The Value of Judicial Function From the Approach of Human Rights*

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Nowadays, the matter of legal pluralism is a subject of great relevance; its limits include some principles as equality, the prohibition of arbitrariness and the right to assistance, and/or sufficient benefits for needy situations. From this point of view, different positions may be distinguished with regard to how the judicial function and hence the social function of judges operates. As the framework that reinforces the judicial action in relation to human rights, we have the democracy and the constitutional paradigm. Specifically, the role of the judiciary can be analyzed from a review of their established duties and without going into the authority they are granted, studying the subject from a dogmatic perspective and also practice. Finally, we conclude that the activity of judges in the performance of their social function is not clear or unambiguous, but rather indeterminate.

Keywords: judicial function, rule of law, European Union, human rights

Introduction

Nowadays, legal norms should recognise and approve both the variety and differentiation, assuming and appreciating them in a positive way, with the limit of respect to their inherent human dignity and inviolable rights. To sum up, the most correct thing is that the social integration of the difference is to be carried out by means of its recognition and acceptance as legal-political principle. The open society implies a constant opening to the change, allowing the comparison with other ways of acting or thinking, which can enrich and improve ours (Añón, 2001). The content depends on the state's principles, the institutional structures, the economic-social situation, and the cultural tradition. For example, according to the political tradition of each area, we have: a) the social-democrat model; b) the corporate model; c) the South European or catholic model; and d) the British model. The regulated types are inscribed in the "liberal market", "progressive liberal", and "institutional welfare" models (Botella, 1997, pp. 191-199).

Its limits include the principle of equality, the prohibition of arbitrariness and the right to assistance, and/or sufficient benefits for needy situations, that ought to be progressively re-evaluated to compensate for losses of purchasing power (Schultheis, 1991). The legal action adopted by the official authorities becomes an integration factor. In all, the model should aim to achieve certain objectives synthesized as follows: fundamental rights for all citizens, by way of a policy of universalization that allows integration whilst respecting certain inalienable minimum elements; differential rights for all through a policy of recognition that

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does not clash with the previous point; and minimum conditions of equality for dialogue through a policy that includes actions to create equality and incentives for cultural exchange, preventing homogenization or assimilation by the more powerful majority or minority (Young, 1989).

There are more and more political communities that act as interpreters; there is a new perception of reality. In the same way, there is a contrast with manipulation and marginalization, and the use of new domains of emancipation is pursued. Radical needs are a result of daily emancipatory practice, which is why the method itself is based on radical subjectivity. We need a new theory of subjectivity that shows that we are before a complex network of growing subjectivities. The growth of the market makes the role of altruistic actions less important, and may make it become the setting for capitalist production (de Sousa Santos, 2005).

When assessing the current situation, positions such as that described above attempt not to fall into conservative legalism; nor do they wish to fall into any totalitarian anti-legalism or any intermediate path, however. For these purposes, it has been thought that legal certainty in open societies must enable groups to influence others freely on the basis of universalizable projects. On this point, there is an underlying opposition of democratic legitimacy supported by a system of social beliefs and values prevailing over other idealistic or formalist criteria of legitimacy. Security does not derive from positive law but from society's ethical experience and aspirations to justice (Corsale, 1979). Even more, a judge is a provider of legal assistance called on to be present in almost all areas (Ost, 1992).

From this point of view, different positions may be distinguished with regard to how the judicial function and hence the social function of judges operates. On the one hand, we have the theory defending the stance that law, synonymous with general rules, is created by legislators and that judges apply it to individual cases, and on the other hand, that which sustains that judges can make law, albeit exceptionally. In any case, however, in order to exercise the social function entrusted to them, when speaking of applying law, the attributions of judges in the process and in decision-making are more extensive than may be believed because the function attributed to them is not limited to the choice and use of legal materials; in addition, it is projected onto the *de facto* elements (Andrés Ibáñez, 1995; Bulygin, 1991).

The Framework That Reinforce the Judicial Action From the Approach of Human Rights

The Democracy

In line with this plan, different plans can be distinguished when valuing democracy:

The plane of freedom, which in Locke (1982), for example, prevails through an agreement between the people and their ruler by a bond based on the will of the fellow members and reason (Carlyle, 1980; Fassò, 1982). Thus, democracy understood in its traditional sense as self-government of the people does not sit well with the core of so-called liberal democracy. Another model, different from that proposed, is that of Rousseau. In his book *The Social Contract* (2001), he called for the State, in order to be legitimate, to stem from a contract in which everyone, by giving themselves to everyone else, ends up giving themselves to no-one. To this is added the general will representing the meeting of individual wills (or interests) and the will (or interest) of society, with this act of union creating a common bond that did not previously exist (Pérez Muñoz, 2010).

In this sense, one could argue that it is necessary to achieve sustainable and controllable freedom. This is very well explained by some authors; for the sake of illustration, Constant (2002) stated that the foundations of a new despotism were established when this unbounded conception of the general will was maintained in *The Social Contract*. Later, in 1859, J. Stuart Mill published his work *On Liberty* (2011), where democracy was

said to be one thing and freedom another. This requires scrupulous respect by governments and public opinion for an impenetrable sphere of individual sovereignty. To be free is simply to be protected from any unlawful outside interference; freedom is freedom from coercion (Stuart Mill, 2011; Fernández García, 1997; Ovejero, 2002; Rivero, 2005).

From a proceduralist plane, one would have to say that, when referring to formal democracy, what is clear is that it coincides with the legitimacy of origin and exercise, and is embodied in universal suffrage, the principle of majority rule and the rule of law. It is “a set of rules (primary or fundamental rules) establishing who is authorized to make collective decisions and under what procedure” (Birch, 2007, pp. 30 ff.). For example, the types of democracy owed to Kelsen, Ross, and Bobbio in the 20th century are procedural in nature, although there are constant references to material values.

Indeed, the Kelsenian doctrine affirms the relationship between democracy and the ideas of liberty and equality as its first foundation. Thus, natural liberty lies at the root of the democratic ideal, which aims to eradicate authority and the State; while the base lies in an equality that deems others are not superior to us and have no right to give us orders (Kelsen, 1988; 1995; 2002). Continuing this examination of theories of democracy, for Ross this is “the form of government in which political power (sovereignty) belongs in law to the whole population and not to a single person or a specific, limited group of people” (Ross, 1989, pp. 133-138). The other author quoted in this section is Bobbio, who contributed a minimal definition of the procedural thesis. He concluded that the characteristic of democracy is that, when collective decisions are taken, as many people as possible must take part, and those who make these decisions must necessarily act in representation of the group, something only feasible with elections (Bobbio, 2009; Champeil-Desplats, 2008).

In the evaluation of democracy from the plane of self-government and participation, Barber (1988) stood out with his claims that it is necessary to overcome the existing positions because what authors, like Nozick, Rawls, and Ackerman have sometimes done has been to define their success in terms of how their democratic loyalties and their emancipatory attitudes have responded more to the demands of socio-cultural and historical processes for the formation of Western capitalist modernity if compared to serving the needs of our current political context. Because of this, what is needed is for civil society to be the axis of all democracies (Barber, 1988; Dahl, 2005; Rodríguez Prieto, 2011). The concept of participatory democracy, originated in the 1860s with the birth of the student movement and the creation of the New Left, involves the use of direct democracy in various forms and levels. The authors whose ideas have shaped it include Rousseau, Tocqueville, and Mill, as well as the more modern Macpherson and Pateman (Dahl, 1991; MacPherson, 2012; Pateman, 1988).

On the plane of deliberation, it can be appreciated that, although it is certainly not the same to talk of deliberative democracy as to talk of participatory democracy, what can be asserted is that the situation as viewed theoretically during the 1950s, 1960s, and 1970s fed into the deliberative democracy of the 1980s (Martí, 2006; Dryzek, 2002; 2005; Niemeyer, 2006). Liberal democracy’s crisis of legitimacy led to the notion of dialogue as a mechanism for the formation or disclosure of the collective will to ensure legitimacy in decision-making, forming what is known as political deliberation. This particular notion of dialogue was the subject of intense discussion in the United States and Europe; Bessette coined this denomination in 1980 with the publication of his article “Deliberative Democracy: The Republican Majority Principle in Government” (Bessette, 1980; 1994).

In short, we will make use of the idea of deliberative democracy as the most plausible to overcome the problems of political representation. On this point, the question is why is it the most reliable to identify correct

decisions. The responses vary according to the position asserted or, in other words, whether the weak or strong version of epistemic justification is upheld. The strong version presupposes a series of theses that are often of great complexity, whereas the weak version is easily acceptable to anyone (Martí, 2006).

From our point of view, a procedural democracy is not enough, since in constitutional rule of law, fundamental rights cause a primary transformation in that they refer to the way in which democratic mechanisms work, in what concerns their areas of influence and their limits, because democracy is not always a possible State, is not always possible in morally acceptable conditions nor is it always an appropriate or desirable result. On the contrary, a material democracy entails considering a series of values as inherent to democracy. Such values are, because of the link with liberalism, freedom, and formal equality, and because of the link with ethical socialism, material equality, and solidarity (Beetham, 2000; Martínez de Pisón, 2001). Consequently, the solution of the dilemma, as Bobbio says, consists in that formal rules are necessary but not enough, and that it is desirable that there are at least a series of requirements as to what their contents should be (Bobbio, 2009).

In synthesis, material democracy is linked to fundamental rights and to the defence of a set of values that make part of it. It is evident that the laws in which these values are established, and that refer to the sources and means of developing the primary laws, indicate what should or should not be decided, and hence determine their essential contents. For this reason, we think that the *coto vedado* theory of Garzón Valdés is a good example of what we have just said. Within the *coto* are the fundamental non-negotiable rights which are necessary conditions for a representative democracy to exist. Dissenting opinions, negotiation, and toleration could only exist outside the *coto* (Ferrajoli, 2016; Garzón, 2000).

However, the author thinks that this should be understood from a context in which we understand the existence of a principle of constant change in the legal forms, and a minimum and essential unit must be used. From the comparison between the different models, it is possible to extract the idea that a lack of regulation integrated by the relevance of a model from another cultural sphere is reconstructed on the basis of the displacement of the interest it might awaken, moving on to study sociologically the social constitution and the strategies of assimilation which belong to the context. From this perspective, at the bottom of the reception, it can be seen that there is no dialogue or exchange. What was first seen as the reproduction of a legal model which was imported, is now taken as the original production reforming a legal form which is not its own. Nevertheless, the reception has to be contrasted with a new form which adopts the opposite solution consisting of determining above all else the historical originality of certain legal utterances (Serrano, 1991; Wiener, 1999). So, the aspects which should be taken into account would be the differences in levels between the players involved, the type of objectives pursued, the instrumental variants, and the degree of rationalization (Serrano (1991, pp. 173-199).

The Constitutional Paradigm

The liberal rule of law has gradually evolved and has become the ideal of the constitutional rule of law. The first problem we encounter is that of knowing what “constitutional State” means, after a first approach we assume that it is a State in which there is a democratic Constitution with normative value that sets legal limits in order to guarantee the liberties and rights of individuals (Añón, 2002; Prieto, 1999). From this, we can infer that there is a Constitution that is the most important law in the system and that directly determines the validity of the other laws in the system. The Constitution is made up of values, principles, fundamental rights, and rules

that affect the government, however, the principles are directly and indistinctly applicable by legislators and judicial operators. Within the scheme, the key element are the fundamental rights which make up the basis of the legal system in the formal and material sense, because they set material limits on public and private powers, in addition to establishing what their aims should be, and serve as institutional guarantees, objective rules that make up part of the legal system and subjective rights that have a particular value over the above-mentioned powers and relations between individuals (Prieto, 1998; Añón, 2002, pp. 26-28). Fundamental rights are the *raison d'être* of constitutional States, because both their origins are an attempt to create coherent proposals to protect, guarantee, and make these rights more effective. A certain type of fundamental rights corresponds to each type of State, and so, it is logical that the constitutional State must correspond to a certain type of rights. But, what type of rights? The answer is new type of rights (Díaz, 2004; Pérez Luño, 2006).

Principlist constitutionalism is of essentially Anglo-Saxon origin although, in addition to Dworkin, we can include Alexy, Nino, Zagrebelsky, and Atienza in this category. In general, they are characterized by not being positivist and start from a separation between law and morality. The rights that have been recognized constitutionally are not rules but are principles in conflict and subject to relative weighting, with law being a social practice that has mainly been entrusted to the activity of judges. Thus, principlist constitutionalism focuses on interpretative and argumentative practices and effectiveness is confused with validity. Judicial practice is the main foundation for the legitimacy of the State (Ferrajoli, 2011a).

Focusing on Dworkin as one of its main exponents, we appreciate that the difference between rules and principles consists, firstly, in that the rules give a clear answer, while the principles mark a direction. Rules, says Dworkin (2013), are applicable to the resolution of dilemmas. If the facts stipulated by a rule are given, either the rule is valid, in which case the answer it gives must be accepted, or it is not and it does not contribute anything to the decision. The rule is applied in the form of “all or nothing”, either the scenario is foreseen in it and it is applied, or it is not and it does not have any type of application.

In this order of ideas, the rules are standards that determine a unique response. But Dworkin (2013) continued, this is not how principles operate. Not even the ones most similar to rules establish any legal consequences that are followed automatically when the expected conditions are met. A principle states a reason that runs in one direction, but does not require a particular decision: “When we say that a certain principle is a principle of our law, what this means is that the principle is such that officials must take it into account, if appropriate, as a criterion that determines to lean in one direction or another”. Taking them into account as a criterion is not the same as necessarily finding the answer in them.

In addition, principles have different “weight and importance”; rules do not. When principles enter into confrontation, for example, in the protection of the consumer and the defense of the environment, whoever must resolve the conflict must take into account the relative weight of each one. Standards do not have this dimension: They are either valid or not, are applicable to the case or not, whatever the hierarchical position they occupy in the ranking, without the way in which the principles and rules are expressed offering too much light as to whether we are in the presence of one or the other. But once we identify the legal principles as a class of separate standards different from the legal rules, Dworkin (2013) maintained that we suddenly find that we are completely surrounded by them. The law professors teach them, the historians of law investigate them, although where they seem to work with the maximum force is in the difficult cases.

On the other hand, in Ferrajoli's theory, the aim is to redefine the theoretical and normative paradigm of modern constitutional democracies (Prieto, 2009). Consequently, it is possible to qualify the version of this

theory of rematerialized constitutionalism or rights. The necessary nexus between guaranteeism and constitutionalism is revealed and vice versa: The first link is produced to carry out the illustrated program; and the second seeks to condition the legitimacy of power to the fulfillment of some moral demands embodied in fundamental rights. However, this does not entail a waiver of the enlightened liberal principle of a separation between law and morality in the name of an option that is supposed to be somehow natural law or within ethical constitutionalism (Prieto, 2009; Ferrajoli, 2009a).

In short, the three main points of Ferrajoli's theory are: the establishment of a concept of fundamental rights; the reformulation in a key guarantee of the idea of constitutionalism; and the determination of a substantial dimension of the concept of democracy (Córdova, 2009; Ferrajoli, 1995; Guastini, 2009).

Ferrajoli reconstructed the traditional legal positivism by maintaining a new constitutional paradigm or guarantee that overcomes the legalistic archetype characterized by the supremacy of the law, the link between the judge and the omnipotence of the legislator. Thus, what is defended is the subordination of legislation to law and legislative majorities, in addition to the procedures, to the substantive content, i.e., to the fundamental rights found in the Constitution (Pisarello & Estrada, 2001). However, Ferrajoli did not agree that it is not possible to intermingle issues of legal validity and issues of justice (de Cabo & Pisarello, 2009). Therefore, the general theory of the guarantee implies a political philosophy based on the primacy of the individual. One sign of identity is that the understanding of the State is based on the doctrine of the State-medium following Hobbes and Locke, and it is considered that, since democracy is subject to law, the terms of law-political relationship are modified by subordinating political to legal issues (Moreno, 2006).

As a starting point linked to the above, the predominant idea is the limitation of powers because this general theory that constitutes the guarantee is the theory of law of the constitutional rule of law. Taking into account the theses of Locke and Montesquieu that always present a potential distrust of power, it is explained that this must be neutralized by making the law conform to a system of guarantees, limits, and links for the protection of rights (Gascón, 2009). With these premises, the methodology used tries to reconcile the natural law and positivism, overcoming the deficiencies of each one (Ferrajoli, 2004; Pisarello & Estrada, 2001; Ruiz Miguel, 2009).

In this regard, the concept of constitutional paradigm or guaranteeing is believed to be formal because it refers to the set of limits and links imposed on the totality of public powers by rules hierarchically superior to those produced in the exercise of the paradigm. But this paradigm is expected to continue to evolve as different needs are dictated by the advance of history and incorporated into fundamental rights. These advances are materialized in accordance with the protection of the rights of freedom and social rights; against private and public powers; and at the international and state levels (Ferrajoli, 2009b; 2009c).

Actions of Judges From the Approach of Human Rights

The role of the judiciary can be established from a review of their established duties and without going into the authority they are granted. This is why it is said that judges:

- a) have a duty to decide with regard to any claim in Law, already in litigation or which may be disputed and having to do with an incorrect action, duly brought before such judges, with or without limitations as to the subject matter; b) judges have a duty to reach an opinion by reference to current standards in force on correct and incorrect behaviour, neither selected nor decided by the particular judge, except to the extent that a judge may construe or expand on existing standards when setting out the legal grounds on which such ruling is based; and c) judges have the monopoly of justified use of force

within human society, by virtue of the prevailing standards of that society (MacCormick, 1981, p. 113; Ruiz Manero, 1990, p. 126)

Special Consideration of Equality and Non-discrimination

The principle of equality in judicial application of the law effectively acts as if it were a parameter establishing whether or not the rulings of judges are in line with the Constitution. In this sense, the way equality is dealt with is technically rather more complicated than just equality as contained in legislation and any approach must use a formula for equilibrium in this regard to overcome the contradiction between the principle of freedom of judicial interpretation and the principle of equality in implementation of the law. Nevertheless, despite neither seeking nor guaranteeing identical treatment of scenarios deemed equal, it must be said that what one seeks to guarantee is to ensure that judges do not act unfairly when interpreting and applying legislation. All in all, *ad personam* rulings cannot be allowed and criteria for differentiation may only be allowed to distinguish between individuals or scenarios as referred to within the particular law (Martínez Tapia, 2000; Ollero, 2004).

This all comes down to the existence of three factors acting to guarantee the law and serving to control or limit the exercise of authority by the law: generality, abstraction, and legitimacy provided by the will of the people (Peña, 1997). Modernity in the traditional sense involves a supposedly necessary relationship between the principle of equality, the concept of national sovereignty, and the idea of law as expressing the general will. In this scheme of things, a judge is subject to the rule of law, despite also being independent from the point of view that the judge is the only instrument capable of ensuring that submission and is required to rule without crossing over into matters comprising competences falling to the legislator (Rubio, 1997).

The way in which one approaches law from within the inherent complexity of the law has much to do with the above. That is to say, that if one wishes to identify and find which components of the legal construction establish legal rules, then that approach reduces the law to a matter of linguistics or a series of pronouncements. In this sense, one might draw the conclusion that such a position is reductionist because it fails to take into account dynamic aspects, of internal development of such law. Nevertheless, neither does a structural approach deal with surrounding issues, such as the function of law or whether or not certain criteria of quality, aesthetics, etc. are followed. The former approach relies on functionality of each of the elements comprised in law, the particular social or individual need the law seeks to fulfil and the purpose of that need. In that scenario, referring to a realist and sociological positioning of law, the authors have not limited this article merely to language and regulation, and finally, there is a third angle, which is the act of evaluation and is often deemed the same as *iusnaturalism*.

The review thus far therefore concerns three traditional stands on the concept of law, to which a fourth must now be added: law as a mechanism for solving practical issues. Such a view is instrumental, pragmatic, and dynamic and adds meaning to the other three perspectives. There is considerable value to viewing the law in this way (Atienza, 2005), in that legal jurisdiction is currently deemed to refer to particular instances given special status and placed between the State and society. Pluralism and the manner in which judicial matters have become more culturally open have influenced that change; the idea of certainty of law has been altered and the end result is greater permeability (Andrés Ibáñez, 2003; López Ayllón, 2004).

The model that arose out of the French Revolution actually began to clash with reality from the early 19th century onward when the formal separation of powers broke with the heterogeneous material of the functions of

those powers. It is true to say that, from very early on, the concept of judges started to disintegrate. On the one hand, there were the actions of ordinary judges applying civil, criminal, and commercial law; and on the other hand, there were judges who would rule in administrative litigation matters. The legislative role *per se* also became increasingly complex and heterogeneous; the concept of the legislator as representing the general public was no longer always a constant, whereas the role of the legislator became more formally established. Furthermore, individuals did not fit into one homogenous whole as equal beings, but rather into a heterogeneous whole comprising many differentiated groups and these continue to exist in actual and different scenarios (Rubio, 1997).

One must acknowledge that law not only comprises formal procedural aspects but also enshrines material aspects shaped by values, principles, and fundamental rights; a rule of law has to reflect the interests and needs of all and must rise above what is merely the will of the majority group. A system of overarching rules must be drawn up in relation to the ground rules in democratic systems. The theory of guarantees, for example, is an attempt to provide a new slant to guarantee mechanisms drawn up in positive legislation, “updating guarantees and directing them as more than merely formal instruments of legal protection for enforcement of rulings or for fostering legislative programmes that are unfulfilled or not carried out” (Ferrajoli, 2011b, pp. 851-852, 855-858; Souza, 1998, pp. 247 ff.). Some of the key aspects are: separation of validity and efficacy, and a distinction between effectiveness and efficiency. When dealing with such issues, a judge does assume a certain degree of authority and must take an intermediary role standing between the law and its intended subjects, or which amounts to the same thing, between the intention of the legislator and the expectations of citizens (Saavedra, 2007).

This being so, the concepts of judge and of the judicial role cannot be adequately described just in terms of legal rules establishing duties without being able to describe the correct judicial role, but rather one must also refer to the competences given to judges to hear and to decide proceedings. Medonça is of the view, on the basis of such ideas, that the legal modalities typically shaping the role of judges in developed legal systems comprise competences, powers, immunities, submissions, and duties (Mendonça, 2000).

Thus, in rules of law and within the framework established by the various different Constitutions, judges are obliged to establish law on the basis of legislation; this is the reasoning behind the suggestion that principles must be sought as the basis for the legal rules, together with the legal institutions, as well as looking at the social scope and consequences of the way principles operate (Saavedra, 2007).

The aspects as set out above form the basis for the idea that legal interest evolves according to the connection with legal concepts established in support of subjective rights and obligations. A mix of moral, cultural, social, political, economic, spatial, or temporal factors, typically deemed changeable, provide the grounds for that development (Añón & García Añón, 2004; Guasp, 1971). Viewed in this way, when rights of a social or political nature are claimed, they may often be reformulated in terms of individual and specific violations of a personal right. There may also be a specific victim. Nevertheless, one should note that even in scenarios where a case does not refer to a group, the outcome of any given case can certainly have a collective effect. One must be aware in such instances that the judiciary acts in the sense of guaranteeing a participative presence of some kind in the political arena (Abramovich, 2007).

That is why traditionally equality in application of the law was designed as an absolute right in that, once equality had been defined by the legislator, those applying the legislation were not permitted to differentiate further between titleholders of the rights and obligations except as established in the legislation, but must

ensure that all are treated equally (Atria, 2000; Giménez Glück, 2004). The *tertium comparationis* is included into the legal standard and whomever applies that standard must take the wording of the legislator into account. The basis for comparison must be a judicial scenario comprising the fact and its (legal) consequence, contrasted with the (legal) scenario being challenged. However, given that the purpose is to rule on the similarity of the scenarios and the different consequence in practice, rulings of this kind usually amount to opinions on similarities and differences between the scenarios. It lies with the plaintiff to allege such similarity (Giménez Glück, 2004; Prieto, 2014).

Equality and Difference

The court is not obliged to uphold the similarity or difference as valid, and must certainly reject the allegation if the reference is to an unlawful practice, or if there is a pre-existing and originating difference between the scenario of fact as upheld and the alleged basis for comparison (Giménez Glück, 2004). Judges seek what is most appropriate, a solution involving the least sacrifice compatible with the greatest satisfaction of another asset or value. However, a negative function arises when ruling on legislation because one attempts to exclude any solution that might imply sacrificing a principle in the event that a particular principle cannot be adhered to alongside fulfilment of another different principle (Giménez Glück, 2004).

Having established these parameters, one becomes aware that the principle of equality's application of the law by the judiciary means that it must not be possible to alter the applied meaning of rulings unfairly in materially identical cases. Thus, if a judge were to decide that a given case must be dealt with differently to earlier precedents, then the legal grounds for this must be sufficient and reasonable. Contradictions may, of course, arise between rulings issued by different jurisdictional bodies and it is established that the principle of equality in application of the law is compatible with the principle of judicial independence. Higher jurisdictional bodies are therefore responsible for re-establishing equality when violated and such rulings may be sought by ordinary or extraordinary appeal. Constitutional doctrine also sanctions lawfulness of interpretation as exercised by ordinary judicial bodies. It is not feasible here to evaluate grounds for such changes in criteria or to decide whether any legislation has evolved in that regard. Such evolution of the law is set out in the judicial rulings concerned and would require evaluating the extent to which the criteria for interpretation applied by judicial bodies across the initial stages of legislation coming into force is in line with the Spanish Constitution.

Applying these parameters, the legal requisites necessary to prove a change in criteria are that an appellant must provide evidence of a suitable comparison; that the scenario used as the basis for comparison must be identical in essence to the scenario of the challenged decision; and that the contrasted decisions must have been issued by the same judicial body. Rulings on equality must also find and uphold: a) that the scenarios are *de facto* identical; b) that those scenarios were dealt with differently; and c) the extent to which the changes signify a change in criteria on the part of the judicial body (Rodríguez-Piñero & Fernández López, 1986; Rosenfeld, 1991). Constitutional Tribunals are not able to look at grounds that may have led to such a change. This can be said to detract from the significance of case law doctrine which is part and parcel of the Anglo-Saxon legal system but not the Spanish system. The necessary factor, however, is that the change must have been brought about consistently and that the different treatment was due to a generalized and impersonal change in criteria. The distinction is therefore made between different enforceability in actual applications of the legal rule and unequal application of the rule. In other words, the issue is whether the legal rule is

effectively applied differently to the same person. This must be considered in conjunction with regard for case law precedent set by the same judicial body and submission to jurisprudence of higher courts (Rodríguez-Piñero & Fernández López, 1986; Rosenfeld, 1991).

One can therefore conclude from this that reasonable and sufficient legal grounds must exist for the change in interpretation of the legal rule and the following question then arises: with regard to what must judicial bodies be required to be reasonable? (Roca, 1986; Suay, 1985). The answer to this is that the measure of any given ruling to uphold or to dismiss lies in what has to be done with regard to the particular legal rule applicable to the case. Asymmetrically, different treatment as equal or as unequal becomes clear when the application of that principle is positive, active, or direct. Along those lines, whereas challenging a rule for violation of equality may lead a court to accept or dismiss the challenge in accordance with the criterion of importance and reasonableness followed by the court, whenever a rule is challenged because it provides equal treatment to a scenario which should have been treated unequally, one could say that courts would not in principle have any option other than to dismiss the challenge because of the absence of reference to that type of case in the clause on equality before the law (Ruiz Miguel, 2003).

One can therefore see the need for equality of form to be expressed as a malleable concept, so that the debate on equality and moral justification viewpoints have to adhere to guideline criteria as assumptions for equal distribution. This is why decisions on importance and reasonableness must consider capacity of choice and basic needs enabling capacity of choice as generically accepted. Those decisions must also adhere to guideline criterion confirming the capacity of moral agents to choose as being of equal value, assuming the equal participation of all. Satisfaction of basic needs and allocation of equal authority in the debate is implicit in both instances.

Furthermore, one should consider the possible presence of different kinds of inequality and different distribution criteria, bearing in mind the context for reviewing equality and the complex nature of the concept (Walzer, 2004). The need for diversity when taking appropriate measures is therefore justified, although one must always assess whether or not the measure and the criteria used are acceptable to the affected parties. Thus, any measure intended to satisfy a basic need and to maintain a capacity for choice, even differentiating measures, or any measure intended to guarantee that specific individuals will have equal authority in a given scenario, where they did not previously have it, must be deemed reasonable. This being so, any measure acceptable to the intended recipients must therefore also be deemed reasonable if one considers the circumstances of the unequal scenario, the context, and possible criteria for distribution (de Asís, 2000).

To sum up, the independence of the judiciary guarantees citizens the right to be judged according to legal parameters in such a way as to avoid unfairness, uphold constitutional values, and safeguard fundamental rights (Andrés Ibáñez, 2003). For its part, another basic principle that must be dealt with is the division of powers, seen from the point of view of two sub-principles: firstly, the specialist tasks carried out in an exclusive and prohibitive fashion by specific bodies, and that of reciprocal independence. Reciprocal independence means that each body may act without interference from another body insofar as formation, operation, and duration. Judges are, of course, independent in this regard and may not be appointed either by the executive or the legislative power, nor can their authority be revoked or removed by either (Greppi, 2012; Guastini, 2003).

However, whereas legislation is expected to evaluate and include decisions, judges must make value judgments with regard to the law. Flexibility occurs in judicial practice with extrapolation of analyses,

upholding the criteria for which legislation was established, the rationality of the law, the intended purposes of the legislator, or the social circumstances at the time the law is applied (Almoguera, 2009; Ely, 1980).

Thus, as long as any inequalities established in legislation affect neither so-called basic rights nor any rights, interests, or scenarios that it would be unacceptable or absurd to remove, one can say that clauses on equality before the law must be relative whenever the root of such legislation is a discriminatory trait and also in instances where there is an absence of such a root to the legislation. One can conclude from these affirmations that it is possible to re-establish equality by refusing equal treatment to subjects with greater legislative advantages and by extending application of equal treatment to subjects excluded from that treatment (Ruiz Miguel, 2000).

Some Practical Issues

Social rights and collective rights. Initially, social rights can be defined as those which establish a benefit or service for holders of the right. The benefit comes mainly from the public authorities but also less commonly from individuals¹. They take the form of rights to substantive equality, i.e., they demand a legal system which differentiates according to real inequality, so that this equality is a condition of the exercise of fundamental rights (Ollero, 1989). Given this aim, the problems related to guarantees of satisfying these rights differ from those of other classes of rights. In this respect, Bovero (2007) believed that, neither the constitutionalization nor internationalization of fundamental rights can be reduced to theoretical declarations based only on a rigorous distinction between them and on their safeguarding. The conflicts arising must be resolved, in order to determine the conduct required.

Linked to the main discussions which add the satisfaction of social rights and programmes of substantive equality, numerous solutions have been designed by various authors. Preuss (1991) systematized the strategies into four groups: The first suppresses distributive rights, which are a handicap for the market to use its function of assignation. This proposal is not admissible because the results would restore the hegemony of the bourgeoisie and run the risk of subjecting the working class to the market, making political dictatorship a real possibility. The second lays bare the conversion of substantive rights into procedural rights, prejudicial to persons who are not capable of pursuing their interests effectively because of lack of resources. The third is linked to what has been called “responsible right”, contained in Article 18 of the German *Grundgesetz*, which determines the loss of constitutional rights involved in an inappropriate use, i.e., a use which takes no account of the negative derivations of the constitutional system as a whole, which could devalue legal claims. The fourth pertains to the *teubnerian* doctrine of a “reflexive law” which calls for a constitutionalization of an organizing conscience of organizations in response to social demands (Preuss, 1991).

One of the key features of the literature on multiculturalism is its emphasis on the need of according collective rights, as human rights, to minority groups. A theory that integrates individual and collective rights can eventually provide a better account for many of the policies and institutions (Torbisco, 2006; Kymlicka, 1989; Kymlicka, 1995; Taylor, 1992; Young, 1998).

On the other hand, one of the most important current questions to be tackled in the field of collective rights is referring to immigration. This phenomenon gives rise to problems in terms of recognizing and guaranteeing

¹ Prieto points out (1998) that this does not always occur, since by its nature, the rights to strike and trade union freedom do not involve any provision, unless the public protection offered for them is considered a provision. Other cases would be those related to those rights which restrict individual autonomy in employment contracts.

the rights of immigrants, as collective rights, to freedom of thought and expression, freedom to pursue different ways of life, and freedom to create, maintain, and develop their own culture. To these we could add the right to autonomy, and the right to cultural differentiation and freedom, as in addition to a framework of freedom, action by the State is needed to remedy marginalization (de Lucas, 2002).

In this way, social rights constitute subjective rights, representing a programme of distribution of goods through a balance between public, collective and private interests. This results in a singular structure with a special mechanism by which the State has to provide assistance and services, and create, strengthen, and promote the conditions allowing individuals and groups to satisfy their needs. Thus, their obligations are also related to the prerequisites for exercising positive liberty. The main point of departure is that individuals are moral subjects endowed with dignity. It defends the idea that we all have real capacity for choice and that we all direct our existence towards certain aims in life (Peces-Barba, 1999).

As we know, it was Bobbio who referred to a particular reality that led to a person no longer being seen as an abstract entity but as a person according to their position in society and age (Peña Freire, 1997). The manner in which the model being studied in the 21st century actually came about is symbolic of the insufficiencies both of the previous classification and of equality at law as a means to render the sexes equal.

Link between the transformation of the liberal idea of a State governed by the rule of law and the crisis of formal equality. Using the arguments of Barcellona to deepen our understanding of equality, there is a link between the transformation of the liberal idea of a State governed by the rule of law and the crisis of formal equality, together with the arrival of democracy as a substantive principle and procedure. Barcellona (1996) commented that substantial inequalities make substantive equality necessary, even though there is only the barest outline of a differentiated treatment of actual situations. The criticism which he makes is that,

the principle of substantive equality is the negation of positive Law and therefore, of the self-created character of imposed rules, precisely because it brings with it a reference to criteria of substantive justice and meta-positive elements. (Barcellona, 1996, p. 52)

It is no coincidence that equality is a form of rule (equal right) and substantive content of the mandate (equality of different situations). Nor is it a coincidence that formal equality (as a means) should exclude the relevance of substantive inequality, and vice versa, that substantial equality (as an end) should violate formal equality... Paradoxically, equality has to negate diversity (hierarchies) but should also prevent homologation (the homogenized society). Its duty is to square the circle. (Barcellona, 1996, p. 74)

This indicates how pernicious it is if society regulates itself freely: administrative, economic, decisional, etc., techniques are essential to break the autonomy of the systems of State and society. This connection should be grounded in the development or control of systems without which one cannot live today, the security of those aspects which are vital for human life, and a range of social benefits which are guaranteed constitutionally. The social benefits can be summarized as regulation of a minimum wage, revised according to changes in the economic situation; a policy of full employment; care for people who are temporarily or permanently incapacitated for work; and an extension of the potential of people's lives, especially that of workers, by increasing access to cultural goods and improving social services, supported by a fair distribution of income according to the economic situation (García-Pelayo, 2005)².

Following Mill (2007, pp. 66-67) and Bentham (1996, pp. 83 ff.), distributive justice is summarized according to the statement: "Between various possible distributions, a just distribution is that which proportions

² In terms of the content of "existential provision" defined by Forsthoff.

the greatest happiness possible to the greatest number of people". The problems arise because there are situations which oppose equality and which are not solved by utilitarianism; there are also inevitable inconveniences in an economic system in which supply and demand play a decisive role (Quintana, 2001).

We accept the defining argument of Hierro (1995) on equality, saying that there have to be adequate resources among all human beings to satisfy basic needs, leaving each to develop his life plan in a similarly autonomous and free way. The tension between equality in practice and in law gives rise to a clash between principles. This should be resolved using the techniques of deliberation. In answer to the question whether there is a general rule of preference, the answer lies in equality and not in differentiation. There is always a reason for equality. Thus equality should be proposed so long as some real inequality does not offer a reason allowing or, depending on the conflicting arguments, imposing a differentiating regulation (Prieto, 1998).

There is a complementarity between equal opportunities and results which is made evident largely in the non-contradiction between liberty and inequality. The achievement of substantial equality justifies a differentiated treatment as long as there is social inequality, and the aim is to reduce or eliminate it in order to obtain a more just society, preventing forms of neutralization, interiorizing or annulling of differences so that minority groups do not remain marginalized (Fariñas, 1997). This technique involves defective procedures which have to be changed. Peces-Barba (2006) had pointed out the great confusion caused in States offering general social rights, in which equality as a differentiation is an instrument for extending them to everyone, rather than for obtaining equivalence. Beyond the research on the criterion of relevance of each operation, the transcendent importance of health, food, education, housing, or culture is clear. At other times, there are needs whose relevance does not seem so clear (Calsamiglia, 1988; Fernández Ruiz-Gálvez, 2003; Pérez Luño, 2005). In this case, as a footnote, the right to become and continue to be owner or debtor creates its guarantees related to the protection and ethical nature of the right to property or credit. The frontiers between fundamental and ownership rights have to be defined (Jori, 2009).

The correction currently taking place in the field of women's rights is occurring due to a new awareness that certain social groups exist in conditions of inequality and are not able to stand up for themselves. This has brought about economic and social rights, subsequently generalised and implying equality of civil and political rights. The specific characteristics are therefore addressed, from a technical point of view, of women who find themselves in situations of inferiority in social relationships for cultural reasons.

What occurs in the cases we are concerned with here is that equality as demanded up until now, without having dealt judicially with a series of factors, has effectively been sought with regard to differences involved in the right to be treated differently. Such differences should be used to make a judicial-political evaluation which would permit identifying human beings as existing in contexts where they are not equal to each other. Common principles and values that draw those differences together are however necessary if we are to render those contexts compatible with equality. Problems arise when one attempts to reconcile integration and differentiation in States which have differentiated minority groups that are growing in size. An example of this in our own case would be that we need to ask ourselves how best to protect polygamous families (McGlynn, 2006).

Equality at law does not take the circumstances of individuals into account. The initial objective sought was to start to erode privilege and inequalities, establishing both a general and abstracted relationship with legislation and seeking equal judicial status both at law and in the application of legal standards in that all persons are deemed to have and to exercise rights equally (de Asís, 2000). One should not forget, however, as

Prieto Sanchis has said, that if one takes equality and differentiation then a certain degree of priority is afforded to the former and a general rule emerges to be followed: “There are always motives for equality and one should therefore seek equality as long as true inequality—which will always exist—does not provide a reason to either permit or, after having evaluated the motives being challenged, impose differentiated regulation” (Prieto, 1995, p. 119).

Equality and criteria of relevance. The criteria of relevance which should prevail when adopting any type of measure specifically rendering fundamental rights must consist in respect for individual autonomy and meeting basic needs in so far as morality is concerned. There is a third aspect to consider alongside those two and which de Asís (2001) described as the insistence on considering rights as the outcome of bringing together different demands having to do with realising lifetime achievements. Determining which criteria are relevant when it comes to establishing equality and differentiation is in essence axiological in that it implies making value judgments with legal regulations serving as the vehicle for and expression of those judgments. Differentiation is arbitrary if there are insufficient grounds to justify it and determining what comprises sufficient grounds is essentially an issue of evaluation. “Different treatment brought to bear on situations of fact that are in themselves unequal, with the purpose of re-establishing true equality by means of a different judicial regime” is supported by Article 9.2 Spanish Constitution. Ruiz Miguel (1994; de Asís, 2000) distinguishes between discrimination for equality and discrimination *as* equality. Equality as a criterion for apportioning rights is double sided: There is equality in the form of negative discrimination, which treats different circumstances or situations which are to be held irrelevant equally, in order to use or to exercise certain rights or to apply legislation; and then, there is equality as positive discrimination, which involves treating circumstances and situations held to be relevant differently (Ruiz Miguel, 1994; de Asís, 2000).

The contemporary concept of equality has its origin in the creation of a legal and social order in which the independence of the individual could only be obtained by positioning him under the auspices of the legal power of the State, with the concept of independence being linked to a formal system and economic autonomy. As Rosenfeld (1998) highlighted, the history of constitutional equality is the result of a long and difficult struggle against feudal status and privileges. This is a dialectical struggle divided into three stages. In the first, difference is a correlate of inequality:

“Those who are characterized as different are treated as inferiors or superiors depending on their position in the hierarchy”. In the second phase, identity is a correlate of equality: “If certain criteria are met, everyone has the right to be treated equally”. Finally, difference is the correlate: “Any person shall be treated in proportion to their needs and aspirations”. (Rosenfeld, 1998, p. 415)

Finally, difference is the correlate: “Any person shall be treated in proportion to their needs and aspirations” (Rosenfeld, 1998, p. 415).

The rights serve to limit the official authority in order to add to its definition and to obtain the support and help it offers in the form of benefits and services. In relation to civil society they serve to defend its members from the official authority and from themselves, to be effective and surpass the natural state, to communicate and establish links between the official authority and the civil society, instead of having the official authority separated from society or a civil society that does not consider the official authority. In short, the purpose of the entire public service must be to ensure the enjoyment of rights and promote them (Peces-Barba, 1999). We draw the conclusion that the actions of the State which we have set out should be modernized and improved

constantly because, given the growing scarcity of many goods and having achieved universal social rights, in many cases the demands are excessive and impossible to meet; and given the problems that arise when determining the individual who is entitled to State's action, the decision-making becomes increasingly more complicated (Donati, 1990; Eekelaar, 2000).

The problem arises because the two principles conflict: differentiation and non-discrimination. For differentiation to be justified, one must know the true situation of the particular person (de Asís, 2000). Nevertheless, several possibilities are usually feasible for establishing equality as a general rule, unless the scenario is unfair, and there is a strong argument for bringing in non-discrimination rules when parity is used as an instrument. The issue has been raised as to whether it might be useful to check appropriateness in considering these concepts. There is certainly a case for political control of appropriateness, rather than merely running a legal check. Many inadmissible forms of discrimination will certainly occur if no checks are put in place, in that requirements would be relaxed and discriminatory scenarios of a cultural nature would be permitted to continue (Rodríguez-Piñero & Fernández López, 1986; Rosenfeld, 1991).

The Question in the Context of the European Union

The fact that the aforementioned model commenced in the 19th century symbolises the failure of the previous classification and equality in legislation to equalise. The historical and relative nature of the concept of equality and non-discrimination means that one must primarily construe the concept according to the social reality of the era when the particular legal rule is applied. This overcomes the common difficulty that presuming one is dealing with a closed clause, not open to possibilities. In reality, formulation of such clauses is open, flexible and capable of adaptation to the variety of different current and future scenarios that might arise (Ferrajoli, 1993; Peces-Barba, 2000; Rabossi, 1990; Rodríguez-Piñero & Fernández López, 1986).

To continue along these lines, the principle of legal certainty means that judicial actions must be foreseeable and in line with earlier responses, in order to maintain coherence. Essentially, the important consideration when justifying discrimination is to consider whether one might sacrifice equality for the good of another constitutionally protected right (Rodríguez-Piñero & Fernández López, 1986; Strauss, 1998). The discriminatory effect of such differentiation must be taken into account in that regard and this explains why there is no simple answer to the question as to whether one can separate the right to equality from the right to non-discrimination (Armstrong, 2006). If one looks at doctrine, there is the well-known polemic based on autonomy of the principle of non-discrimination, overcoming bilateralism and neutrality and starting out from a specific evaluation of the social reality by the creator. It is not therefore possible to confirm the existence of discriminatory behaviour by evaluating differences between compared categories, as one can when deciding on equality (Baker, Cantillon, Lynch, & Walsh, 2004; Pumar, 2001; Rodríguez-Piñero & Fernández López, 1986).

Main Sentences

Insofar as European Union Law is concerned, the first judgments to establish jurisprudence on this issue at the Luxembourg Court of Justice were the judgment of 25 May 1971, in the case of *Defrenne I* (80/70); judgment of 8 April 1976, case of *Defrenne II* (43/75); and the judgment of 15 June 1978, case of *Defrenne III* (149/77), among others. The issue of positive action was however not dealt with until the *Kalanke* case. In this scenario, the preliminary issue in the *Kalanke* case had to do with *Land* legislation in Bremen (Germany) on the equal treatment of men and women in public service, which establishes that selection, provision of jobs, and

promotion “shall be granted preferentially to women, against equally qualified male candidates in sectors where women are underrepresented”.

The Luxembourg court judgment *Kalanke v. Land de Bremen*, of 17 October 1995 (C-450/93) ruled that the Bremen legislation contravened European Directive 76/207/EEC Article 2, paragraphs 1 and 4 because it established the automatic promotion of women over equally qualified men whenever women are underrepresented. The Commission construed that ruling as only condemning the automatic nature of the positive-action land policy, in that such action might amount to unlawful discrimination against men.

The aforesaid ruling upheld the appeal lodged by a male employee who had been refused promotion to benefit a woman, thereby highlighting the difficulties of determining the meaning and scope of community law. The ruling considered that the principle of non-discrimination must apply to both the feminine and masculine genders and set aside the historic and factual discrimination of women as a collective group, furthermore establishing the formal priority of individual rights. This called into question the principle of real equality of treatment between the genders for the sake of achieving an outcome and rendered a strictly literal interpretation which may not be the most appropriate (Atienza, 2005; Ruiz Miguel, 1996).

Subsequently, the Luxembourg Court, in the case of *Marschall v. Rhineland-Westphalia Land*, of 11 November 1997 (C-409/95), established that the trial court had ruled that women should not be automatically preferred for promotion if there were motives that tipped the balance in favour of the male candidate (Article 25.5 Public Service Act, Rhineland-Westphalia Land). Council Directive 97/80/EC, on the burden of proof in sex discrimination cases, is particularly important in this regard. The Court declared in the case of *Marschall* that community law does not oppose national legislation on the promotion of women candidates in business sectors with fewer women than men as a compulsory priority, as long as the advantage is not automatic and male candidates are guaranteed that their applications will be reviewed and not excluded a priori.

There are substantial similarities between this scenario and the issue that arose in the *Kalanke* case: The problem occurred in the same geographical area (a German Land) and within the scope of legislation applicable to public services, although specifically related to the field of education. It is, however, the “open clause” establishing the possibility that is specifically similar. The Court ruled that in contrast to the legislation that had been reviewed in the *Kalanke* judgment, the disputed provision contains a clause establishing that women would not be automatically preferred for promotion whenever the qualities of the male candidate were such that the balance was tipped in his favour (referred to as the “open clause”) (Ballestrero, 2006; García Añón, 1999; Martín Vida, 1998).

Other cases exist in addition to the two well-known cases set out above, such as the matter of *Badeck v. Land in Hessen*, of 28 March 2000 (C-158-97). The ruling in question attempts to validate the two earlier cases of *Kalanke* and *Marschall*, declaring them to be compatible with Community Law as long as they do not automatically and unconditionally grant preference over male candidates to equally qualified female candidates and as long as applications are reviewed objectively bearing in mind the particular personal circumstances of all candidates”. All in all, the ruling establishes that Directive 76/207 is not contrary to Hessen Law (Barrère, 2003).

Finally, one should mention the judgment in the case of *Abrahamson*, of 6 July 2000 (C-407/98), which also interprets Articles 2, sections 1 and 4 of Directive 76/207. Community Law was deemed incompatible with the Swedish legislation in this instance in that preferred selection was not permitted when the difference in qualifications was not substantial, nor even when the difference was slight. Also, the case of *Lommers*, 19

March 2002 (C-476/99), which has similarities with the case of *Badeck* and considers an “open clause” upon evaluating the particular personal circumstances of the employees concerned (Sastre, 2004).

A Critical Perspective of the Rule of Law

In this way, this results in a singular structure with a special mechanism by which the State has to provide assistance and services, and create, strengthen and promote the conditions allowing individuals and groups to satisfy their needs. Thus, their obligations are also related to the prerequisites for exercising positive liberty. The main point of departure is that individuals are moral subjects endowed with dignity. It defends the idea that we all have real capacity for choice and that we all direct our existence towards certain aims in life (Peces-Barba, 1999).

From a different viewpoint, the arrival of social States has been accompanied by the loss of generality and abstraction of laws. For this reason, special laws have been developed, and a step by step process of delegation and fragmentation that has led to the creation of confusing, specialized and highly technical laws has taken place. In fact, the various repercussions of laws on the economy and on work, in addition to the increasing levels of red tape, meant that laws have become an instrument that resolves problems of the moment, that attempts to meet immediate needs, it is no longer envisaged as the result of reasoning, but rather as the equilibrium point of the interests of the legislator, the executive power and Public Administration. Law as an instrument of the social State and its use for purposes of integration and performance of social policy has imposed material rationality over formal rationality. This materializing process aims to protect positions using rules and accomplishes this by modifying some power structures and by controlling socio-economic processes. We cannot, however, talk about a material rule of law that has a minimum set of formal conditions for there to be a minimum level of legal security, even if it is based on material and rational reasons, in such a way that the regulatory content of laws must be sought in its adaptation to the actions linked to them and the results they are expected to yield (Galiana, 2003). In a few words, what should be highlighted is the validity that has passed from being based on the meeting of certain requirement to adapting to a complex set of ideas because of the power struggle between lawmaking institutions and the sources of Law, so conditioning the legislator depending on the content of principles and rights (La Torre, 1995; Prieto, 1998).

A legal guarantee is a functional, relational and multidimensional reality that can be analysed within a legal system (Peña, 1997). In general, if we apply Kelsen's theory beyond it is constitutional formulation, a right that is not guaranteed is not authentic, therefore it is advisable to separate the issues of rights and guarantees on the basis of the legality principle as a rule of recognition. This distinction, in Ferrajoli's (2009d) opinion is of great importance at both a theoretical and metatheoretical level. In the former it is thought that the absence of guarantees amounts to the existence of loopholes, which national and international authorities are compelled to protect against.

The latter goes a step further, here the distinction does not come down to having a descriptive role, but also a critical and normative role. It is critical as regards the loopholes and antinomies that must be emphasized and normative, as regards the legislation and jurisdiction. As far as social rights are concerned, it is necessary to distinguish between the possibilities of technical and political realization. Technically, they can be guaranteed, because the acts required to satisfy them would inevitably be discretionary, unable to be formalized and would not be susceptible to jurisdictional controls and constraints. For that reason, the complexity is essentially political.

Ferrajoli's (2009d; 2011b; 2016) talks of primary guarantees, of prohibitions and obligations that go hand in hand with the rights and, similarly, of the relationships that exist between what is permitted and what is prohibited, and between what is permitted and what is not compulsory. The secondary guarantees are related to the responsibilities of the judicial organs to apply sanctions or declare annulments, if there are invalid or illegal acts that infringe the obligations or prohibitions that constitute the primary guarantees. Therefore, Ferrajoli adopts a formalist stance, separating fundamental rights from their guarantees, and insisting that problems can be resolved theoretically because of the existence of a normative disfunction. But we must not forget that in practise we do come across antinomies that cannot be resolved by interpretive means, but instead by annulment. In the case of a loophole that can be resolved by a normative act, theories such as "every right consisting of the hope of a benefit implies a corresponding obligation" must either be renounced or else compelled to deny the existence of the regulations that introduced the right.

In this way, the question of guarantees means that there are rights with a greater degree of resistance than others depending on what the authorities have decided (Prieto, 1998), in fact Guastini (1994) went as far as to talk of real rights and presumed rights. The existence of one attributive regulation is sufficient to confer rights. On the other hand, the fact that they are promulgated does not mean that they are guaranteed, it is also necessary to have the appropriate mechanisms available for their protection. In short, the real rights are those susceptible to jurisdictional protection, being able to be applied or vindicate themselves before a specific subject. The content refers to a clearly-defined conduct of responsibility, with a subject who is the holder. And the presumed rights are those which do not satisfy any of these conditions.

Conclusions

The globalization of law has two main regulatory dimensions: the degree to which the world is subject to a set of legal rules, and reference to the certainty that human relationships are governed by law everywhere in the world (Shapiro, 1993; Galgano, 2005). Legal rules undergo conversion into obsessive-compulsive rules and become a system that legitimates itself based on its inherently self-generating nature. In addition, the initial concept of legal relations and their components are transformed into a techno-legal order under the influence of a new technical focus (Boodman, 1991; Dezalay & Garth, 1996; Glenn, 2003). Thus, a new order emerges, characterized by the formation of networks that imply that the globalization of Law must centre around commercial and contract law, public law, protecting human rights and also the growing importance of lawyers, together with the dissemination of contents and legal procedures. All three of these mean that the regulatory authority of the State with respect to these areas is unlimited, although States can decide whether to participate or else to withdraw (López Ayllón, 1999). In this state of affairs, linear systematicity is forgotten in order to implement a circular system, surpassed by the specification of new concepts.

As a result of the changes brought about in our society, the activity performed by judges and their function have changed over time. In fact, in the model of the rationalist enlightenment under the auspices of legal positivism, judges had to respect the contents of the law and meet the requirement of predictability. Any concurrent problems were easily resolved by analogy, the rules remedying contradictions or interpretation criteria, in such a way that, in the liberal security model, there is a connection between the requirements of certainty before the law and the characters of the social and political organisation that is consubstantial with the modern State. All this means that we associate security with legality, speaking more accurately of legal certainty. This concept follows the principles put in place since the start of modern times and reaches its perfect

expression with the idea of a systematic and stable kind of law.

Many authors have, however, highlighted the fact that the rules of law are no longer to be looked on in this way. For these purposes, Corsale (1979), for example, maintains that certainty is an element of law itself and that the common concept is due to a vision derived from the modern State and the bourgeoisie. Corsale qualifies this by claiming a change is necessary in the ideological plane: the replacement of individualism and conservatism by the security of society and the community, leaving to one side, in the legal sphere, formal legalism and promoting an ideological concept as the backbone of the structure. This demands a conception of the legal rules as social interaction, giving rise to a process whereby all individuals are acting to satisfy their needs, stressing the superiority of the results achieved thanks to co-operation (Arcos, 2000; Pérez Luño, 1994).

The above is due to the fact that the conclusion of the process is preceded by a series of decisions that must be taken by the judge. Thus, as judges are presented with rules that may be interpreted in different ways, there can be at least five decisions: a decision on validity, attempting to determine the validity of the regulatory material applied; a decision on interpretation, indicating the meaning and scope of the rules applied, something which also occurs with established facts when there are numerous elements to be evaluated; a decision on the evidence is characterised by specifying the facts that are to be judged and is executed by means of evidence-based activity, a very important role being played by empirical rules and legal evidence; a decision on integration, in which the facts are absorbed by the rule, requires an evaluation of the relationship between these two premises; and the final legal decision is that attempting to determine the legal consequences arising out of the aforementioned subsumption. One can also add the argumentative decision through which it is feasible to establish the general framework to be followed in the decision, with the possibility of also operating with a specific argumentation technique (de Asís, 1995).

With regard to the judgement of relevance, this occurs prior to the analysis of the case when the judge establishes contact with the facts and claims, understood from the judge's legal perspective through the practice of subsumption in law. But the evaluations of a case increase with the complexity of the issues to be decided and with the possibilities of choice in the determination of the decisions and their justification or grounds (de Asís, 1995; Wasserstrom, 1961). Nonetheless, all creation arises from an application, except in the case of constitutional creation, and the greatest problem posed is that of producing innovation (de Asís, 1995, pp. 276-277). As a result, the application of legal rules represents a rationalising activity and this is because it is the judge who has the last word on legal matters, thus connecting back to sovereignty and the origin of legal structures without overlooking the fact that the recipients of the judicial resolutions must be the citizens, whose legitimate rights and interests must be protected (Atria, 2005).

Elsewhere, it has been observed that the judicial function today is often exercised by means of arbitration, which represents one option, together with the transformations brought about by the globalisation of the conflict resolution system. Arbitration is the main mechanism for resolving conflicts under *lex mercatoria* and it has even begun to be seen that the implementation of this *lex* constitutes a method applied by arbitration courts rather than a substantive universal system of rules. In addition, a return to the ethics of the legal professions has been observed and there are numerous alternatives in all legal cultures, so in many *favelas* in Brazil or in South Africa, rule of law is not applied but disputes are resolved. Hence, there may be other alternative systems inside and outside the official structure (Arnaud & José Fariñas, 1998).

In short, the activity of judges in the performance of their social function is not clear or unambiguous, but rather indeterminate. Its boundaries are very difficult to specify, and it is doubtful whether it takes place in the

exercise of a function that produces law or applies law. This idea coincides with the issues of the indeterminacy of law and the defeasibility of rules within a diversity of meanings, with a series of consequences relating to the tasks of interpreting law and its discretionality (Ródenas, 2012).

However, the author thinks that this should be understood from a context in which we understand the existence of a principle of constant change in the legal forms, and a minimum and essential unit must be used. From the comparison between the different models, it is possible to extract the idea that a lack of regulation integrated by the relevance of a model from another cultural sphere is reconstructed on the basis of the displacement of the interest it might awaken, moving on to study sociologically the social constitution and the strategies of assimilation which belong to the context. From this perspective, at the bottom of the reception, it can be seen that there is no dialogue or exchange. What was first seen as the reproduction of a legal model which was imported, is now taken as the original production reforming a legal form which is not its own. Nevertheless, the reception has to be contrasted with a new form which adopts the opposite solution consisting of determining above all else the historical originality of certain legal utterances (Serrano, 1991). So, the aspects which should be taken into account would be the differences in levels between the players involved, the type of objectives pursued, the instrumental variants, and the degree of rationalization (Serrano, 1991).

References

- Abramovich, V. (2007). Acceso a la justicia y nuevas formas de participación en la esfera política. *Estudios socio-jurídicos*, 9, 9-33.
- Almoguera, J. (2009). La legitimidad de la función judicial: Independencia e imparcialidad judicial. In M. Grande (Ed.), *Independencia judicial: Problemática ética* (pp. 55-82). Madrid: Dykinson.
- Andrés Ibáñez, P. (1995). *La experiencia jurisdiccional: Del estado legislativo de derecho al estado constitucional de derecho*. Madrid: General Council of the Judiciary Power.
- Andrés Ibáñez, P. (2003). Derecho y justicia en el siglo XXI. Más difícil todavía. *Jueces Para la Democracia*, 48, 27-40.
- Añón, M. J. (2001). La interculturalidad posible: Ciudadanía diferenciada y derechos. In J. de Lucas (Ed.), *La multiculturalidad* (pp. 217-270). Madrid: General Committee of Judicial Power.
- Añón, M. J. (2002). Derechos fundamentales y estado constitucional. *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol*, 40, 25-36.
- Añón, M. J., & García Añón, J. (Eds.). (2004). *Lecciones de derechos sociales*. Valencia: Tirant lo Blanch.
- Arcos, F. (2000). *La seguridad jurídica: Una teoría formal*. University Carlos III of Madrid-Dykinson.
- Armstrong, C. (2006). *Rethinking equality. The challenge of equal citizenship*. Manchester: Manchester University Press.
- Arnaud, A. J., & José Fariñas, M. (1998). *Introduction à l'analyse sociologique des systemes juridiques*. Brussels: Bruylant.
- Atienza, M. (2005). *Derecho y argumentación*. Bogotá: Externado University of Colombia.
- Atria, F. (2000). Concepciones de la función judicial: El caso de la igualdad ante la ley. In F. González and F. Viveros (Eds.), *Igualdad, libertad de expresión e interés público* (pp. 111-143). Santiago (Chile): Diego Portales University.
- Atria, F. (2005). Creación y aplicación del Derecho: Entre formalismo y escepticismo. In F. Atria, E. Bulygin and J. J. Moreso (Eds.), *Lagunas en el Derecho. Una controversia sobre el Derecho y la función judicial* (pp. 45-72). Madrid: Marcial Pons.
- Baker, J., Cantillon, S., Lynch, K., & Walsh, J. (2004). *Equality: From theory to action*. Houndmills: Palgrave MacMillan.
- Ballestrero, M. V. (2006). Igualdad y acciones positivas: Problemas y argumentos de una discusión infinita. *Doxa*, 29, 59-76.
- Barber, B. (1988). *The conquest of politics: Liberal philosophy in democratic times*. Princeton: Princeton University Press.
- Barcellona, P. (1996). *El individualismo propietario*. (J. E. García Rodríguez, Trans.). Madrid: Trotta.
- Barrère, M. (2003). La acción positiva: Análisis del concepto y propuestas de revisión. *Cuadernos Electrónicos de Filosofía del Derecho*, 9, 29 pp.
- Beetham, D. (2000). *Democracy and human rights*. Cambridge, United Kingdom: Polity Press.
- Bentham, J. (1996). *An introduction to the principles of morals and legislation*. Oxford: Clarendon Press.
- Bessette, J. M. (1980). Deliberative democracy: The majority principle in republican government. In R. A. Goldwin and W. A. Schambra (Eds.), *How democratic is the constitution?* (pp. 102-116). Washington: American Enterprise Institute.

- Bessette, J. M. (1994). *The mild voice of reason: Deliberative democracy & American national government*. Chicago: University of Chicago Press.
- Birch, A. H. (2007). *Concepts and theories of modern democracy*. London: Routledge.
- Bobbio, N. (2009). Democracia: Las técnicas. (J. Fernández Santillán, Trans.). In M. Bovero (Ed.), *Teoría general de la política* (pp. 155-172). Madrid: Trotta.
- Boodman, M. (1991). The myth of harmonization of laws. *American Journal of Comparative Law*, 39(4), 699-724.
- Botella, J. (1997). La opinión pública ante el "Welfare State" oferta o demanda? In S. Giner and S. Sarasa (Eds.), *Buen gobierno y política social* (pp. 191-199). Barcelona: Ariel.
- Bovero, M. (2007). Derechos fundamentales y democracia en la teoría de ferrajoli: Un acuerdo global y una discrepancia concreta. In A. de Cabo and G. Pisarello (Eds.), *Los fundamentos de los derechos fundamentales* (pp. 215-242, P. Andrés et al., Trans.). Madrid: Trotta.
- Bulygin, E. (1991). Sentencia judicial y creación del Derecho. In C. E. Alchourrón and E. Bulygin (Eds.), *Análisis lógico y derecho* (pp. 355-369). Madrid: Center for Political and Constitutional Studies.
- Calsamiglia, A. (1988). Sobre el principio de igualdad. In G. Peces-Barba (Ed.), *El fundamento de los derechos humanos* (pp. 97-110). Madrid: Debate.
- Carlyle, A. J. (1980). *Political liberty*. Westport: Freenwood Press.
- Champeil-Desplats, V. (2008). *Norberto Bobbio: Pourquoi la démocratie?* Paris: Michel Houdiard.
- Constant, B. (2002). *Political writings*. (B. Fontana, Trans.). Cambridge (United Kingdom): Cambridge University Press.
- Córdova, L. (2009). Constitucionalismo democrático y orden global en Luigi Ferrajoli. In M. Carbonell and P. Salazar (Eds.), *Garantismo: Estudios sobre el pensamiento jurídico de Luigi Ferrajoli* (pp. 447-461). Madrid: Trotta-National Autonomous University of Mexico.
- Corsale, M. (1979). *Cetezza del diritto e crisi di legittimità*. Milan: Giuffrè.
- Dahl, R. (1991). *Democracy and its critics*. New Haven-London: Yale University Press.
- Dahl, R. (2005). *Who Governs*. New Haven-London: Yale University Press.
- de Asís, R. (1995). *Jueces y normas: La decisión judicial desde el ordenamiento*. Madrid: Marcial Pons.
- de Asís, R. (2000). La igualdad en el discurso de los derechos. In J. A. López García and J. A. del Real (Eds.), *Los derechos: Entre la ética, el poder y el derecho* (pp. 149-168). Madrid: University of Jaén-Dykinson.
- de Asís, R. (2001). *Sobre el concepto y el fundamento de los derechos: Una aproximación dualista*. Madrid: Dykinson.
- de Cabo, A., & Pisarello, G. (2009). Ferrajoli y el debate sobre los derechos fundamentales. In A. de Cabo and G. Pisarello (Eds.), *Los fundamentos de los derechos fundamentales* (pp. 9-17). Madrid: Trotta.
- de Lucas, J. (2002). Algunas propuestas para comenzar a hablar en serio de política de inmigración. In J. de Lucas and F. Torres (Eds.), *Inmigrantes cómo los tenemos? Algunos desafíos y (malas respuestas)* (pp. 23-48). Madrid: Talasa.
- de Sousa Santos, B. (2005). Beyond neoliberal governance: The world social forum as subalterm cosmopolitan politics and legality. In B. de Sousa Santos and C. Rodríguez Garavito (Eds.), *Law and globalization from bellow: Towards a cosmopolitan legality* (pp. 29-63). New York, N.Y.: Cambridge University Press.
- Dezalay, Y., & Garth, B. (1996). *Dealing in virtue—International commercial arbitration and the construction of a transnational legal order*. London, Chicago: University of Chicago Press.
- Díaz, E. (2004). Estado de derecho y derechos humanos. In J. Betegón, F. J. Laporta, J. R. de Páramo, and L. Prieto (Eds.), *Constitución y derechos fundamentales* (pp. 17-40). Madrid: Center for Political and Constitutional Studies.
- Donati, P. (1990). I diritti-doveri dei mondi vitali: l'Europa delle famiglie. *Rivista Internazionale di Filosofia del Diritto*, 1, 51-81.
- Dryzek, J. S. (2002). *Deliberative democracy and beyond: Liberals, critics, contestation*. New York, N.Y.: Oxford University Press.
- Dryzek, J. S. (2005). Deliberative democracy in divided societies. *Political Theory*, 33(2), 218-242.
- Dworkin, R. (2013). *Taking rights seriously*. London: Bloomsbury.
- Eekelaar, J. (2000). Uncovering social obligations: Family law and the responsible citizen. In M. Maclean (Ed.), *Making law for families* (pp. 9-28). Oxford: The Oñati International Institute for the Sociology of Law-Hart Publishing.
- Ely, J. (1980). *Democracy and distrusts. A theory of judicial review*. Cambridge: Harvard University Press.
- Fariñas, M. J. (1997). *Los derechos humanos: Desde la perspectiva sociológico-jurídica a la "actitud postmoderna"*. Madrid: University Carlos III of Madrid-Dykinson.
- Fassò, G. (1982). *Historia de la filosofía del derecho*. (J. F. Lorca, Trans.). Madrid: Pirámide.

- Fernández García, E. (1997). *Entre la razón de Estado y el Estado de Derecho. La racionalidad política*. Madrid: Dykinson.
- Fernández Ruiz-Gálvez, E. (2003). *Igualdad y derechos humanos*. Madrid: Tecnos.
- Ferrajoli, L. (1993). La differenza sessuale e le garanzie dell'uguaglianza. *Democrazia e diritto*, 2, 49-73.
- Ferrajoli, L. (1995). *La sovranità nel mondo moderno: Nascita e crisi dello stato nazionale*. Milan: Anabasi.
- Ferrajoli, L. (2004). La pragmática de la teoría del derecho. (J. Ferrer, Trans.). In L. Ferrajoli (Ed.), *Epistemología jurídica y garantismo* (pp. 109-139). Mexico City: Fontamara.
- Ferrajoli, L. (2009a). *Garantismo: Una discusión sobre derecho y democracia*. (A. Greppi, Trans.). Madrid: Trotta.
- Ferrajoli, L. (2009b). Derechos fundamentales. In A. de Cabo and G. Pisarello (Eds.), *Los fundamentos de los derechos fundamentales* (pp. 19-56). Madrid: Trotta.
- Ferrajoli, L. (2009c). El paradigma normativo de la democracia constitucional. (L. Prieto, Trans.). In G. Marcilla (Ed.), *Constitucionalismo y garantismo* (pp. 15-42). Bogotá: University Externado of Colombia.
- Ferrajoli, L. (2009d). Los derechos fundamentales en la teoría del Derecho. In A. de Cabo and G. Pisarello (Eds.), *Los fundamentos de los derechos fundamentales* (pp. 139-196. P. Andrés et al., Trans.). Madrid: Trotta.
- Ferrajoli, L. (2011a). Constitucionalismo principalista y constitucionalismo garantista. (N. Guzmán, Trans.). *Doxa*, 34, 15-53.
- Ferrajoli, L. (2011b). *Derecho y razón: Teoría del garantismo penal*. (P. Andrés Ibáñez et al., Trans.). Madrid: Trotta.
- Ferrajoli, L. (2016). *Derechos y garantías: La ley del más débil*. (P. Andrés Ibáñez, and A. Greppi, Trans.). Madrid: Trotta.
- Galgano, F. (2005). *La globalización en el espejo del derecho*. (H. Roitman and M. de la Colina, Trans.). Buenos Aires: Rubinzal-Calzoni.
- Galiana, A. (2003). *La legislación en el estado de derecho*. Madrid: Dykinson.
- García Añón, J. (1999). El principio de igualdad y las políticas de acción afirmativa: Algunos problemas de la dogmática jurídica y el Derecho europeo. *Cuadernos Electrónicos de Filosofía del Derecho*. Retrieved from <https://dialnet.unirioja.es/servlet/articulo?codigo=10312462>
- García-Pelayo, M. (2005). *Las transformaciones del Estado contemporáneo*. Madrid: Ariel.
- Garzón, E. (2000). El consenso democrático: Fundamento y límites del papel de las minorías. *Isonomía*, 12, 7-34.
- Gascón, M. (2009). La teoría general del garantismo: Rasgos principales. In M. Carbonell and P. Salazar (Eds.), *Garantismo: Estudios sobre el pensamiento jurídico de Luigi Ferrajoli* (pp. 21-39). Madrid: Trotta-National Autonomous University of Mexico.
- Jiménez Glück, D. (2004). *Juicio de igualdad y tribunal constitucional*. Barcelona: Bosch.
- Glenn, H. P. (2003). A transnational concept of law. In P. Cane and M. V. Tushnet (Eds.), *Oxford handbook of legal studies* (pp. 839-862). Oxford: Oxford University Press.
- Greppi, A. (2012). *La democracia y su contrario: Representación, separación de poderes y opinión pública*. Madrid: Trotta.
- Guasp, J. (1971). *Derecho*. Madrid: Aguilar.
- Guastini, R. (1994). "Derechos": Una contribución analítica (Draft). In J. M. Sauca (Ed.), *Problemas actuales de los derechos fundamentales* (pp. 127-141). Madrid: Carlos III University of Madrid-Official State Gazette.
- Guastini, R. (2003). ¿Separación de los poderes o división del poder? (M. Bono López, Trans.). In R. Guastini, *Estudios de teoría constitucional*. Mexico City: Fontamara.
- Guastini, R. (2009). Tres problemas para Luigi Ferrajoli. In A. de Cabo and G. Pisarello (Eds.), *Los fundamentos de los derechos fundamentales* (pp. 57-62, P. Andrés et al., Trans.). Madrid: Trotta.
- Hierro, L. (1995). *Justicia, igualdad y eficiencia*. Madrid: Centre for Constitutional Studies.
- Jori, M. (2009). Ferrajoli sobre los derechos. In A. de Cabo and G. Pisarello (Eds.), *Los fundamentos de los derechos fundamentales* (pp. 105-137, P. Andrés et al., Trans.). Madrid: Trotta.
- Kelsen, H. (1988). El problema del parlamentarismo. In H. Kelsen, *Escritos sobre la democracia y el socialismo* (J. Ruiz Manero, Trans.). Madrid: Debate.
- Kelsen, H. (1995). *Teoría general del derecho y del estado*. (E. García Máynez, Trans.). Mexico: National Autonomous University of Mexico.
- Kelsen, H. (2002). *Esencia y valor de la democracia*. (R. Luengo & L. Legaz, Trans.). Granada: Comares.
- Kymlicka, W. (1989). Liberal individualism and liberal neutrality. *Ethics*, 99(4), 883-905.
- Kymlicka, W. (1995). *Multicultural citizenship: A liberal theory of minority rights*. Oxford: Oxford University Press.
- La Torre, M. (1995). Rules, institutions, transformations: Considerations on the "evolution of law" paradigm. Florence: European University Institute, Department of Law.
- Locke, J. (1982). *The second treatise of civil government*. Arlington Heights: Harlan Davidson.

- López Ayllón, S. (1999). *Las transformaciones del sistema jurídico y los significados sociales del Derecho: La encrucijada entre tradición y modernidad*. Mexico City: National Autonomous University of Mexico.
- López Ayllón, S. (2004). *Globalización, estado de derecho y seguridad jurídica*. Mexico City: National Autonomous University of Mexico.
- MacCormick, N. (1981). *H. L. A. Hart*. London: Edward Arnold Publishers.
- MacPherson, C. B. (2012). *The life and times of liberal democracy*. Oxford: Oxford University Press.
- Martí, J. L.. (2006). *La república deliberative: Una teoría de la democracia*. Madrid: Marcial Pons.
- Martín Vida, M. A. (1998). Medidas de tratamiento preferente a favor de las mujeres en el ámbito comunitario: Reflexiones al hilo de la sentencia “Marschall”. *Revista Española de Derecho Constitucional*, 53, 313-336.
- Martínez de Pisón, J. M. (2001). *Tolerancia y derechos fundamentales en las sociedades multiculturales*. Madrid: Tecnos.
- Martínez Tapia, R. (2000). *Igualdad y razonabilidad en la justicia constitucional*. Almería: University of Almería.
- McGlynn, C. (2006). *Families and the European Union: Law, politics and pluralism*. Cambridge, United Kingdom: Cambridge University Press.
- Mendonça, D. (2000). *Las claves del derecho*. Barcelona: Gedisa.
- Mill, J. S. (2007). *El utilitarismo* (E. Guisán, Trans.). Madrid: Alianza.
- Moreno, R. (2006). Democracia y derechos fundamentales en la obra de Luigi Ferrajoli. *Universitas, Revista de Filosofía, Derecho y Política*, 3, 3-39.
- Niemeyer, S. (2006). The ends of deliberation: Meta-consensus and Inter-subjective rationality as ideal outcomes. *Swiss Political Science Review*, 13, 497-526.
- Ollero, A. (1989). *Derechos humanos y metodología jurídica*. Madrid: Center of Constitutional Studies.
- Ollero, A. (2004). Igualdad ante la ley y uso alternante del Derecho. In J. Betegón, F. J. Laporta, J. R. de Páramo, and L. Prieto (Eds.), *Constitución y derechos fundamentales* (pp. 493-536). Madrid: Center for Political and Constitutional Studies.
- Omaghi, L. (1986). *Il concetto di interesse*. Milan: Giuffrè.
- Ost, F. (1992). Jupiter, Hercule, Hermès: trois modèles de juge. In P. Bouretz (Ed.), *La force du droit: Panorama des débats contemporains* (pp. 241-272). Paris: Esprit.
- Ovejero, F. (2002). *La libertad inhóspita: Modelos humanos y democracia liberal*. Barcelona: Paidós.
- Pateman, C. (1988). *Participation and democratic theory*. Cambridge: Cambridge University Press.
- Peces-Barba, G. (1999a). *Curso de derechos fundamentales: Teoría general*. Madrid: University Carlos III of Madrid-Official State Gazette.
- Peces-Barba, G. (1999b). De la función de los derechos fundamentales. In G. Peces-Barba (Ed.), *Derechos sociales y positivismo jurídico: Escritos de filosofía jurídica y social* (pp. 131-155). Madrid: University Carlos III de Madrid-Dykinson.
- Peces-Barba, G. (2000). De la igualdad normativa a la igualdad de hecho: Las cuotas femeninas en las elecciones. In J. A. López García and J. A. del Real (Eds.), *Los derechos: Entre la ética, el poder y el derecho* (pp. 169-180). Madrid: University of Jaén-Dykinson.
- Peces-Barba, G. (2004). De la función de los derechos fundamentales. In G. Peces-Barba (Ed.), *Derechos sociales y positivismo jurídico: Escritos de filosofía jurídica y social* (pp. 131-155). Madrid: University Carlos III de Madrid-Dykinson.
- Peces-Barba, G. (2006). *La Constitución y los derechos*. Bogotá: University Externado of Colombia.
- Peña, A. M. (1997). *La garantía en el estado constitucional de derecho*. Madrid: Trotta.
- Pérez Luño, A. E (1994). *La seguridad jurídica*. Barcelona: Ariel.
- Pérez Luño, A. E. (2005). *Dimensiones de la igualdad*. (R. González-Tablas Sastre Ed.). Madrid: University Carlos III of Madrid-Dykinson.
- Pérez Luño, A. E. (2006). *La tercera generación de derechos humanos*. Navarra: Thomson-Aranzadi, Cizur Menor.
- Pérez Muñoz, C. (2010). Deliberación y democracia: Una réplica a Gallardo. *Revista Uruguaya de Ciencia Política*, 19(1), 59-86.
- Pisarello, G., & Estrada, A. J. (2001). Presentación. In L. Ferrajoli (Ed.), *El garantismo y la filosofía del derecho* (pp. 11-20, J. M. Díaz Martín and G. Pisarello, Trans.). Bogotá: University Externado of Colombia.
- Preuss, U. K. (1991). El concepto de los derechos y el Estado del bienestar. (F. Serra, J. Aparicio, and F. García Selgas, Trans.). In E. Olivas (Ed.), *Problemas de legitimación en el Estado social* (pp. 88-89). Madrid: Trotta.
- Prieto, L. (1995). Igualdad y minorías. *Derechos y Libertades*, 5, 111-154.
- Prieto, L. (1998). *Ley, principios, derechos*. Madrid: University Carlos III of Madrid-Dykinson.
- Prieto, L. (1999). *Constitucionalismo y positivismo*. Mexico: Fontamara.

- Prieto, L. (2009). La teoría del Derecho de *Principia iuris*. In G. Marcilla (Ed.), *Constitucionalismo y garantismo* (pp. 43-73). Bogotá: University Externado of Colombia.
- Prieto, L. (2014). *Justicia constitucional y derechos fundamentales*. Madrid: Trotta.
- Pumar, N. (2001). *La igualdad ante la ley en el ámbito de la seguridad social*. Navarra: Aranzadi.
- Quintana, F. (2001). *Prudencia y justicia en la aplicación del derecho*. Santiago: Editorial Jurídica de Chile.
- Rabossi, E. A. (1990). Derechos humanos: El principio de la igualdad y la discriminación. *Revista del Centro de Estudios Constitucionales*, 7, 175-192.
- Rivero, A. (2005). Prólogo a alexis de toqueville. In A. de Tocqueville (Ed.), *La democracia en América* (D. Sánchez de Aleu, Trans.). Madrid: Alianza.
- Robinson, E. W. (Ed.). (2004). *Ancient greek democracy: Readings and sources*. Malden: Blackwell.
- Roca, E. (1986). Jurisprudencia, precedentes y principio de igualdad. *Revista Jurídica de Cataluña*, 4, 841-874.
- Ródenas, Á. (2012). *Los intersticios del derecho: Indeterminación, validez y positivismo jurídico*. Madrid: Marcial Pons.
- Rodríguez Prieto, J. R. (2011). Educación, civismo y democracia: Una mirada desde el pensamiento de Benjamin R. Barber. In N. Belloso and A. de Julios Campuzano (Eds.), *El retorno a la sociedad civil. Democracia, ciudadanía y pluralismo en el siglo XXI* (pp. 155-172). Madrid: Oñati International Institute for the Sociology of Law-Dykinson.
- Rodríguez-Piñero, M., & Fernández López, M. F. (1986). *Igualdad y discriminación*. Madrid: Tecnos.
- Rosenfeld, M. (1991). *Affirmative action and justice: A philosophical and constitutional inquiry*. London-New Haven: Yale University Press.
- Rosenfeld, M. (1998). Hacia una reconstrucción de la igualdad constitucional. (J. Dorado, Trans.). *Derechos y Libertades*, 6, 411-444.
- Ross, A. (1989). *Por qué democracia?* (R. J. Vernengo, Trans.). Madrid: Center for Political and Constitutional Studies.
- Rousseau, J. J. (2001). *Du contrat social*. Paris: Flammarion.
- Rubio, F. (1997). *La forma del poder. Estudios sobre la Constitución*. Madrid: Center of Constitutional Studies.
- Ruiz Manero, J. (1990). *Jurisdicción y normas: Dos estudios sobre función jurisdiccional y teoría del Derecho*. Madrid: Center of Constitutional Studies.
- Ruiz Miguel, A. (1994). La igualdad como diferenciación. In Several Authors, *Derechos de las minorías y de los grupos diferenciados* (pp. 286-290). Madrid: Escuela Libre Editorial.
- Ruiz Miguel, A. (1996). La discriminación inversa y el caso Kalanke. *Doxa*, 19, 123-140.
- Ruiz Miguel, A. (2000). La igualdad en la jurisprudencia del Tribunal Constitucional. In L. García San Miguel (Ed.), *El principio de igualdad* (pp. 155-200). Madrid: University of Alcalá-Dykinson.
- Ruiz Miguel, A. (2003). Sobre el concepto de igualdad. In M. Carbonell (Ed.), *El principio constitucional de igualdad: Lecturas de introducción* (pp. 31-67). Mexico City: National Commission of Human Rights.
- Ruiz Miguel, A. (2009). Validez y vigencia: Un cruce de caminos en el modelo garantista. In M. Carbonell and P. Salazar (Eds.), *Garantismo: Estudios sobre el pensamiento jurídico de Luigi Ferrajoli* (p. 211-232). Madrid: Trotta-National Autonomous University of Mexico.
- Saavedra, M. (2007). *Jurisdicción, constitución y derecho*. Mexico City: Fontamara.
- Sastre, R. (2004). La acción positiva para las mujeres en el Derecho comunitario. *Revista General de Derecho del Trabajo y la Seguridad Social*, 6. Retired from https://www.iustel.com/v2/revistas/detalle_revista.asp?id_noticia=402950&d=1
- Schultheis, F. (1991). Affaires de famille-affaires d'état: Des visions et des divisions inter-culturelles d'une réflexion sociologique. In F. de Singly and F. Schultheis (Eds.), *Affaires de famille, affaires d'État* (pp. 7-20). Nancy: Est Publishers.
- Serrano, A. (1991). Dogmática jurídica y análisis sociológico: El derecho. *Doxa*, 10, 173-199.
- Shapiro, M. (1993). The globalization of law. *Indiana Journal of Global Legal Studies*, 1(1), 37-64.
- Soriano, R. (1992). *Los derechos de las minorías*. Seville: MAD.
- Souza, M. L. (1998). Del uso alternativo al garantismo: una evolución paradójica. *Anuario de Filosofía del Derecho*, 15, 233-256.
- Strauss, D. (1998). The illusory discrimination between equality of opportunity and equality of result. In N. Devins and D. M. Douglas (Eds.), *Redefining equality* (pp. 51-64). New York, N.Y.: Oxford University Press.
- Stuart Mill, J. (2011). *On liberty*. Luton: Andrews UK.
- Suay, J. (1985). *El principio de igualdad en la justicia constitucional*. Madrid: Institute of Local Government Studies.
- Taylor, C. (1992). The politics of recognition. In A. Gutmann (Ed.), *Multiculturalism and "the politics of recognition": An essay by Charles Taylor* (pp. 25-73). Princeton (New Jersey): Princeton University Press.
- Torbisco, N. (2006). *Group rights as human rights: A liberal approach to multiculturalism*. Dordrecht: Springer.

- Walzer, M. (2004). *Las esferas de la justicia: Una defensa del pluralismo y la igualdad*. (H. Rubio, Trans.). Mexico: Fondo de Cultura Económica.
- Wasserstrom, R. A. (1961). *The judicial decision. Toward a theory of legal justification*. Stanford: Stanford University Press.
- Wiener, J. (1999). *Globalization and the harmonization of law*. London: Pinter.
- Young, I. M. (1989). Polity and group difference: A critique of the ideal of universal citizenship. *Ethics*, 99(2), 250-274.
- Young, I. M. (1998). Polity and group difference: A critique of the ideal of universal citizenship. In A. Philips (Ed.), *Feminism and politics* (pp. 250-274). Oxford: Oxford University Press.