players foresee future moves before making the following move. But besides all this work, which requires a high level of deliberative imagination, every lawyer must always be thinking about the judge, who is

not interested in knowing the interests of each of the parties, to the extent that promoting private interests does not constitute a persuasive argument for the execution of his or her institutional work. In other words, lawyers must be aware that the judge is only interested in hearing what the law says. Those responsible for the decisions in the judicial deliberative game only want to know if certain sanctioned law is relevant to the case and, if so, if it violates any principle or process, or if its interpretation is contradictory to some relevant interpretation held in the past, and, if this is the case, which interpretation must prevail and why.

Thus, since the lawyers know that the judge wants to decide the case by bearing in mind complex mandates, the arguments that they must put forward in favor of their party relate to the interest of the judge. The arguments in favor of the private interest of their party must be arguments of public interest and, therefore, to be effective, lawyers must be able to translate private interests effectively to the complex language of the public interest.

A few words on the lawyers who devote themselves to advising their clients: at first glance, it seems that arguments needed to succeed in the discussions that do not take place in court do not require lawyers to put themselves in the place of the judge. In fact, the abilities needed for a successful negotiation might require the lawyer to relax the demands for impartiality, information, or openness that are recommended for discussions in court. However, in the majority of these transactions it is crucial to take into account that the parties assume that the agreement they will reach will be supported by rituals that make it valid in the sense that if one of the parties fails to observe the law, the other party can resort to the monopoly of public force to redress such noncompliance. Note that the guardian of the legitimate use of public force is the judiciary. Thus, even in extrajudicial transactions, the parties' lawyers must ask themselves what a judge would say should the agreement need to be taken to court.[21]

Therefore, lawyers serve two masters: their clients and the judges. They serve their clients by generating arguments that persuade the judge to decide in accordance with their interests, and they serve the judges by creating the best arguments they can express in favor of their clients to allow the judges to perform their role, namely: to balance the respect for majoritarian decisions; to protect rights and democratic processes; and to preserve and improve the language of law. This double role is so important that in many countries lawyers have the monopoly (either legal or de facto) of representation before the court.

21. *See generally* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSIONS 173 (4th prtg. 1995); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990).

B. *A Justified Monopoly*

So far, I have justified a certain role of the judges, and therefore of lawyers, in a constitutional democracy and explained the rules of the deliberative game of law in which judges can only be persuaded with certain types of arguments. I have stated that the arguments that succeed in achieving a favorable decision to the client are those that best comply with the three types of requirements that fall on the judges: that they are deferent to the popular will, that they prevent the violation of rights and the manipulation of democratic processes exercising their countermajoritarian role, and that they maintain and improve the practice that law involves. Thus, if a lawyer is able to translate the interests of his or her client into arguments that persuade the judge that the decision he or she is about to make is the one that best combines these three elements, the lawyer should win the case.

This translation is a very difficult task to carry out, and people must go on with their lives and cannot dedicate themselves to developing these abilities. This would justify, prima facie, the lawyers' monopoly in a constitutional democracy, which in principle seems paradoxical to the extent that it would deprive citizens of the right to defend their rights by themselves, and not through representation. In other words, although nobody is a better judge of one's own interests than oneself, the problem of judicial deliberation is that the judge does not care about the individual interest of each party; he or she only cares about the interest insofar as it is sustained by arguments that can be translated into arguments of public interest.

If this is the justification of the monopoly of public deliberation in the hands of lawyers, how can we break down these obligations to understand in particular what the obligations of lawyers are in a constitutional democracy?

1. Lawyers Must Defend Their Clients' Interest

This mandate means that in the exercise of their profession, lawyers cannot disappoint their clients regarding their needs and desires, which seems obvious through its application, though is not so. In fact, how can the client be identified, and therefore, the interests the lawyer must serve? Is it the individual, his or her family, his or her children, or the organization, to which they belong? Is it the public in general that the client must serve? To fulfill the obligation of defending the interests of our client, we must first ask ourselves what such an obligation entails.[22] Once there is

22. It is an extremely difficult question, and even if one agreed with Justice Louis Brandeis when he proposes that lawyers should work for "the situation," the question is not easier. *See Hearings Before the Subcomm. of the S. Comm. on the Judiciary on the Nomination of Louis D. Brandeis to Be an Associate Justice of the Supreme Court of the United States*, 64th Cong. 287 (1916).

an agreement about who the client is and what his interests are, the lawyer must decide the strategy to defend them.

The translation of private interest to public interest is complex and it is important not to lose what the client came for in such a translation. What is lost, because something is always lost, must be something the client accepts to lose or knows he or she will lose. There are many obligations related to the clients' right to information, their right to consent, their right to confidentiality, even if the facts in question are important for the case, and the limits that the lawyer imposes on his or her clients in a strategy to defend their interests. That loss of information or interests that results from the translation of the private interest into the public interest, which is necessary for the lawyer, must be a translation that the clients know, understand, and accept.

It is clear that the above overrides any kind of fraud to the clients: fraud as a result of lack of information, or lack of consent, for example. I leave aside more obvious questions traditionally discussed in the codes of professional ethics (or in penal codes) such as the prohibition of stealing their money, deceiving them about fees, lying to them, or not working in their favor.

2. Monopoly Must Be Exercised Respecting Equality

The second justification of lawyers' monopoly is that the deliberative process of which law consists must be open to everybody, of the same quality and accessibility, and therefore lawyers' services must be rendered in those conditions.

a. *Equality Regarding the Quality of Service*

Inequality in rhetorical competency or in the ability to translate private interests to public arguments produces disastrous consequences for deliberation regarding the application of the law. In fact, when a good lawyer confronts a bad lawyer, it is possible that this inequality restricts the arguments available to the judge and permits the introduction of fallacies in the deliberation that are accepted as valid arguments, facts not adequately proved, and, in turn, inadequate solutions to the tensions inherent in constitutional democracy.[23] Thus, whether one is being represented by a bad or good lawyer is of importance not only to the client, but also to the interest of law, insofar as the absence of this relative equality in the quality of legal representation in the deliberation introduces the risk of inadequate arguments and the exclusion of arguments that have the virtue of improving the quality of the rule of law. In this sense, the qualitative differences among lawyers must not be too broad, and the clients should be able to know when one lawyer is better than another.

23. *See generally* Alan Wertheimer, *The Equalization of Legal Resources*, *in* 17 PHILOSOPHY AND PUBLIC AFFAIRS 303 (1988).

Regarding this last question, there are institutions that are obliged to create certain public goods that reduce the cost of accessing this information. One of these institutions is the school of law, which is expected to include in its degree something about the quality of the lawyers graduating from it, who are, in the case of Argentina, immediately allowed to access the market.[24] This is the first reason to control the quality of the teaching of law and it is above all relevant to define the knowledge and minimum skills that are expected from someone who has obtained a law degree. Clients should not make inquiries about whether one degree is better than another. The degree should have a value in itself, and thus become a public good.

In this sense, then, there should be a quality requirement relatively equal to all the lawyers that the system allows into the market, permitting them to defend people's interests. Of course this obligation lies not only in the schools of law but also in other institutions, and is particularly a fundamental obligation of the state insofar as it is understood as a guarantee of equality in the service of justice. But it is also an obligation of the bar associations—since the state delegates the control of the profession to them—to keep certain regularity in the quality of the service rendered by their registered professionals.

b. *Equality in Access*

The justification of the enjoyment of this monopoly includes the duty to defend particular interests with relatively equal rhetorical ability and with the best legal arguments at everyone's reach. The distribution of lawyers among those who need them cannot be related to their clients' wealth; their particular geographic situation; their ability to access public buildings or to understand the oral or written language of law; or their gender, race, or social position—to name only some of the barriers that may hamper a client's access to justice. From the accessibility point of view, even if there are tolerable differences in the quality of lawyers, the market should not be the distribution criterion controlling the service of justice. The mere fact that one is better off or lives in a certain place should not guarantee a better defense (or a mere defense), since this circumstance would be evidence of the denial of the reasons why the monopoly was given to lawyers. The monopoly is not given to lawyers so that a few become rich defending some other few.

This is not the venue to offer proposals for an egalitarian extension of the access to justice. However, it is important to insist once again that this obligation is part of the necessary institutional offer of every constitutional democracy and is therefore basically a responsibility of the state, no matter how it is structured. This obligation can be honored using the resources that the market generates through the legal profession, the state (through the

24. Since the academic degree permits the immediate exercise of the profession without any other requirement.

courts), the government attorney's office and the public defender's office, the schools of law through the legal clinics, and civil society in general. Thus the existence of an adequate public policy regarding the egalitarian access to deliberation on the manner in which law should be applied is a fundamental obligation of the state and is part of the issues that illustrate how it complies with the requirements that justify its existence.

c. *Monopoly Must Be Exercised in Accordance with the Obligation of Consolidating the Rule of Law*

Lawyers must not make decisions that undermine the instrument that democracy gives them to fulfill their work. In this essay, I have defined public interest in the sphere of justice as the balance of the three obligations of judges (the respect for the majoritarian decisions, the countermajoritarian control and the preservation and improvement of the language of law) and the lawyer's job as dependent on those obligations in the sense that he or she must be oriented to facilitate them. This collective practice of lawyers is what is frequently identified with the rule of law in the judicial sphere. It is in this sense that we state that the lawyers' monopoly is also justified when it is exercised in such a way that it does not destroy the delicate balance of obligations in which the rule of law exists.

That is, lawyers must restrict themselves and avoid breaking this complex institutional practice, even when doing so would given them a better opportunity to win their case. In the terms we have set out, lawyers breach this obligation when they do not fully assume their role as translators of private interests into public interest, but instead, in their eagerness to defend the private interest of the client, distort the best interpretation of what the public interest demands. In Latin America, many aspects of the profession have never been related to the demand that this standard requires. There are still many questions that could be described as the obligation of exercising the legal profession in accordance with a strong conception of the *rule of law.* Taken seriously, this obligation imposes a heavy burden on those who try to make reforms for the consolidation of the rule of law, because of the wide range of habits and rules that conflict with this standard but are taken for granted as the usual, and in some sense, correct way of doing things.

CONCLUSION

There is a certain attitude towards legal interpretation that continues among us and conceives the law in a mere instrumental way, aligned with a disdainful attitude toward the creation of arguments of public nature and that states that any interpretation of the rules that satisfies the interests of the client must be introduced in the process. However, just as it happens with the judge, it is expected that the lawyer contributes to the construction of the language of law. In this sense, the lawyer has to pay, on the one hand, his or her obligations regarding the past, i.e., he or she must make

sure that the people's expectations of what the law requires are not betrayed by the permanent change in the interpretation of the law. On the other hand, he or she must honor his or her obligations regarding the future, making sure that the law improves with regard to the deference he or she owes to the will of the people, the respect of rights, and the improvement of the legal practice.

In order to justify the expropriation and the monopoly of defense of the rights of the people on whom it is sustained, legal practice must be unconditionally faithful to the never-ending struggle to achieve the double ideal of democracy and constitutionalism.

My proposal has argued, based on the teachings of Carlos Nino, that only as long as the legal profession fulfills these three obligations—that of defending the client's interest, permitting everyone equal access to the judicial deliberation, and not defending the private interest at the expense of the public interest—the task that constitutional democracy has monopolistically assigned the legal profession is justified, and it can then become a relevant actor in the building of the rule of law.