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Deliberative Democracy, Social Rights and the Modulation of Judicial Review**

Democracia deliberativa, derechos sociales y la modulación del control judicial de constitucionalidad

ABSTRACT

Roberto Gargarella has infused into constitutional theory a deliberative approach to constitutional review and rights adjudication. By this, he has enriched our understanding of deliberative democracy as a political system in which the judiciary can play a central role, especially through the institution of constitutional review. Furthermore, he has provided us with crucial insights into the deliberative potential of this institution, shedding light on the different ways in which it may serve to secure the essential conditions of democratic deliberation. The article centers on this twofold, crucial contribution of Gargarella – to constitutional theory *and* to deliberative democratic theory – with a focus on the relationship between social rights and constitutional review. First, it presents the main controversial issues raised by this relationship, concerning both social rights justiciability and adjudication. Second it highlights the resources provided by Gargarella to understand and address both orders of issues, based on his account of deliberative democracy and constitutional review. Third, the article addresses the resulting view of the action of courts on social rights. In particular, it inquires into the idea of a “third way” for judicial action, requiring to *modulate* judicial review so as to mediate between judicial inertia and activism.

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KEYWORDS

Deliberative democracy, social rights, justiciability, adjudication, Gargarella.

RESUMEN

Roberto Gargarella ha incorporado a la teoría constitucional una visión deliberativa del control de constitucionalidad y de la garantía judicial de los derechos. De este modo, ha enriquecido nuestra comprensión de la democracia deliberativa como sistema político en el que la judicatura puede jugar un papel central, especialmente a través de la institución del control de constitucionalidad. Más aún, nos ha proporcionado hallazgos cruciales sobre el potencial deliberativo de esta institución, mostrando las diferentes maneras en las que puede servir para garantizar las condiciones esenciales de la deliberación democrática. El artículo se centra en esta importante doble contribución de Gargarella –a la teoría constitucional y a la teoría de la democracia deliberativa– con especial atención a la relación entre derechos sociales y control de constitucionalidad. Primero, presenta los principales temas controvertidos que plantea esta relación, tanto en lo que concierne a la justiciabilidad de los derechos sociales como a su adjudicación. Segundo, destaca los recursos que Gargarella proporciona para entender y abordar ambos asuntos, sobre la base de su comprensión de la democracia deliberativa y del control de constitucionalidad. Tercero, analiza la perspectiva sobre la acción de los tribunales en materia de derechos sociales que resulta de ello. En especial, explora la idea de una “tercera vía” de acción judicial, que exigiría *modular* el control de constitucionalidad *para mediar* entre la inercia y el activismo judicial.

PALABRAS CLAVE

Democracia deliberativa, derechos sociales, justiciabilidad, adjudicación, Gargarella.

SUMMARY

1. Constitutional Review and Social Rights. 2. Democracy and the Justiciability of Social Rights. 2.1. Deliberative Democracy and the Adjudication of Social Rights. 3. A Full and Deliberative Modulation of Judicial Review. Conclusions. References.

1. CONSTITUTIONAL REVIEW AND SOCIAL RIGHTS

In contemporary constitutional democracies, the protection of social rights is uncertain and tied to the fate of a controversial process of legal – and judicial – enforcement. In fact, the scope and means of social rights adjudication are constantly evolving and widely debated, especially in the sphere of constitutional adjudication. In this sphere, the exercise of judicial review on issues concerning social rights allows courts to scrutinize legislative acts and the underlying distributive choices. The possibility for non-representative bodies, such as courts, to review and counter the decisions of representative political bodies raises a counter-majoritarian difficulty, which may undermine the democratic legitimacy of judicial interventions on social rights¹.

From this perspective, the action of courts is particularly controversial in two respects.

First, the justiciability of social rights. It is controversial whether, and why, social rights are amenable to judicial consideration as much as civil and political rights². On this issue, there has been “a significant turn towards judicially enforced social rights”. The debate has shifted its focus from the “the wisdom of giving judges the power to enforce social rights” to “a set of questions about the practical effect of justiciable social rights and the potential of such rights to deliver on the promise of social transformation through law”³.

Second, and relatedly, the adjudication of social rights: how courts should address such rights, and to what extent they should thereby interfere with the decisions of political, legislative institutions.

The first aspect mostly concerns the scope and justification of social rights adjudication, whereas the second pertains primarily to the strength and intensity of the judicial action within that scope.

Based on a deliberative understanding of democracy, Roberto Gargarella has made crucial contributions in regard to both aspects, showing also how they are connected⁴.

1 As pointed out by BICKEL, A.M. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. New Haven: Yale University Press, 1986.

2 In this respect, the status of social rights is controversial especially in virtue of a relationship with obligations that, according to some interpretations, fails to meet the formal requirements of a legal relationship. More specifically, it is argued that social rights do not fit a conceptual scheme built around an axiom of correlativity, which represents legal claims as correlative with legal duties. This view, however, has been challenged: first, by approaches that disconnect, both substantively and formally, the legal status of rights from their correlativity with legal duties; and second, by approaches that argue for the applicability of the correlativity scheme to the analysis of social rights and, nonetheless, disconnect the substantive and normative status of such rights from the correlativity with duties.

3 GARGARELLA, R.; DOMINGO, P., and ROUX, T. (ed.). *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* Aldershot: Ashgate, 2006, 255.

4 *Ibid.*; GARGARELLA, R. *Should Deliberative Democrats Defend the Judicial Enforcement of Social Rights?* In BESSON, S., and MARTÍ, J.L. (ed.), *Deliberative Democracy and its Discontents*. London: Routledge, 2006, 233-252.

First, he has provided a key to the justiciability of social rights, by pointing out that the scope of judicial actions does not just depend on the nature of the issues that fall within that scope. Rather, it mostly depends on the broader democratic framework within which the judiciary operates. In these terms, the justiciability of social rights does not depend much on the nature of such rights – as allegedly “positive”, expensive rights – and the possibility of effectively enforcing them by judicial means. Rather, and more fundamentally, it crucially depends on evaluations of the nature of democratic systems and the role that courts should play in such systems⁵. Second, Gargarella has provided an account of the adjudication of social rights based on a deliberative conception of democracy, which points to an exercise of judicial review mediating between judicial activism and inertia⁶.

In both respects, Gargarella’s account emphasizes what the judicial practice often tends to obscure: the relevance of democratic premises for the articulation of a judicial discourse on social rights.

In fact, as Gargarella remarks in an insightful analysis of constitutional case law, courts often do not expound the view of democracy underlying their approach to social rights. And when they do so, they often present it in poor terms, especially if compared to the refined democratic arguments deployed in decisions on other rights, such as freedom of expression⁷. The most surprising fact, in this respect, concerns the judicial use of arguments that, although relying on very different conceptions of democracy – from the pluralist conception to the Rousseauian conception – all lead to the same conclusion: democracy requires political, representative institutions, rather than courts, to deal with social rights⁸.

As Gargarella notes, however, this conclusion is only supported by certain views of democracy: “The argument from democratic theory does not come down obviously in support of the idea that judges have no role to play in the enforcement of social rights”⁹. Other views – and the deliberative view in particular – lead to different conclusions, pointing to the legitimacy of social rights adjudication:

Theories of deliberative democracy have a lot to tell us in this regard. In particular, these theories suggest that judges should be more active in enforcing social

5 GARGARELLA, R. *Democracia deliberativa, justicia dialógica y derechos sociales*. In *Teoría política*. 2, 2012, 231-256; GARGARELLA, R. *¿Democracia deliberativa y judicialización de los derechos sociales?* In *Perfiles latinoamericanos*. 13, 28, 2006, 9-32.

6 GARGARELLA. *¿Democracia deliberativa y judicialización de los derechos sociales?*, cit.

7 *Ibid.*, 10-14.

8 *Ibid.*, 10-14.

9 GARGARELLA, R. *Theories of Democracy, the Judiciary, and Social Rights*. In GARGARELLA, R.; DOMINGO, P., and ROUX, T. (ed.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* Aldershot: Ashgate, 2006, 13.

rights, but in ways that are not only compatible with, but also necessary for, a more robust and just democracy¹⁰.

Let me focus now on this claim and Gargarella's point that democratic premises crucially bear on the (1) justiciability and (2) adjudication of social rights.

2. DEMOCRACY AND THE JUSTICIABILITY OF SOCIAL RIGHTS

Justiciability can be defined as the amenability of a question/claim to judicial resolution¹¹. More precisely, a question/claim is justiciable "when the appropriate court or courts will decide it on the merits"¹². As such, the notion of justiciability plays a crucial role in the judicial discourse, especially in negative terms: "cases or issues are nonjusticiable when courts will refrain from deciding them on the merits, asserting for various reasons that the cases or issues are not suitable for judicial resolution"¹³. This notion marks the scope of judicial action¹⁴, expressing the condition under which a question/claim can be addressed according to legal standards and by a judicial body, describing *and* prescribing certain limits to judicial action.

In a "fact-stating sense", the notion of justiciability describes a state of affairs in which a question/claim is procedurally enforceable before a court. In a "prescriptive sense", it refers to the "aptness" of that question/claim to judicial resolution, given the nature of such question/claim and the institutional capacity and competence of the judiciary¹⁵.

10 *Ibid.*, 29.

11 In *Baker v. Carr*, 369 U.S. 186 (1962), Justice Brennan defined non-justiciability as "inappropriateness of the subject matter for judicial consideration", pointing out that it differs from a lack of jurisdiction: "in the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not 'arise under' the Federal Constitution, laws or treaties [...] or is not a 'case or controversy' within the meaning of that section; or the cause is not one described by any jurisdictional statute". Furthermore, Brennan identifies two orders of considerations that should guide the assessment of justiciability: considerations concerning "the appropriateness under our system of government of attributing finality to the action of the political departments" and also those concerning "the lack of satisfactory criteria for a judicial determination".

12 TUSHNET, M., and GONZÁLEZ-BERTOMEU, J.F. *Justiciability*. In TUSHNET, M.; FLEINER, T., and SAUNDERS, C. (ed.), *Routledge Handbook of Constitutional Law*. New York: Routledge, 2013, 135-144, 111.

13 *Ibid.*, 111.

14 KING, J. *Judging Social Rights*. Cambridge: Cambridge University Press, 2012, 129: justiciability is a "commonly employed concept for demarcating judicial restraint".

15 According to a distinction introduced by MARSHALL, G. *Justiciability*. In GUEST, A.G. (ed.), *Oxford Essays in Jurisprudence*. Oxford: Oxford University Press, 1961, 269. On the

Combining these aspects, the notion of justiciability serves as a filter through which we can separate what has constitutional relevance and lends itself to be adjudicated by courts from what, although constitutionally relevant, does not lend itself to be adjudicated by a court.

The case of social rights is emblematic in this sense. Although contemplated by constitutional provisions, it is controversial whether, and to what extent, the content of those provisions can be adjudicated according to legal standards. Furthermore, even if we assume that the content of constitutional provisions can always be adjudicated according to legal standards, it could be reasonable to reserve their application and enforcement to political institutions¹⁶.

Constitutions may present areas of “non-justiciability”, left to legislative and political bodies to an extent that depends on the constitutional order and the particular issue at stake.

With respect to constitutional adjudication, justiciability tends to be inversely proportional to the degree of specificity with which a constitution regulates constitutional review:

Constitutional review can be acknowledged in the constitution’s text, as in nearly every modern constitution, or can be implied from the constitution’s structure, as in the United States. The language creating constitutional review can be more or less detailed, more or less ambiguous. What the constitution says about the scope of constitutional review will have implications for a system’s approach to justiciability: a broad definition of constitutional review will fit well with a narrow or non-existent definition of nonjusticiability; conversely, a narrow definition of constitutional review will fit well with a broad definition of nonjusticiability¹⁷.

Furthermore, justiciability tends to be inversely proportional to the degree of specificity of constitutional norms regulating substantive issues. The more detailed is this content, the narrower are the margins of judicial maneuver:

The constitution’s substance might have similar implications. The more detailed a constitution is in dealing with a particular subject, the less room there might be for constitutional review, and the greater the inclination to describe constitutional challenges to legislation dealing with that subject as nonjusticiable. Yet, a detailed

reference to judicial capacity and legitimacy, see also KING, *Judging Social Rights*, cit., and SOSSIN, L. *Boundaries of Judicial Review: The Law of Justiciability in Canada*. 2.^a ed. Toronto: Carswell, 2012.

16 According to BARAK, A. *The Judge in a Democracy*. Princeton: Princeton University Press, 2009, 178-185, there are no questions of constitutional relevance that cannot be determined in legal terms. In this sense, those questions are always “normatively” justiciable – there are always legal criteria to address them. However, they might be institutionally non-justiciable, that is, it might be reasonable to leave them to political actors and decision-making fora.

17 Tushnet and GONZÁLEZ-BERTOMEU. *Justiciability*, cit., 111.

constitutional provision limits the law-makers' discretion, and courts might be willing to find disputes over "abuse of discretion" justiciable because they believe that the details provide them with clear guidance for resolving the controversy¹⁸.

In sum, the extent to which a constitution is detailed in regulating constitutional review and substantive issues provides some indications about the justiciability of those issues in the forum of constitutional adjudication. However, determining such justiciability ultimately depends on further considerations about the appropriate scope of judicial action and, therefore, the place and role of the judiciary in a constitutional *democracy*. Justiciability is not a consideration itself to which courts can appeal in order to justify the scope of their action. Rather, it is the result of several considerations, concerning both the content of constitutions and the nature of the democratic order¹⁹.

Notwithstanding this conceptual complexity, courts often merely "declare" the justiciability or non-justiciability of a claim, without expounding the considerations according to which that claim is amenable to judicial consideration or not. Gargarella sheds light precisely on this shortcoming of social rights case law, showing the crucial relevance of considerations about the nature of democratic systems. These considerations provide the premises of a judicial approach to social rights' justiciability:

It is difficult to find an interesting judicial elaboration in its (more or less explicit) references to democracy, when it comes to cases related to social rights [...] In many of the decisions examined, it was possible to recognize the negligence in the transition made by the judges from the democratic premises to the conclusions of what they should do, or (more commonly) not do regarding the application of social rights. Typically, the judges make clear their obligation to respect democracy, from there, the importance of respecting the will of the legislator, to sustain, based on such premises, their inability to intervene in the process that involves the violation of any social right²⁰.

Indeed, qualifying questions concerning social rights as justiciable, or not, requires courts to appreciate the scope of their action in a constitutional system, under standards of democratic legitimacy.

In this respect, Gargarella's analysis allows us to appreciate that the notion of justiciability is neither merely descriptive nor only evaluative. Rather, it

18 *Ibid.*, 111.

19 As remarked by McLEAN, K.S. *Constitutional Deference, Courts and Socio-economic Rights in South Africa*. Pretoria: Pretoria University Law Press, 2009, 109, "justiciability is the conclusion to a set of arguments rather than an argument itself. It is a legal short-hand of the courts to demarcate the issues that they will consider based on prior considerations".

20 GARGARELLA. ¿*Democracia deliberativa y judicialización de los derechos sociales?*, cit., 10.

qualifies as “thick”, being an “amalgam of description and evaluation”²¹: it describes a set of conditions under which a claim/question can be addressed by a court and embeds the evaluation of those conditions, based also on criteria of democratic legitimacy. As such, it is applied on the basis of both “what the world is like” and “a *certain evaluation of the situation*, of persons or actions”²². In this sense, the notion of justiciability has a normative shape, that is, a shape defined by the underlying evaluative point: to apply it correctly, the descriptive content alone is insufficient and we need to resort to such evaluative point²³.

In the case of social rights, Gargarella draws out attention precisely to this extremely relevant aspect. The normative shape – the evaluative point of justiciability – primarily concerns the understanding of the democratic system in which courts operate. Nonetheless such point is often downplayed by courts. They tend to use the notion of justiciability as a “conceptual shorthand”²⁴, to label a certain question/claim as internal or external to the judicial domain, without expounding the evaluative point that guides the use of such label. In particular, courts often do not articulate the considerations about the nature of the democratic system and the role that courts should play in such system²⁵. The democratic premises grounding judicial choices with respect to the justiciability of social rights are frequently left in the background. Furthermore, when these premises are explicit, they are often poorly expounded:

21 According to the distinction between thin and thick concepts of WILLIAMS, B. *Ethics and the Limits of Philosophy*. London: Taylor & Francis, 2011. WANG, L., and SOLUM, L.B. *Confucian Virtue Jurisprudence*. In AMAYA, A., and HO, H.L. (ed.), *Law, Virtue and Justice*. Oxford: Hart, 2013, 111-112, point out that thick concepts have an *amalgam nature*, combining description and evaluation.

22 WILLIAMS. *Ethics and the Limits of Philosophy*, cit., 144.

23 In this sense, FELDMAN, H.L. *Objectivity in Legal Judgement*. In *Michigan Law Review*. 92, 1994, 1195, argues that thick concepts are blend concepts that “apply only under certain factual circumstances and, at the same time, they evaluate those circumstances”. Indeed, justiciability is “a contingent and fluid notion dependent on various assumptions concerning the role of the judiciary in a given place at a given time as well as on its changing character and evolving capability”, as remarked by SCOTT, C., and MACKLEM, P. *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*. In *University of Pennsylvania Law Review*. 141, 1992, 17.

24 McLEAN. *Constitutional Deference, Courts and Socio-economic Rights in South Africa*, cit., 109.

25 In this sense, McLEAN, *ibid.*, 109: “despite the centrality of this notion of justiciability, there appears to be little consideration of what is meant by the term in the context of arguing whether a particular category of rights or questions is justiciable. The issue is complicated by the conflation, by some writers, of the notion with the different concept of enforceability. Clearly, the notion of enforceability is related to the notion of justiciability, but they are distinct: enforceability deals with the ability of the courts to fashion a remedy to protect or enforce the interests or entitlements it wishes to protect and enforce, while justiciability concerns the question of whether a matter is suitable for judicial resolution”.

In their arguments related to democracy, many judges at different times resorted (especially) to two very different notions of democracy. Some appealed to what I will call a pluralist notion of democracy, while others referred to what we will define as a more progressive, populist or participatory notion. The remarkable thing is that, no matter which of the opposing concepts was preferred, the judges tended to the same conclusion: respecting democracy requires that judges do not put into practice social rights²⁶.

Indeed, courts should not merely state that democracy is a limit to the justiciability of social rights, but should explain *why* this is so, in light of the democratic premises that they endorse. Gargarella's analysis allows us to appreciate that these premises are the key to the justiciability of social rights. Then, it goes further and fills them with content, based on a deliberative understanding of democracy.

Let me briefly inquire into these deliberative premises and how they bear on the justiciability of social rights.

In Gargarella's words, a democratic system is deliberative if it fulfills at least two conditions: first, "public decisions" should be "adopted after an ample process of collective discussion" in which, second, there should be "the participation of all those potentially affected by the decision"²⁷. In general terms, a democratic system of this sort does not exclude the legitimacy of judicial review: this is part of a deliberative democratic order if it contributes to democratic deliberation and secures some essential conditions for citizens' free and equal participation in political deliberation²⁸.

From such perspective, Gargarella points out that social rights are justiciable. Their adjudication is legitimate insofar as the exercise of judicial review contributes to the enrichment of public deliberation and to the guarantee of a free and equal participation in that deliberation²⁹.

In these terms, courts can play a central role in a *deliberative* democracy: they can be part of a broader deliberative setting. A complex setting that results from the interplay of judicial actions with legislative, political, and popular actions. In this respect, Gargarella's analysis draws our attention to the

26 My translation. GARGARELLA. *¿Democracia deliberativa y judicialización de los derechos sociales?*, cit., 10.

27 GARGARELLA. *Theories of Democracy, the Judiciary, and Social Rights*, cit., 27.

28 In more general terms, the idea that courts, and judicial review, can support/enhance democratic deliberation has been defended, in different terms, also by ACKERMAN, B.A. *We the People*. Vol. 1: *Foundations*. Cambridge, MA: Harvard University Press, 1993; MICHELMAN, F. *Law's Republic*. In *Yale Law Journal*. 97, 1988, 1493; EISGRUBER, C.L. *Constitutional Self-government*. Cambridge, MA: Harvard University Press, 2009; FRIEDMAN, B. *Dialogue and Judicial Review*. In *Michigan Law Review*. 91, 4, 1993, 577-682; NINO, C.S. *The Constitution of Deliberative Democracy*. New Haven: Yale University Press, 1998; SUNSTEIN. *Legal Reasoning and Political Conflict*. Oxford: Oxford University Press, 2018.

29 Along the lines set out by NINO. *The Constitution of Deliberative Democracy*, cit.

inclusive dynamic that should characterize deliberative democracies so as to integrate institutional and non-institutional actors and sites of deliberation³⁰.

The emphasis on such dynamic also characterizes the most recent developments of deliberative democratic theory and in particular, the systemic approach to deliberative democracy³¹. According to this approach, we should understand deliberative democracy as a *system*: a complex set of actors and activities combined in a practice of democratic deliberation to which they contribute in different ways. From this perspective, assessing the democratic legitimacy of the various components of the system requires us to appreciate the deliberativeness of each component in light of its connections to the other components³². That is, we should look at the deliberative output of interactions across the system, rather than the deliberative output of the single actions performed by single components of the system.

In fact, the different components can transmit aspects of deliberative capacity to each other. In such a dynamic, democratic legitimacy results from mechanisms of cross-fertilization: it is the product of a combination of multiple actions, fulfilling different requirements of deliberativeness³³.

From this perspective, the adjudication of social rights is one among many ways in which courts can contribute to the deliberativeness of a democratic system, in additive or in summative terms³⁴.

In additive terms, social rights adjudication – and judicial action more generally – stand as a “specific method or institution” that “injects” deliberation into the democratic system. Along the lines set out by Rawls³⁵, courts serve as fora through which deliberation is injected into the public sphere.

30 GARGARELLA, R. “*We the People*” *Outside of the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances*. In *Current Legal Problems*. 67, 1, 2014, 1-47.

31 On the systemic approach to deliberative democracy, see MANSBRIDGE, J. et al. *A Systemic Approach to Deliberative Democracy*. In PARKINSON J., and MANSBRIDGE, J. (ed.), *Deliberative Systems: Deliberative Democracy at the Large Scale*. Cambridge: Cambridge University Press, 2012, 1-26; PARKINSON, J., and MANSBRIDGE, J. (ed.), *Deliberative Systems: Deliberative Democracy at the Large Scale*. Cambridge: Cambridge University Press, 2012; and PARKINSON, J. *Deliberative Systems*. In BÄCHTIGER, A. et al. (ed.), *The Oxford Handbook of Deliberative Democracy*. Oxford: Oxford University Press, 2018, 432-446. Roots of this account are in Habermas’ idea of a “two-track” deliberative democracy, advanced in HABERMAS, J. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. New York: John Wiley & Sons, 2015.

32 HUTT, D.B. *Deliberation and Courts: The Role of the Judiciary in a Deliberative System*. In *Theoria*. 64, 152, 2017, 78.

33 As emphasized in MANSBRIDGE, J. et al. *A Systemic Approach to Deliberative Democracy*, cit.

34 PARKINSON. *Deliberative Systems*, cit., 434. BÄCHTIGER, A., and PARKINSON, J. *Mapping and Measuring Deliberation: Towards a New Deliberative Quality*. Oxford: Oxford University Press, 2019.

35 RAWLS, J. *The Idea of Public Reason Revisited*. In *The University of Chicago Law Review*. 64, 3, 1997, 765-807.

In summative terms, deliberation is a product of the “scale and complexity of a given system”³⁶, rather than a feature that specific institutions or methods “inject” into – or add to – the system. It is the interaction between courts and other actors and venues of deliberation that makes the system deliberative as a whole.

Gargarella’s view can be seen as closer to this summative account. It points to an understanding of social rights adjudication and judicial review as part of a broader set of institutions and methods that – through a dialogic, inclusive interaction – can produce a *democratic* deliberation. From this perspective, rather than “adding” deliberation to the system, courts should allow this deliberation to unfold within a system³⁷ structured and organized so as to promote a “public collective dialogue” involving also citizens³⁸.

2.1. *Deliberative Democracy and the Adjudication of Social Rights*

Once the justiciability of social rights is grounded in deliberative premises, the intensity of judicial review is yet to be determined. As I remarked earlier, the problem of adjudication concerns precisely this aspect: how strict should the judicial review of legislative acts be in order to contribute to the deliberativeness of the system? Gargarella’s deliberative understanding of democracy provides the resources to address also this problem. It provides the reasons for the justiciability of social rights as part of a set of institutional actions producing and fostering the deliberativeness of a democratic system. Then, it also serves as a key to the determination of the intensity of judicial actions, by reference to the role they play in that system. On this view, judicial actions should unfold “in a respectful way towards popular authority”, through a “modulation” of judicial review that allows them to go as far as required to fit the deliberative, constitutional framework³⁹.

Gargarella, then, sheds light on the different forms that such modulation can take. For instance, courts may declare: that “a constitutional right has been violated, without specific remedies”; or that “a constitutional right has been violated and ask the State to provide a remedy”; or that “a constitutional right has been violated, require the government to provide a remedy, and specify what kinds of remedies can be adopted, how, and when”⁴⁰. As an example of

36 PARKINSON, J. *Deliberative Systems*, cit., 440.

37 GARGARELLA, R. *Why Do We Care about Dialogue?* In YOUNG, K., *The Future of Social and Economic Rights*. Cambridge: Cambridge University Press, 2019.

38 GARGARELLA. “*We the People*” *Outside of the Constitution*, cit.

39 My translation. GARGARELLA. *¿Democracia deliberativa y judicialización de los derechos sociales?*, cit., 21.

40 My translation. *Ibid.*, 23.

this “modulation” of judicial review, Gargarella cites the experience of the South-African, Indian, and Colombian Constitutional Courts.

In particular, with respect to the Colombian Court, Gargarella mentions the doctrine of “modulation of the effects of decisions”, which aims at “harmonizing the necessity of preserving the constitution with respect to legislative decisions”. Judicial decisions based on this doctrine can be “interpretative”, “expressly integrative” and “materially expansive”. Furthermore, the “modulation” of their effects can be temporal, based on the postponement of the moment when they produce their effects⁴¹. For example, in a famous decision, regarding the abuses committed by public personnel within prisons, the Court recognized the validity of the prisoners’ claims, but established that the government would have four years to rectify the situation. Similarly, the Court also recognized that the Congress, rather than the judiciary, was the institution responsible for deciding how to end those abuses⁴². In this case and others, the Court proved able to intervene and yet be extremely respectful towards the authority of the legislature. These cases show how “courts can have a strong attitude in the protection of social rights and, at the same time, show respect for the legislature and, in broader terms, their commitment to deliberative democracy”⁴³.

This is a “third way” that, according to Gargarella, courts should take in social rights adjudication: they should avoid both activism and inertia to stand in the middle, by crafting their decisions so to calibrate the impact of their interventions on political choices and actions⁴⁴. In such terms, the modulation of judicial review should proceed, from time to time, with the aim of furthering democratic deliberation. Focusing on cases, and specific remedies, courts should graduate their action so as to support or integrate the political choices made through democratic deliberation, rather than impairing this deliberation or taking its place.

Let me inquire further into this idea of a “third way” for judicial action, with a focus on the modulation of judicial review.

41 My translation. *Ibid.*, 26.

42 The reference is to the decision T-153/98. Gargarella also mentions a decision (T-025/2004) in which the Court adopted a similar strategy in the case of evicted or displaced persons, that is, to populations expelled from their place of residence due to political violence. The Court found the government’s policy unconstitutional, because insufficient and ineffective, but even so it did not impose on public authorities how to act. Rather, the Court stated that it would closely monitor the issue to ensure that the Authorities’ action decisions were in accordance with the Constitution and apt to solve the desperate situation of the evicted people.

43 My translation. GARGARELLA, ¿*Democracia deliberativa y judicialización de los derechos sociales?*, cit., 27.

44 *Ibid.*, and GARGARELLA, R. *La revisión judicial en democracias defectuosas*. In *Brazilian Journal of Public Policy*. 9, 2019, 152-168.

3. A FULL AND DELIBERATIVE MODULATION OF JUDICIAL REVIEW

Following a taxonomy put forward by Young⁴⁵, we can choose between three models of adjudication: detached; engaged; supremacist. These models entail different degrees of judicial activism/deference towards political institutions. As pointed out by Klatt⁴⁶, the choice between these models requires us to appreciate the different institutional reasons at stake in the particular circumstances in which the judicial review takes place. Such reasons concern the allocation of competences on the issue under consideration: on the one hand, the competence of political institutions to deliberate and decide on that issue and, on the other, the judicial competence to review the legislative acts based on political deliberations and decisions. Klatt accounts for these reasons, concerning competences, as formal principles that can be conceived, as much as substantive principles, as optimization requirements in Alexy's terms⁴⁷. Like substantive principles, formal principles can conflict and when a conflict between them arises, the solution "is not to be found by means of interpreting competence norms. Rather, a balancing procedure has to be employed"⁴⁸. This is a procedure according to which norms of principle should be balanced one against the other so as to maximize their fulfillment and minimize their sacrifice⁴⁹. Klatt argues that we should apply this procedure to address the conflict arising between judicial and political competences with respect to social rights. We should weigh such competences and, then, we should strike a balance among them and set the appropriate intensity of the judicial control so as to maximize the protection of rights without disproportionately sacrificing political choices on distributive issues⁵⁰. The weight of competences, and underlying institutional reasons,

45 YOUNG, K.G. *Constituting Economic and Social Rights*. Oxford: Oxford University Press, 2012.

46 KLATT, M. *Positive Rights: Who Decides? Judicial Review in Balance*. In *International Journal of Constitutional Law*. 13, 2, 2015, 354-382.

47 ALEXY. *A Theory of Constitutional Rights*, cit.

48 KLATT. *Positive Rights: Who Decides? Judicial Review in Balance*, cit., 364.

49 The use of proportionality review has been spreading at a national, transnational, and international level. On its wide circulation, see SWEET, A.S., and MATHEWS, J. *Proportionality balancing and global constitutionalism*. In *Columbia Journal of Transnational Law*. 47, 2008, 72; BARAK, A. *Proportionality: Constitutional Rights and their Limitations*. Cambridge: Cambridge University Press, 2012; JACKSON, V.C. *Constitutional Law in an Age of Proportionality*. In *Yale Law Journal*. 124, 2014, 3094; BEATTY, D.M. *The Ultimate Rule of Law*. Oxford: Oxford University Press, 2004; COHEN-ELIYA, M., and PORAT, I. *Proportionality and Constitutional Culture*. Cambridge: Cambridge University Press, 2013.

50 KLATT. *Positive Rights: Who Decides? Judicial Review in Balance*, cit., 364. This approach applies to conflicts among formal principles the proportionality template to adjudicate conflicts among substantive principles concerning the protection of rights. There are different versions of this template, but the standard version structures the judicial analysis in three steps, so as to determine whether the acts under review are justified according to criteria of suitability,

depends on five factors: the quality of the decision that should undergo the judicial review; the epistemic reliability of the premises used for this decision; the significance of the material principles at stake; the function of the competence in a system of division of labor between judicial and political actors; democratic legitimacy⁵¹.

This approach provides us a scheme to reason about conflicts of competences with a focus on their intensity and the weight that the underlying institutional reasons carry one against the other, on the basis of relevant factors. It does not, however, provide those reasons or account for those factors⁵². The reasons for judicially interfering with political choices – or not – and the factors that determine their weight, depend on premises that the balancing scheme does not provide, but rather requires to be in place.

As such, this balancing approach to the modulation of judicial review cannot capture Gargarella's understating of social rights adjudication. First, it primarily focuses on the intensity of the judicial review, and the weight of underlying judicial reasons, whereas Gargarella's analysis draws our attention to the scope – and democratic premises – of judicial action. Second, and relatedly, the balancing approach focuses on conflicts among institutional competences, whereas Gargarella's view points to the integration of judicial action into a broader deliberative framework, encompassing institutional as well as non-institutional actors and venues of deliberation⁵³.

With regard to the first aspect, Gargarella's account of judicial review and social rights points to a *full* modulation of judicial review: it requires to mold the scope of judicial actions on social rights issues and, furthermore, to adjust the intensity of these actions within that scope. As I pointed out in the previous sections, the scope depends on the extent to which the judicial review can contribute to secure the basic conditions of a deliberative demo-

necessity and proportionality *stricto sensu*. More precisely, this template devises a sequence of three analytical steps assessing: (1) the suitability of the institutional act under review relative to its (legitimate) purpose (suitability test); (2) the necessity of the act in relation to the accomplishment of that purpose (necessity test); and finally (3) the proportionality of the act, that is, whether the relevance of the interests protected by the act, and the extent to which they are satisfied, can justify sacrificing the rights at stake. This is the *proportionality stricto sensu* stage. According to ALEXY, R. *On Balancing and Subsumption: A Structural Comparison*. In *Ratio Juris*. 16, 4, 2003, 436-437, the criterion of proportionality *stricto sensu* guiding this stage requires that: "The greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other". Under this sub-principle the "Law of Balancing" requires three steps by which to establish: (a) the degree to which a right or principle has fallen short of being satisfied or has been sacrificed; (b) the import that can be associated with satisfying a right or principle in conflict with the one that has been sacrificed; and (c) the importance of satisfying the second principle as justification for sacrificing or failing to satisfy the first.

51 KLATT. *Positive Rights: Who Decides? Judicial Review in Balance*, cit.

52 KUMM, M. *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*. In *Law & Ethics of Human Rights*. 4, 2, 2010, 155.

53 GARGARELLA. "We the People" *Outside of the Constitution*, cit.

cratic system. And the intensity of the judicial control should be adjusted so as to secure democratic deliberation through the enforcement of social rights. Attention to both, as Gargarella has taught us, is crucial from a deliberativist perspective. In particular, appreciating the scope of judicial interventions is of the utmost importance. Before considering the degree of control that courts should exercise through judicial review, we need to set the scope of their interventions, by taking into account the extent to which they can contribute to secure the basic conditions of a deliberative democratic system.

In these terms, the modulation of judicial review is twofold: a modulation *of* review, concerning the boundaries of judicial control, and a modulation *in* review, concerning the intensity of such control. The differentiation of these levels reproduces the twofold dimension of social rights adjudication in Gargarella's analysis. On the one hand, the dimension in which courts interact with other deliberative actors; on the other hand, the dimension in which courts adjudicate social rights and enforce them so as to secure democratic deliberation.

In this respect, Gargarella's account of democracy, judicial review and social rights serves as a framework to go beyond the deliberativist discomfort with judicial review. This framework allows us to modulate the judicial action on social rights without embracing the constitutionalist assumption that, when it comes to rights, the scope and the intensity of judicial review are necessarily the widest and the strongest. Rather, they should be both adjusted in order to fulfill the requirements of a deliberative system.

With regard to the second aspect, and based on the reconstruction provided so far, Gargarella's view points to a *deliberative* modulation: it does not pursue a balance of legislative and judicial competences, but rather works towards the integration of judicial review into a broader deliberative framework, combining institutional and non-institutional actors and including citizens⁵⁴.

In order to fit such framework, courts should modulate the intensity of their scrutiny based on what their interaction with other, various, deliberative actors requires from time to time. From this perspective, as contended by Gargarella, they should avoid both activism and inertia. Being components of a deliberative system, they should proceed at an intermediate level and adjust the scope and intensity of their scrutiny to what is required, from time to time, to foster democratic deliberation⁵⁵. A way to do so, could be to keep judicial arguments and decisions at a middle level, by reference to principles that mediate between foundational principles and intuitions about cases⁵⁶.

54 *Ibid.*

55 GARGARELLA. *La revisión judicial en democracias defectuosas*, cit.

56 SIDGWICK, H. *Practical Ethics: A Collection of Addresses and Essays*. Oxford: Oxford University Press, 1998; AUDI, R. *The Good in the Right: A Theory of Intuition and Intrinsic Value*. Princeton: Princeton University Press, 2004; SUNSTEIN. *Legal Reasoning and Political Conflict*, cit.; and SUNSTEIN, C.R. *The Second Bill of Rights: FDR's Unfinished Revolution. And why We Need it More than Ever*. New York: Basic Books, 2009.

Based on such mid-level principles, as argued by Sunstein, social rights adjudication may point to incompletely theorized decisions setting standards of protection on which different deliberative actors can converge⁵⁷. For these purposes, relevant mid-level principles⁵⁸ could be procedural and substantive principles with a limited scope and/or a limited degree of abstraction. As such, they could provide a justificatory ground on which different deliberative actors may converge in spite of divergence on the foundational principles of the democratic system or the specific cases to which those principles apply. They could serve as the focus of the judicial engagement with social rights, within a dynamic of democratic deliberation that involves – includes – different deliberative actors and concerns.

CONCLUSIONS

Roberto Gargarella provides us with a powerful theoretical framework to understand and address the relationship between democracy, the judiciary and social rights. Based on a deliberative understanding of democracy, Gargarella casts social rights as justiciable and embeds their adjudication in a democratic setting: the judicial action on social rights is legitimate insofar as it contributes to secure the essential conditions of democratic deliberation. Accordingly, courts should *modulate* their action. They should not refrain from adjudicating issues related to social rights, but should nonetheless allow for political actors to deliberate on those issues. And such modulation requires not only to adjust the intensity of the judicial scrutiny, but also to mold its scope within the broader democratic setting in which the judiciary operates. In such terms, Gargarella's framework allows us to go beyond the idea that modulating judicial review ultimately boils down to a balance among institutional competences. Rather it must fully capture the broader setting in which courts should calibrate, and account for, the *scope* of their interventions, paying special attention to the democratic premises that they endorse. The judicial discourse on social rights has a democratic point: Gargarella brings it to light, to address the deliberative shortcomings of social rights case law and, at the same time, to point out, and then make use of, the deliberative potential of judicial review.

57 SUNSTEIN, C.R. *Incompletely Theorized Agreements*. In *Harvard Law Review*. 108, 7, 1995, 1733-1772. I analyze this aspect of Sunstein's theory also in VALENTINI, C. *Democrazia repubblicanesimo e razionalità deliberativa. Il costituzionalismo di Cass Sunstein*. Bologna: BUP, 2012.

58 Along these lines, on mid-level principles and judicial review see also MORESO, J.J., and VALENTINI, C. *Judicial Dialogue as Wide Reflective Equilibrium: In the Region of Middle Axioms*. Working paper presented at the workshop "Mid-level Principles in the Law", 2019 IVR World Congress, Lucerne.

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