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Nota editorial

Lazos, límites y muéganos: el papel normativo de la ciudadanía[1]

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Los wichís son un pueblo indígena sudamericano de 13 mil años de antigüedad que habita las cuencas del río Bermejo, a lo largo de Bolivia y Argentina. En 2006, Qa'tu —un hombre wichí de 28 años— fue procesado por el Estado argentino por, presuntamente, violar a la hija menor de edad de su concubina, quien, como resultado, quedó embarazada. El Estado argentino protege a sus ciudadanos contra lo que considera un delito sexual grave; sin embargo, muchas mujeres de la comunidad wichí, y en particular las supuestas víctimas, protestaron contra la acción coercitiva ejercida por la ley argentina, ya que ésta, prohibitiva de ese tipo de intercambios sexuales, fue desconocida por la comunidad wichí.

Aparentemente, el pueblo wichí protege el interés de las jóvenes de iniciar relaciones sexuales después de su primera menstruación con el fin de explorar y ejercer libremente su sexualidad. De hecho, las mujeres witchí se consideran todas *cuñadas* entre sí.[2] De forma que en las audiencias judiciales, la "víctima" declaró a favor del presunto violador: "Soy

[1] Estoy profundamente agradecido con Juan Vega e Imer Flores por todas las facilidades ofrecidas para la realización de esta publicación. Quedo en deuda con Sandra Gómora, por sostener heroicamente a *Problema*, a veces a costa de sí misma. Su devoción a la academia es, verdaderamente, una inspiración. Muchas gracias a Alejandro Nopaltitla Jiménez, Lucía Michelle Corzas Corona y José de Jesús Mendoza Morales, por su ayuda durante el coloquio y la edición. Por último, muchas gracias a Erick Nava Galindo, por su apoyo en la traducción de esta editorial.

[2] Este ejemplo se discute en Bidaseca, K. (2011). Mujeres blancas buscando salvar a mujeres color café: desigualdad, colonialismo jurídico y feminismo postcolonial. *Andamios. Re-*

una mujer, esposa de Qa'tu y madre de Menajen… Yo era una mujer libre cuando lo elegí. Mi madre, las mujeres y la comunidad aceptaron lo que yo quería, pero ahora mi hombre está preso y no se me permite verlo. La justicia de los blancos tiene que escucharme y liberar a Qa'tu".

Por otro lado, las feministas blancas se oponen fuertemente a una prerrogativa de consideración especial sugerida por un tribunal superior para tener en cuenta los desacuerdos culturales, defendiendo una interpretación universal de la integridad sexual de los niños (Bidaseca, 2011). Entonces, como ciudadanos argentinos los wichís están obligados a obedecer las normas que prohíben ese tipo de comportamiento sexual, pero como miembros de su comunidad política están igualmente obligados a respetar los intereses de la mujer para iniciar relaciones sexuales, incluso si son muy jóvenes para los estándares argentinos.

Las cuestiones relativas al juicio moral en torno a las edades convencionales de consentimiento a través de diferentes perspectivas culturales son difíciles de abordar, ya que esto requiere tratar con disputas complejas en metaética, justicia epistémica y hermenéutica. Pero mi intención aquí no es discutir la ética transcultural del consentimiento; más bien, sólo quiero subrayar la naturaleza de este tipo de conflictos en términos de diferentes nociones de pertenencia, y en particular, destacar el hecho de que la literatura filosófica angloamericana sobre la ciudadanía tiende a enfocarse en una concepción ideal o prospectiva de la misma.

Ahora bien, los filósofos de los países ricos tienden a preguntarse qué concepto de *ciudadanía* es más coherente con el resto de la ontología social o cuál es el más coherente con nuestras prácticas (Carens, 2013; Bozniak, 2008; Miller, 2000, Walzer, 1983; Marshal, 1965). También hay otras y otros que miran hacia el futuro para preguntarse qué tipo de concepto de ciudadanía deberíamos tener para hacer frente a los retos y nuevas formas de libertad y cuidado mutuo que las condiciones actuales demandan con respecto a los medios de comunicación, la inteligencia artificial, el terrorismo, las caravanas migrantes, el calentamiento climático, los grupos sin participación política, etcétera (Donaldson y Kymlicka, 2016). Pero sospecho que este tipo de enfoques sufren de un sesgo importante, ya que tienden a ocultar lo que considero es el problema más importante de la justicia en torno a la ciudadanía: el hecho de que para la mayoría de la sociedad mundial, ser ciudadanos rara vez sirve al propósito de establecer relaciones de libertad social e igualdad; al contrario, puede permitir que ciertas formas de opresión perduren a través de las fronteras, los pueblos y el tiempo. En ese sentido, creo que uno de los principales desafíos

vista de Investigación Social, *8*(17), 61-89. Estoy agradecido con Paula Eloísa Sánchez Luna, por señalarme esta dirección

que enfrenta el pueblo wichí tiene que ver con cómo la ciudadanía argentina enmarca a su grupo en cuanto a los derechos y deberes que impone a los miembros de los pueblos originarios argentinos.

Lo anterior, por supuesto, necesita aclararse con más cuidado, por lo que en esta introducción voy a tratar de explicar cómo los artículos contenidos en este volumen encajan en esta agenda de investigación que hasta aquí he descrito, y cómo algunos de los participantes desean continuar su investigación. Al mismo tiempo, esto me permitirá aclarar de qué manera los artículos ofrecen nuevas perspectivas sobre la ciudadanía. Pero antes de proceder a los argumentos, para empezar, voy a señalar al menos tres hechos familiares que a menudo se pasan por alto en la literatura dominante, pero que, sin embargo, son bastante palpables para los investigadores latinoamericanos.

En primer lugar, los países latinoamericanos abarcan un gran número de grupos etnoculturales y pueblos. Cuando Estados como el Reino Unido o España luchan por mantener la unidad entre unos pocos pueblos, naciones como Bolivia, Perú y México tienen que lidiar con hasta 60 pueblos diferentes, minorías etnoculturales y lingüísticas y muchas otras formas contemporáneas de estatus jurídicos, de identidad, virtud cívica y pertenencia. En segundo lugar, la región está muy afectada por la discriminación, la exclusión y la desigualdad. Los grupos sociales percibidos como los menos valiosos son, sistemáticamente, excluidos de la educación, las oportunidades y los recursos. En contraste, ser un hombre católico blanco de clase media alta o alta garantiza el poder exigir que todos los bienes y derechos que implica la ciudadanía sean proveídos. Pero para el resto de los grupos menos valiosos su acceso a los bienes y derechos sigue siendo condicional o arbitrario. Por último, lo mismo ocurre fuera de las fronteras: ser un ciudadano de un país rico equivale a una forma de privilegio medieval, tal y como ser una mujer bora en Perú no provee el mismo acceso a los derechos que ser un miembro de la clase alta peruana; ser una nicaragüense fuera de Nicaragua no provee el mismo acceso a las fronteras internacionales que ser un ciudadano canadiense fuera de Canadá.

Entiendo la ciudadanía como una forma de membresía, ya sea como una forma de pertenencia (legal o de otro tipo) a un grupo que ejerce su autodeterminación política, a una forma de autoidentificación recíproca a tales grupos, a un ejercicio colectivo de las virtudes necesarias para actualizar esas formas de membresía o una combinación de todas las anteriores (Kymlicka & Norman, 2005, p. 211). Precisamente porque la ciudadanía puede circunscribir, al mismo tiempo, jurisdicción legal, alcance moral, identidad y virtudes políticas, es que se hace referencia a ella

como correlato del vínculo inclusivo entre personas libres e iguales que ha sido característico de las democracias liberales contemporáneas, cuando menos en teoría (Rawls, 2001). Sin embargo, esta noción, en apariencia sencilla, se derrumba fácilmente por el tipo de conflictos de lealtad y pertenencia como el que enfrentan los wichís contra la justicia argentina.

Las membresías wichí y argentina parecen chocar entre sí como formas de lealtad legal y/o moral a un cuerpo de reglas, valores, principios o visiones de lo que equivale a ser un buen argentino o un buen wichí. Las feministas argentinas quizá tienen buenas razones para cuestionar las relaciones sexuales con menores de edad como un daño a la autonomía de las mujeres jóvenes, pero la voz de las mujeres wichí fue sistemáticamente silenciada durante el proceso, dañando, justo, la misma autonomía que las primeras buscaban proteger. Es posible que el estado de devaluación social que sufren los wichís en Argentina, como pueblo indígena, influyera para que inicialmente la corte pasara por alto sus interpretaciones y percepciones sobre el hecho, hasta que un tribunal superior ordenó la suspensión del proceso hasta recibir un dictamen antropológico para confirmar la edad apropiada de consentimiento entre los wichís (Bidaseca, 2011).

Como dije antes, no está claro cómo los derechos y las obligaciones que la ciudadanía argentina defiende pudieran conciliarse con la membresía wichí sin negar a los wichís el mismo tipo de alcance legal, moral y social que la membresía argentina tiene, convirtiéndolos en un pueblo subordinado sin ciudadanía. Entonces, alguien podría argumentar que el enigma cultural está fuera de lugar porque, por muy acaloradas que sean estas controversias en la erudición sobre el relativismo moral y legal, sigue siendo claro que la *ciudadanía* es para los *ciudadanos*, así que los deberes de los wichís como ciudadanos argentinos deberían ser claros, al menos formalmente, a pesar de que ello pueda plantear controversias en el ámbito de la metaética o la revisión judicial. Pero incluso en términos formales, la ciudadanía sigue siendo fragmentada y problemática.

Para ver esto, considere a Friedrich Nottebohm, un ciudadano alemán por lugar de nacimiento y herencia. Nottebohm emigró a Guatemala, convirtiéndose allí en residente durante la mayor parte de su vida, pero nunca solicitó la ciudadanía guatemalteca. En cambio, en algún momento hizo una solicitud para obtener pasaporte de Liechtenstein, ya que planeaba usar la ciudadanía de ese país para protegerse contra las sanciones impuestas a los ciudadanos alemanes durante la Segunda Guerra Mundial. El gobierno guatemalteco arrestó a Nottebohm, quien, como respuesta, hizo una petición para que Liechtenstein demandara al gobierno guatemalteco por trato injusto. Así, aunque Nottebohm tenía, de hecho,

la ciudadanía de Liechtenstein, no queda claro que no debiera ser tratado como ciudadano guatemalteco a pesar de nunca haber solicitado la residencia.

Esto podría significar que la ciudadanía no es nada sencilla. Incluso en los casos en que podemos resguardarnos en los aspectos formalistas de la ley, que especifican quién es un ciudadano y quién no, todavía puede haber espacio para la interpretación y la disputa. En el caso de Nottebohm, por ejemplo, la corte internacional propuso el "principio de ciudadanía real y efectiva" para dejar de lado los requisitos formalistas de ciudadanía, buscando, en cambio, la asignación de membresía según el contexto, cosa que apuntaba a la membresía guatemalteca incluso si Nottebohm nunca la hubiera solicitado.

Pero si nos vemos obligados a examinar el contexto como en el caso wichí, muy a menudo parece que la ciudadanía puede muy bien presentarse como una noción paradójica, ya que consolida algún tipo de grupo inclusivo mediante el establecimiento de parámetros formales para la exclusión. No obstante, con frecuencia los parámetros de inclusión tienden a chocar con los criterios de inclusión (Bosniak, 2008, p. 1; Sachar, 2009, p. 33), dejando así espacio para correcciones interpretativas. También, crucialmente, muestra que los conflictos internos de pertenencia (culturales, étnicos o de otro tipo) no están fuera de lugar, pues la ciudadanía parece estar en tensión consigo misma: las grietas y fisuras fluyen desde dentro hacia afuera, por así decirlo.

Este es uno de los rasgos más problemáticos de la ciudadanía: su ambivalencia normativa. La ciudadanía se basa en la inclusión, pero al mismo tiempo, y por las mismas razones, la inclusión es un atributo que depende de la concepción que una comunidad tiene sobre sí misma, concepción que es, en sí misma, excluyente, ya que no admite ni atiende fácilmente a la crítica externa y la disputa (Bosniak, 2008, p. 3). Así, si la concepción de la ciudadanía argentina incluye a los wichís, parece que ellos pierden derecho a negociar su propia noción de pertenencia contra la membresía argentina.

A primera vista, algo que parece sensato es abordar el desorden conceptual de la ciudadanía. Según Linda Bosniak (2008), hay varias maneras de barajar el concepto de ciudadanía: en primer lugar, podemos distinguir la *concepción introspectiva de la ciudadanía* centrada en la naturaleza de las relaciones entre presuntos miembros (un poco como los argentinos ajenos a las voces de sus pueblos indígenas) de la *concepción limítrofe de ciudadanía*, centrada, en cambio, en la comunidad exclusiva y el cierre (un poco como Nottebohm en busca de protección sobre la ciudadanía de Liechtenstein). Sin embargo, cualquiera de las dos versiones

parece fundamentalmente mal equipada para hacer frente a las demandas de la membresía contemporánea porque los límites sociales y políticos de la membresía son todo el tiempo objeto de continua disputa y negociación (Bosniak, 2008, p. 7; Sachar, 2009, p. 41). Asimismo, me parece que ambas concepciones colapsan en la misma porque al final el cierre de la comunidad está determinado y justificado por los rasgos morales de la concepción introspectiva con respecto a las relaciones de grupo (Abizadeh, 2008). Como explicó Michael Walzer (1983): la membresía es el primer bien que una comunidad distribuye según su propio carácter cultural.

Un enfoque alternativo sería buscar alguna manera de ordenar la discusión mediante la distinción de diferentes tipos de preguntas que podemos hacer sobre la ciudadanía. Según Bosniak, siguiendo el camino del análisis conceptual podemos tomar varias rutas: podemos preguntarnos, en última instancia, *qué es la ciudadanía*, lo que nos dirá qué la hace especial entre otros tipos de membresía. Además, podríamos preguntar *dónde tiene lugar la ciudadanía*, lo que nos informa sobre su alcance y límites. Finalmente, podemos preguntarnos *quién es un ciudadano*, lo que nos determinará el conjunto de principios que establecen la clausura del grupo. Pero este enfoque, aunque profundo y productivo, sólo amplía el problema, al abrir la puerta a todo tipo de discusiones sobre ciudadanía, sea económica, social, animal, humana, etcétera (Bosniak, 2008, p. 13).

Tal vez este tipo de expansión conceptual es la razón por la que, en algún momento entre la segunda mitad del siglo XX y el comienzo de éste, algunos filósofos pensaron en traducir cada tema de las teorías de la justicia distributiva en la gramática de la ciudadanía, pero perdiendo las limitaciones de la abstracción de una manera que, problemas concretos como la injusticia estructural, la estabilidad y el apoyo y la política de identidad, podrían abordarse con éxito, mientras los estudiosos de la justicia seguían explorando los matices conceptuales del consenso ideal y la igualdad teórica (Kymlicka y Norman, 2015, pp. 212 y 213).[3] Pero para mí, el estado actual de expansión con respecto a la naturaleza, el alcance y el lugar de la ciudadanía, requiere que en su lugar demos un paso atrás —tal vez al mismo tiempo permitimos la expansión— y procedamos, más bien

[3] *Cfr.* Marshall, T. (1965). Citizenship and Social Class. En *Class, Citizenship and Social Development* (pp. 71-134). Cambridge University Prees; Kymlicka, W. & Norman, W.(2005). Citizenship. En R. G. Frey & C. H. Wellman (Eds.). *A Companion to Applied Ethics* (pp. 2010-223). Blackwell; Macedo, S... (1996). Community, Diversity, and Civic Education: Toward a Liberal Political Science of Group Life. *Social Philosophy and Policy*, *13*(1), 240-268; Carens, J. (2000). *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness*. Oxford University Press on Demand; Miller, D. (2000). *Citizenship and National Identity*. Cambridge Polity Press.

negativamente, por eliminación. Esto significa buscar primero un sentido claro de lo que la ciudadanía no debe ser para tener una mejor idea de lo que sí debe ser.[4]

En este sentido, creo que debemos tratar de construir un modelo orientado a la opresión que siga este camino de eliminación negativa, haciendo un mapa del panorama de las injusticias estructurales que sufrimos debido a nuestra ciudadanía. Todos somos ciudadanos y, sin embargo, podemos preguntarnos de qué diferentes maneras hemos sido perjudicados no a pesar de nuestra ciudadanía, sino, más bien, como resultado de cualquier expresión de la naturaleza de nuestra ciudadanía; es decir, la identidad que cultiva, su condición, sus reclamos políticos o las virtudes que defiende. Para ver esto, considere los siguientes casos:

Cancún se encuentra en el área del Caribe mexicano y es un destino deseado por algunos turistas blancos estadounidenses. Estos turistas se alojan en una zona contenida de la laguna, disfrutando así de un acceso exclusivo y restringido a las playas y piscinas. Los lugareños viven en la ciudad de Cancún, que está separada de la zona hotelera. Ahora bien, Kante es un hombre maya de 20 años que estudia la licenciatura en administración hotelera y, por lo general, no se le permite estar en las áreas del hotel, excepto cuando está trabajando. En la zona hotelera los turistas se enfrentan a un ambiente cuidadosamente diseñado para que puedan sentirse dentro de México, pero no de una manera que podría hacerlos sentir demasiado ajenos. Kante y sus compañeros de trabajo están capacitados para encajar en este espectáculo: aprenden cómo acercarse a los turistas, cómo sonreírles y cómo acomodar sus idiosincrasias y particularidades etnoculturales. Asimismo, Kante y otros trabajadores mayas a menudo son exotizados para la mirada de los turistas como parte del espectáculo que los hoteles muestran para su beneficio, de manera que los lugareños tienen prohibido ser ellos mismos alrededor de los turistas.

En cierta medida, y en este contexto, las relaciones entre los turistas y los trabajadores locales como Kante no son meros intercambios de tra-

[4] Hasta cierto punto, la propia Bosniak tropieza con esto cuando se da cuenta de que realmente tiene sentido hablar de la ciudadanía de los extranjeros, sobre todo cuando observamos cómo la ciudadanía, como condición, choca con la ciudadanía política y legal. Este es el caso destacado por la charla de ciudadanía de segunda clase: "…que son personas que disfrutan de la ciudadanía de estatus pero que, sin embargo, se les niega el disfrute de los derechos de ciudadanía, o «ciudadanía igual». A la inversa, se podría decir que los extranjeros disfrutan de ciertos incidentes de «ciudadanía igual» en nuestra sociedad actual, en virtud de poseer una importante gama de derechos fundamentales a pesar de su falta de ciudadanía" (Bozniak, 2008, p. 15). Esto muestra cómo la ciudadanía de estatus, la legal y la normativa son analíticamente distintas de una manera que requiere un enfoque negativo para trazar sus límites.

bajo. De los intercambios laborales surgen otras asimetrías donde los turistas disfrutan de la confirmación de su privilegio y superioridad por el servicio recatado de la fuerza de trabajo local. La ciudadanía se hilvana en la naturaleza estructural e institucionalizada de muchas de estas asimetrías, desventajas, identidades, subordinación, explotación, discriminación, desempoderamiento y otras formas de opresión. No importa quién eres para determinar si perteneces a las zonas de playa; importa de dónde eres. Como dice Young, esta forma de auto e identificación colectiva sirve como un "reconocimiento del poder de las reglas sobre mi vida debido a mi linaje o estatus burocrático" (Young, 2002).

Ahora, alguien puede objetar que los centros vacacionales son lugares liminales diseñados para la tolerancia, por lo que estos rasgos que refrendan la opresión involucrada en formas de ciudadanía son, obviamente, exacerbados por la interacción local-turista; pero tal vez no son persistentes o sistemáticos en otros espacios sociales más familiares, como universidades y clubs. Sin embargo, creo que en lugares como América Latina tendemos a experimentar la ciudadanía precisamente en esos términos: como el espacio donde ocurre la opresión y no siempre como la protección contra de ella.

Por supuesto, esta experiencia no es homogénea. El privilegio puede proteger a un individuo de este tipo de experiencias, pero a medida que la vulnerabilidad de alguien aumenta por la interseccionalidad de diferentes membresías a grupos socialmente devaluados de acuerdo con el género o las distinciones étnicas, nacionales, raciales y de clase, su experiencia de ciudadanía tiende a normalizar o naturalizar diferentes formas de opresión. En este sentido, la ciudadanía y sus prácticas moralmente problemáticas pueden ser instrumentales para legitimar muchas de estas formas de opresión. Como señala Bosniak (2008, p. 12): "Caracterizar prácticas, instituciones o experiencias en el lenguaje de la ciudadanía es darles un reconocimiento político sustancial y valor social [...] Describir aspectos del mundo en el lenguaje de la ciudadanía es un acto político legitimador". Este es, obviamente, el caso cuando la ciudadanía proporciona acceso a los derechos; pero, por desgracia, cuando se convierte en el espacio de la opresión, la ciudadanía también normaliza los males.

Consideremos ahora el siguiente ejemplo: en cierto banco estadounidense, un grupo de analistas recibe su retroalimentación anual a través de Zoom. El personal directivo es internacional: un supervisor ruso y una ejecutiva francesa. Fernando, un analista líder de 30 años, es elogiado por su jefa francesa Catherine, mientras Yuri pide al resto del equipo que siga el ejemplo de Fernando, quien es especialmente elogiado por sus buenas habilidades de escritura. Más tarde Tom, un compañero

de trabajo blanco nativo de Estados Unidos, bromeando, le dice a Fernando lo ridículo que es que le pidan que aprenda de las habilidades de escritura de Fernando, siendo él un hablante nativo del inglés. Además, debido al tipo de cambio de divisas, Fernando recibe un tercio de lo que reciben los otros analistas.

En este caso se ha eliminado el contexto liminal del lugar de vacaciones y las fronteras mismas, ya que las interacciones se mantienen en reuniones virtuales; pero la dinámica de discriminación, la explotación, la subordinación y otras formas de opresión permanecen sostenidas por la diferencia de ciudadanía entre Fernando y sus colegas. Quizá ahora está quedando claro que lo que estos casos tienen en común es que ambos muestran la naturaleza conflictiva de la pertenencia en nuestro mundo social actual. De hecho, una de las particularidades más omnipresentes de nuestro tiempo es la fragmentación y multiplicación de diferentes formas de pertenencia. Los grupos ceremoniales y tradicionales que solían ser familiares, decisivos y primitivos para determinar nuestra pertenencia e identidad, parecen ahora chocar y superponerse entre sí, haciendo demandas que compiten, producen contradicciones conceptuales y desafían la coherencia de nuestro marco teórico. Sin embargo, el Estado nacional sigue siendo el nodo donde todas las concepciones de ciudadanía todavía gravitan, por lo que la ciudadanía aún es la principal forma de pertenencia y configuración dentro del grupo. Pero cada vez más, la interacción internacional e intercultural que nuestro mundo global permite nos está brindando oportunidades para desafiar la ciudadanía legal y sus concepciones.

Por otra parte, esta agenda también tendría el problema de ser expansionista si no estuviera delimitada por un cambio de metodología y por objetivos normativos. En efecto, este desafío que estoy destacando implica un cambio metodológico que documente los daños injustos y el mal moral que sufrimos; mas no a pesar de que somos ciudadanos, sino, más bien, debido a ello. La idea es emplear un enfoque crítico de descubrimiento para centrarse primero en la injusticia estructural producida por diferentes concepciones y dominios de la ciudadanía con el fin de adquirir una idea más detallada de lo que la ciudadanía no debe ser. El resultado es establecer un punto de vista crítico para desafiar las concepciones introspectivas y fronterizas, destacando el tipo de injusticias estructurales que ambas producen.

Sin embargo, en este caso el enfoque crítico, en sí mismo, no es suficiente, ya que *ciudadanía* es un concepto normativo. No podría ser suficiente ofrecer un diagnóstico de los males de ser ciudadano, sino que a medida que avanzamos necesitamos integrar los límites y fron-

teras que descubrimos con el concepto normativo. La esperanza es que surja un nuevo modelo de ciudadanía que pueda satisfacer los desafíos actuales o, al menos, que se pueda construir un *desiderata* para discutir qué tipo de concepciones de ciudadanía se requieren para enfrentar nuestra situación actual.

POLETH (Teorías Políticas, Jurídicas y Éticas) es un grupo de investigación multidisciplinario (integrado por estudiantes e investigadores) que ha seguido una agenda de investigación similar a la que he esbozado anteriormente. Después de sumergirnos en el concepto de discriminación y en los agravios y perjuicios que son distintivos de ese tipo de opresión, decidimos que necesitábamos tomar lo que habíamos aprendido sobre actos discriminatorios y discriminación estructural y trasladarlo al campo gravitacional de la ciudadanía.[5] Tal vez la esperanza fuera que con este movimiento pudiéramos descubrir más sobre el verdadero sitio y la dimensión de las formas persistentes de injusticia.

Durante el último año y medio hemos estado leyendo y discutiendo diferentes formas de mapear el tipo de opresión que surge como resultado de las prácticas y rasgos normativos de la ciudadanía. Asimismo, para contrastar nuestro diagnóstico y las conclusiones normativas, pedimos a otros filósofos extranjeros que se unan a la conversación. Este intercambio tuvo lugar los días 13 y 14 de junio de 2022 en el Instituto de Investigaciones Jurídicas de la UNAM, donde nuestros distinguidos invitados y miembros de POLETH deliberaron exhaustivamente sobre el rol normativo de la ciudadanía en el mundo contemporáneo y las diferentes injusticias y casos de opresión que ese rol produce.

Con base en lo anterior, los dos artículos que ofrecen un enfoque que, considero, se ajusta más al que dibujé previamente, fueron los de Michael Blake, por un lado, y Luis Xavier López-Farjeat y Tatiana Lozano, por el otro. Lozano y López-Farjeat abogan por una forma de confederalismo democrático que podría establecer una especie de término medio aristotélico entre dos opuestos problemáticos: la ciudadanía cosmopolita y las formas particularistas o localistas de pertenencia. Ambos extremos tienden a perjudicar a todos los que no son ciudadanos modelo o, mejor dicho, a los que no encajan de forma perfecta en la ciudadanía como categoría excluyente, como los migrantes y los pueblos indígenas. Según López-Farjeat y Lozano, en "Confederalismo democrático: una alternativa para afrontar las tensiones entre las ciudadanías global y local", una concepción de ciudadanía cosmopolita falla en tener en cuenta las desigual-

[5] El resultado de este proyecto de investigación puede encontrarse en español en Muñoz & Camacho (2022). http://www.librosoa.unam.mx/bitstream/handle/123456789/3575/Trato%20de%20sombras.pdf?sequence=1&isAllowed=y

dades reales producto de las dinámicas globales entre la raza y la cultura, porque el cosmopolitismo se construye, en gran medida, en torno a una forma de vida etnocéntrica (occidental) y metropolitana.

En contraste, una concepción local de ciudadanía, encarnada, por ejemplo, por los zapatistas, puede ser fuertemente excluyente para todos aquellos que no pertenecen a la comunidad o no se ajustan a sus formas. El confederalismo democrático sería una alternativa porque quizá pueda establecer formas de autogobierno y cooperación del lado de las instituciones gubernamentales oficiales. Esto, a su vez, debería ayudar a procesar conflictos y confrontaciones morales y legales como el que enfrentan los wichís y las instituciones argentinas.

Del mismo modo, Michael Blake nos deslumbra con un artículo dedicado a mostrarnos cómo el turismo internacional puede ser un espacio de injusticias políticas y distributivas. Para demostrarlo, en "Todos odian a un turista: viajes por el mundo, trabajo epistémico y ciudadanía local" se centra en dos grandes preocupaciones éticas producidas por el turismo internacional: en primer lugar, analiza la falta de reciprocidad entre los lugareños y el turista que quizá establece buenas razones para un caso de injusticia epistémica. Es importante destacar que la industria del turismo hace que los trabajadores locales aprendan a actuar su cultura para los turistas. La falta de reciprocidad o injusticia se traduce en los beneficios que el turista obtiene en términos de recursos culturales y de entretenimiento, que no conllevan un coste similar en términos del trabajo epistémico que implica el intercambio. En segundo lugar, este tipo de asimetrías puede suponer un daño a la capacidad de los locales para la agencia política, y en última instancia, para participar plenamente como ciudadanos en su propia comunidad política. Según Blake, esto nos permite destacar una forma específica de daño epistémico: dichos problemas pueden disminuir sistemáticamente la competencia local en la participación política y el compromiso con los conciudadanos. Este tipo de injusticia estructural implica que la moralidad puede requerir una mayor disposición del turista para ser consciente de su responsabilidad por personas como Kente y sus compañeros de trabajo, para así establecer un trabajo epistémico justo durante su visita.

Presumiblemente, el confederalismo democrático de López-Farjeat y Lozano requerirá los medios y tecnologías necesarios para realizar una enorme cantidad de trabajo epistémico propio si pudiera aspirar a conciliar las expectativas de los localistas y los globalistas. Pero como expliqué antes, las contradicciones de la ciudadanía no permanecen dentro de la comunidad política; la ciudadanía y su tensión siguen a la gente en movimiento. Por lo tanto, antes de hacer un recuento detallado del tra-

bajo epistémico que requieren las instituciones globales, tal vez necesitamos mapear las formas de opresión con un alcance internacional.

Alex Sager hace justo eso, entregándonos "Ciudadanía republicana radical para un mundo en movimiento". Sin embargo, en lugar de tomar la opresión como un todo, Sager se enfoca en el problema de la dominación tomando el enfoque republicano. En este sentido, busca un sustituto del conocido modelo de democracia liberal estatista mediante el examen histórico de varias alternativas. Y el estándar empleado en el examen histórico es la no dominación (participación activa e igualitaria de las personas sujetas al poder), tal como se encuentra en la teoría republicana radical que fundamenta la no dominación. En su artículo, Sager establece primero por qué el modelo estatista dominante de organización política no aborda los peligros colectivos que enfrenta la humanidad y, en general, impide el logro de la justicia. Luego describe cómo se ve una alternativa desde una perspectiva republicana radical y, por último, proporciona algunas directrices sobre los esfuerzos más urgentes para rehacer el mundo. De manera crucial, defiende una forma de federalismo transnacional contra las formas vestigiales del colonialismo. Por ello se centra en las condiciones de los migrantes para afirmar que cualquier conjunto de instituciones que garanticen la no dominación requerirá, necesariamente, fronteras mayormente liberalizadas o abiertas.

Sería interesante reflexionar sobre las similitudes y distinciones entre el confederalismo democrático de López-Farjeat y Lozano y el federalismo transnacional de Sager, sobre todo en lo que se refiere a los desafíos que representan los problemas reales del mundo, como la crisis de los refugiados. De hecho, las formas internacionales de opresión son particularmente preocupantes en el caso de las personas más vulnerables en condiciones de movilidad. Pero para eso podemos considerar "Reexaminando el refugio: la crisis migratoria de Centroamérica", donde Stephen Macedo estudia los debates normativos en torno a la cuestión general de quién debería calificar para el estatus de refugiado. Esto nos permitirá evaluar el estándar utilizado para decidir quién califica para el mencionado estatus de refugiado o para el estatus de protección temporal (TPS, por sus siglas en inglés). Pero el problema es la extensión del estatus. Parece que la moralidad requiere que para los receptores de TPS a largo plazo, como con los indocumentados a largo plazo, haya un camino hacia la ciudadanía estadounidense plena. Sin embargo, además de las preguntas conceptuales y reglamentarias en torno a la norma, Macedo destaca que en el mundo real el reto es hacer que los países poderosos cooperen en las soluciones, en especial mediante el apoyo a las instituciones internacionales. Así, Macedo concluye que "los migrantes estadounidenses

son rehenes de la política profundamente disfuncional de los Estados Unidos, que por lo tanto debe añadirse a la lista de cosas que amenazan a la humanidad".

Al menos algunos de los rasgos esenciales de esta disfunción se ilustran con detalle en "Regímenes de ciudadanía y exclusión: análisis histórico de la legislación sobre migración ilegal en los Estados Unidos", donde Rubén Chávez, Alejandro Mosqueda y Camelia Tigau comparten una visión pesimista de la ciudadanía por la desigual distribución de sus beneficios en el mundo. A este respecto, la ciudadanía no se refiere tanto a la inclusión, sino, más bien, a la inclusión de algunos a expensas de muchos otros. Esta visión pesimista les permite evaluar la equidad del régimen de ciudadanía en Estados Unidos, al comparar la legislación propuesta contra la inmigración no autorizada. Según Chávez, Mosqueda y Tigau, el régimen de ciudadanía estadounidense carece de equidad porque la gran mayoría de las propuestas legislativas están motivadas por los ciclos electorales, por lo tanto, los políticos que buscan puestos de elección popular explotan los sentimientos antiinmigrantes para su beneficio político. Además, existe un gran incentivo para impedir que los inmigrantes obtengan la ciudadanía: las presiones del mercado para preservar una mano de obra de bajo costo.

Ambos artículos, el de Macedo y el de Chávez, Mosqueda y Tigau, llegaron a la conclusión de que debemos repensar la ciudadanía desde una perspectiva internacional, multilateral e incluso cosmopolita. Así que quizá el lector disfrute especulando de qué manera, ya sea el confederalismo democrático (López-Farjeat y Lozano) o el federalismo transnacional (Sager), podrían ayudar en el problema y el contexto tan brillantemente ilustrado por Macedo, Chávez, Mosqueda y Tigau.

Es posible que en cualquiera de los dos casos fuera necesario financiar la gobernanza internacional, pero tal vez se podría asegurar un flujo constante de efectivo de los propios migrantes a través de sus sociedades de origen. De hecho, en un enfoque totalmente normativo, Doug Bamford nos ha presentado la afirmación de que los migrantes internacionales pueden retener la obligación de pagar impuestos a las sociedades de origen. En "Las obligaciones en un mundo internacional: la importancia de la residencia pasada y la ciudadanía", Bamford explica cómo, a su vez, las sociedades receptoras deben reconocer el deber de sus residentes internacionales y asegurarse de que este deber se descarga de manera adecuada para aliviar las demandas de justicia. Tal vez las sociedades receptoras puedan cumplir esta obligación tributaria en nombre de sus residentes internacionales no sólo como una forma de compensación para los Estados que salen perdiendo como resultado de la "fuga de cere-

bros", sino también para enfrentar los desafíos financieros que establecen la necesidad de las instituciones mundiales.

En cualquier caso, este tipo de instituciones será mucho más vulnerable a los problemas familiares de las instituciones nacionales. En consecuencia, vale la pena considerar también lo que Lucero Fragoso tiene que decir sobre el efecto perjudicial que la corrupción tiene sobre los ciudadanos. En "Responsabilidad ciudadana frente a la corrupción estructural", Fragoso busca establecer el tipo de enfoque metodológico adecuado para enfrentar un problema estructural como la corrupción, con el fin de determinar lo que todos debemos hacer contra ella, pues, según, no necesitamos participar directamente en el soborno o el nepotismo para ser responsables de mantener las prácticas corruptas; al ser un mal estructural, todos compartimos la responsabilidad política. En tal sentido, el enfoque adecuado para abordar este tipo de corrupción de fondo es el de las responsabilidades colectivas. Desde allí vemos que tenemos responsabilidad política siempre y cuando aceptemos implícitamente los "esquemas e ideología" que sostienen y fortalecen el sistema social de la corrupción. Como resultado, los ciudadanos no sólo tienen el deber de denunciar públicamente los actos de soborno o de organizarse para llevar a cabo la transformación de las prácticas institucionales; tienen una responsabilidad colectiva de actuar para cambiar los esquemas e ideologías que sustentan el sistema social de la corrupción.

Ahora, por supuesto, la responsabilidad política es una concepción fragmentaria, por lo que, aunque todos sean culpables, no todos pueden ser considerados con el mismo grado de responsabilidad. La responsabilidad especial debe ser distribuida según las posiciones sociales. Tal vez este modelo de responsabilidad contra la corrupción podría reproducirse para abarcar a las instituciones internacionales, en particular teniendo en cuenta la creciente vulnerabilidad que estas instituciones muestran respecto del interés de las transnacionales y los Estados poderosos.

Por último, un recorrido por la injusticia que suponen las prácticas e instituciones que abarcan la ciudadanía no está completo sin, al menos, una visión desde el exterior. De hecho, es quizá la literatura sobre el estatus moral de los animales la que más ayuda a ensayar los límites del concepto de ciudadanía. En este orden de ideas, en su texto "Los derechos de ciudadanía de los gallos de Veracruz", Luis David Reyes pretende mostrar que México está liderando la tendencia actual de reconocer a los animales no humanos como sujetos de derechos, al reconocerles los derechos de ciudadanía. Aunque Reyes no se involucra con la injusticia sufrida como resultado de la ciudadanía, aborda los límites externos del concepto. En el artículo se argumenta que una reciente resolución

de la Suprema Corte de Justicia de México, relativa a una legislación local, debe interpretarse en el sentido de conceder derechos de ciudadanía a los animales no humanos que viven en el estado donde se aplica esa legislación. El documento comienza discutiendo el contexto en el que la ley relevante fue aprobada y luego impugnada, y también se examina el análisis y la resolución realizados por el tribunal supremo. El texto respalda esta resolución argumentando que, al menos bajo ciertas condiciones específicas, los derechos de los animales deben interpretarse como derechos de ciudadanía.

Esta vasta expedición a través de diferentes tipos de opresión e injusticias ha producido para cada uno de los miembros de POLETH una variedad de resultados. Hablando por mí, estoy más convencido que nunca de que el aspecto central de la opresión es la discriminación. En lo personal, he llegado a creer que en América Latina la mayoría de nosotros experimentamos la ciudadanía como una institución corrupta y fragmentada que, mientras ofrece algunas protecciones y prerrogativas, también nos expone a otros daños y males. Según esta intuición, la discriminación estructural incorpora la mayoría de los mecanismos y estrategias que la sociedad utiliza para el cierre social; es decir, para mantener el acceso a los recursos y las oportunidades disponibles principalmente para los grupos sociales valorados. Para ello estoy terminando un libro —con Muñoz Oliveira, UNAM-CIALC— donde desarrollamos una concepción de la discriminación estructural como forma de ciudadanía corrupta.[6]

Por otro lado, el resto de los miembros de POLETH ha llegado —en su mayoría— a la conclusión de que necesitamos una mejor comprensión de cómo los diferentes tipos de opresión se relacionan entre sí en contextos sociales específicos. La esperanza es que una mejor comprensión del funcionamiento de la opresión nos aclare lo que significa sufrir daños y perjuicios debido a la ciudadanía propia y lo que una concepción normativa de la ciudadanía requiere de la pertenencia en el mundo real. Mientras tanto, espero que el lector pueda unirse a nosotros en la conversación y ayudarnos a enfrentar el intrincado dilema de la ciudadanía en el siglo XXI.

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[6] Esperamos que este libro esté disponible a finales de 2023 o inicios del 2024.

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Editorial note

Bonds, Boundaries and Bundles: the Normative Role of Citizenship[1]

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The Wichís are a 13-thousand-year-old South American indigenous people inhabiting the basins of the Bermejo river across Bolivia and Argentina. In 2006 the Argentinian state prosecuted Qa'tu, a 28-year-old Wichí man for allegedly raping the underage daughter of his concubine, who, as a result, became pregnant. The Argentinian state, on one hand, protects its citizens against what it considers a severe sexual offense. Nevertheless, many women in the Wichí community, and particularly the alleged victims, protested against the coercive action undertaken by Argentinian law. The Wichí community did not recognize the Argentinian law prohibiting this kind of sexual exchanges. The Wichí people, on the other hand, protect the interest of young females to initiate intercourse after their first menstruation in order to explore and freely exercise their sexuality. In fact, Wichí women consider themselves all sisters-in-law.[2] During the judicial hearings, the alleged victim testified in favor of the alleged

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[2] This example is discussed Bidaseca, K. (2011). Mujeres blancas buscando salvar a mujeres color café: desigualdad, colonialismo jurídico y feminismo postcolonial. *Andamios. Revista de Investigación Social*, *8*(17), 61-89. I am grateful with Paula Eloísa Sánchez Luna for pointing me in this direction.

rapist. She said "I am a woman, Qa'tu's wife and mother of Menajen… I was a free woman when I chose him. My mother, the women, and the community, all accepted what I wanted, but now my man is imprisoned, and I am not allowed to see him. White people's justice has to listen to me and free Qa'tu". White feminists strongly oppose a special-consideration prerogative suggested by a superior court in order to take into account cultural disagreements, arguing for a universal interpretation of the sexual integrity of children (Bidaseca, 2011). As Argentinian citizens, the Wichí are bound to obey the rules banning specific sexual behaviours, but as members of their political community they are equally bound to respect the interests of women who initiate intercourse even if they are too young to do so by Argentinian standards.

The issues concerning the moral judgment around conventional ages of consent across different cultural outlooks require dealing with complex disputes surrounding metaethics, epistemic justice, and hermeneutics. My intention here is not to discuss the transcultural ethics of consent. Rather, I wish only to underline the nature of this kind of conflict in terms of different notions of membership. I particularly wish to highlight how Anglo-American philosophical literature on citizenship tends to focus either on an ideal conception of citizenship or on a prospective conception of it.

Philosophers hailing from affluent countries tend to ask what concept of citizenship is more coherent with the rest of social ontology, or which concept is the most consistent with our practices (Carens, 2013; Bozniak, 2008; Miller, 2000; Walzer, 1983; Marshal, 1965). Alternatively, there are others who look to the future and ask what kind of concept of citizenship we ought to have if we want to face the challenges and new forms of freedom and mutual caring that the arising conditions are demanding. Such conditions include mass media, artificial intelligence, terrorism, mass migration, global warming, traditionally disenfranchised groups, among others (Donaldson y Kymlicka, 2016). But I suspect an important bias hinders these approaches, as they tend to conceal what I believe to be the most important problem of justice surrounding citizenship: The fact that for most of the world, citizenship seldom serves the purpose to establish relationships of social freedom and equality. For many people it is quite the opposite; it may even allow forms of oppression to continue across borders, peoples, and time. In that vein, I believe one of the main challenges the Wichís face has to do with how Argentinian citizenship frames their group regarding the rights and duties it imposes upon members of Argentinian first nations.

This of course needs some unpacking, so in this introduction, I will take the chance to explain how the papers contained in this volume fit this

agenda of research, and how some of the participants wish to move forward. Hopefully this will help clarify in which way they offer fresh outlooks into citizenship scholarship. But before I proceeded to the arguments, at the outset, let me point out there are at least three familiar facts often overlooked by leading literature, but which are nonetheless fairly palpable for Latin American researchers. First, Latin American states encompass a great number of ethnocultural groups and peoples. When states like the United Kingdom or Spain struggle to maintain unity between just a few peoples, states like Bolivia, Perú and México have to deal with dozens or hundreds of different peoples, ethnocultural and linguistical minorities and many other contemporary forms of identity, legal status, civic virtue, and belonging. Secondly, Latin America is heavily affected by discrimination, exclusion, and inequality. The social groups perceived as the less valuable, are systematically excluded from education, opportunities, and resources. In contrast, to be a white Catholic male of upper middle-class or high-class upbringing guarantees all the goods and rights entailed in citizenship. But for the rest of the groups, their access to goods and rights remains conditional or arbitrary. Finally, the same happens outside each country's borders. As many have remarked, being a citizen of an affluent society resembles a form of god-given privilege just as much as being a Bora woman in Perú does not provide the same access to rights and goods as being a white male Peruvian citizen. Similarly, to be a Nicaraguan citizen outside Nicaragua does not offer the same access to international borders as being a Canadian citizen outside Canada.

I understand citizenship as a form of membership, either as a form of belonging (legal or otherwise) to a political or self-determined body, a form of reciprocal self-identification to such groups, a collective exercise of the virtues needed to actualize those forms of membership, or a combination of the above (Kymlicka y Norman, 2005, p. 211). Precisely because citizenship could be expressed as simultaneously encompassing legal jurisdiction, moral scope, identity, and political virtues, it is often invoked to convey the kind of inclusive bond between free and equal individuals which has, at least in theory, become so characteristic of democratic contemporary liberal states (Rawls, 2001). However, this apparently straightforward notion is easily crushed by allegiance and belonging conflicts such as the one Wichís face against Argentinian justice.

Wichí membership and Argentinian membership seem to clash with each other as forms of legal and moral allegiance to a body of rules, values, principles or accounts of what amounts to be a good Argentinian or a good Wichí. Argentinian feminists may very well have good reasons to question underage sexual intercourse as a harm to the autonomy

of young women, yet the voice of Wichí women was systematically silenced during the process, also harming the very autonomy they sought to protect. Perhaps Wichí people's devaluated social status in Argentina, as an ancient first nation, was influential to initially make the court overlook their interpretations and perceptions about the fact, until a higher court ordered the suspension of the process, awaiting an anthropological expert report to confirm the appropriate age of consent among Wichís (Bidaseca, 2011).

As I said above, it is unclear how the rights and obligations Argentinian citizenship upholds could be reconciled with Wichí membership without denying Wichís the same kind of legal, moral, and social scope Argentinian membership has, making them in fact a subordinated people without citizenship. Some may argue the cultural conundrum is beside the point because, as heated as these controversies may become within the scholarship on moral and legal relativism, it remains clear that citizenship is for citizens, so the duties of Wichís as Argentinian citizens should be straightforward at least formally even though this may raise controversies in the realm of metaethics or judicial review. Still, even in formalistic terms, citizenship remains fragmented and problematic.

In order to see this, consider the case of Friedrich Notthebohm, a German citizen by birth and soil who migrated to Guatemala, becoming a resident for most of his life. Notthebohm never applied for Guatemalan citizenship, but at some point, he decided to apply for a Liechtenstein passport as he was planning to use Lichtenstein citizenship to shield himself against sanctions enforced on German citizens during the Second World War. The Guatemalan government arrested Notthebohm, and he issued a petition for Liechtenstein to sue the Guatemalan government for unjust treatment. Even though Notthebohm had in fact been granted Liechtenstein citizenship, it is not clear that he should not be treated as a Guatemalan citizen despite the fact he never applied for it.

This could mean citizenship is anything but straightforward. Even in cases we may withdraw to the formalistic aspects of the law specifying who is a citizen and who is not. there may still be room for interpretation and dispute. In the case of Notthebohm, for example, the international court proposed the principle of real and effective citizenship in order to abandon the formalistic requirements of citizenship, looking instead for the allocation of membership according to the context which pointed to Guatemalan membership even if Notthebohm had never filled out an application.

Nevertheless, if we are forced to look into the context as in the Wichís case, very often it seems citizenship may very well present itself as a para-

dox. It consolidates some kind of inclusive group by means of establishing formal parameters for exclusion, but very often the parameters of inclusion tend to clash with the grounds for said inclusion (Bosniak, 2008, p. 1; Sachar, 2009, p. 30), thus making room for interpretative corrections. Crucially, it also shows internal conflicts of membership (cultural, ethnic or otherwise) are not beside the point, as citizenship seems in tension with itself: the cracks and fissures flow from within outwards.

This is one of the most problematic traits of citizenship: its normative ambivalence. Citizenship is predicated on inclusion, but at the same time and for the same reasons, inclusion is an attribute parasitic on the conception that one community has about itself, which is in itself exclusive, as it does not easily admit or welcome external criticism and contestation (Bosniak, 2008, p. 3). So, if the conception of Argentinian citizenry includes Wichís, it seems Wichís would not be entitled to negotiate their own notion of belonging against that of Argentinian membership.

On the face of it, one thing it seems sensible to do is to deal with the conceptual untidiness of citizenship. According to Linda Bosniak (2008), there are several ways to shuffle the concept of citizenship. First, we can distinguish the *inward-looking conception of citizenship* focused on the nature of the relations among presumed members —like Argentinians being oblivious of the voices of their first nations— and *the boundary-conscious citizenship*, focused instead on community exclusion —a bit like Notthebohm seeking protection from Liechtenstein citizenship. Either version, however, seems fundamentally ill equipped to handle the demands of contemporary membership, whose social and political boundaries are subject to ongoing contestation and negotiation (Bosniak, 2008, p. 7; Sachar, 2009, p. 41). Additionally, it seems to me, both concepts collapse into an all-encompassing inward-looking view, with community closure being determined and justified by the inward-looking moral quality of group relations (Abizadeh, 2008). As Michael Walzer explained, membership is the first commodity a community distributes as in accordance with its own cultural character (Walzer, 1983).

An alternative approach is to look for a way to organize the discussion by distinguishing among different kind of questions we may ask about citizenship. According to Bosniak, we can follow several routes in the path of conceptual analysis. We may ultimately ask *what citizenship is*, which will tell us what makes it special among other kinds of membership. We could also ask *where citizenship takes place*, which may inform us on its scope and boundaries. Finally, we may ask *who is a citizen*, which should provide the set of principles determining exclusion. But this approach, although profound and productive, only expands the problem as it opens the floor

to all kinds of discussions about economic citizenship, social citizenship, animal citizenship, human citizenship, and the list goes on (Bosniak, 2008, p. 13).

Perhaps this kind of conceptual expansion may explain why, at some point between the second half of the 20th century and the beginning of this century, some philosophers proposed to translate each topic of the theories of distributive justice into the grammar of citizenship, but without the constraints of abstraction. In their view, this could help address concrete problems, such as structural injustice, stability and support, and the politics of identity while justice scholars continued to explore the conceptual nuances of ideal consensus and theoretical equality (Kymlicka & Norman, 2015, pp. 212 and 213).[3] In contrast, to me, the current expansion regarding the nature, scope and site of citizenship requires that we instead take a step back —perhaps at the same time we allow the expansion— and proceed rather negatively by elimination. This means to seek first a clear sense of what citizenship should not be, to then have a better idea of what citizenship should be.[4]

In this vein I believe we must try to construct an oppression-oriented model that follows this path of negative elimination by mapping the landscape of the structural injustices bestowed upon us through our citizenship. We are all citizens and yet we can ask in which different ways we have been wronged, not despite our citizenship, but rather as a result of any expression of our citizenship's nature: the identity it harvests, its status compared to other citizenships, the politics or the virtues it upholds. In order to see this, consider the following cases:

[3] See for instance: Marshall, T. (1965). Citizenship and Social Class. En *Class, Citizenship and Social Development* (pp. 71-134). Cambridge University Prees; Kymlicka, W. & Norman, W. (2005). Citizenship. En R. G. Frey & C. H. Wellman (eds.). *A Companion to Applied Ethics* (pp. 2010-223). Blackwell; Macedo, S. (1996). *Community, Diversity, and Civic Education: Toward a Liberal Political Science of Group Life. Social Philosophy and Policy*, *13*(1), 240-268; Carens, J. (2000). *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness*. Oxford University Press on Demand; Miller, D. (2000). *Citizenship and National Identity*. Cambridge Polity Press.

[4] To some extent Bosniak herself stumbles with this, when she realizes that it actually makes sense to talk about *the citizenship of aliens*, particularly when we notice how citizenship as a status clashes with political and legal citizenship. This is the case highlighted by the talk of second-class citizenship "…which are people who enjoy status citizenship but who nevertheless are denied the enjoyment of citizenship rights, or "equal citizenship". Conversely, aliens could be said to enjoy certain incidents of "equal citizenship" in our society today by virtue of possessing an important range of fundamental rights despite their lack of status citizenship" (Bozniak, 2008, p. 15). This shows how status citizenship, legal citizenship, and normative citizenship are analytically distinct in a way that requires a negative approach in order to draw their boundaries.

Cancún is located in the Mexican Caribbean coast, and it is a desired destination for some US white tourists. These tourists are accommodated in a contained area of the Cancún lagoon, thus enjoying exclusive and restricted access to the area's beaches and pools. Locals live in Cancun city, which stands apart from the hotels area. Kante is a Mayan 20-year-old male studying a bachelor's degree in hotel administration. He is not usually allowed in the hotels area unless he is working. In the hotels area, tourists are presented with a carefully manicured environment so they can feel they are in Mexico, but not in a way that could make them feel too alien. Kante and his work colleagues are trained to fit into this performance: they must approach the tourists in a certain way, smile at them and accommodate their idiosyncrasies and ethno-cultural particularities. Kante and other Mayan workers are often exoticized for the gaze of the tourists as part of the show the hotels put up for tourists' benefit. Locals are, in effect, forbidden from being themselves around tourists.

To some extent, in this context, the relationships between tourists and local workers such as Kante are not mere economic or labour exchanges. Crucially, other asymmetries emerge from the labour exchanges, where tourists enjoy the confirmation of their privilege and superiority by the demure service of the local workforce. Citizenship cuts across the structural and institutionalized nature of many of these asymmetries in the form of concrete disadvantages, identities, subordination, exploitation, discrimination, disempowerment, and other forms of oppression. A person's belonging in the hotels or beach areas is not contingent on who they are, but where they are from. As Young puts it, this form of self and collective identification serves as an "…acknowledgement of the power of the rules over my life because of my lineage or bureaucratic status" (Young, 2002).

Now, someone may object that holiday resorts are liminal places designed for tolerance of such differences, so these traits signing oppression entailed in forms of citizenship are obviously exacerbated by the interaction between locals and tourists. After all, perhaps such dynamics are not persistent or systematic in other more familiar social spaces, such as a country club or a university. However, I believe in places such as Latin America we tend to experience citizenship precisely in those terms: as the site where oppression happens and not always as the protection against forms of oppression.

Of course, this experience is not homogeneous. Status-privilege conditions can shield an individual from this kind of experiences. Nonetheless, as a person's vulnerability increases by the intersectionality of different memberships to socially devaluated groups according to gender or ethnic, national, racial, and class distinctions, their experience of citizen-

ship tends to normalize or naturalize different forms of oppression. In this sense, citizenship and its morally problematic practices may be instrumental to legitimize many of these forms of oppression. As Bosniak remarks: "to characterize practices or institutions or experiences in the language of citizenship is to afford them substantial political recognition and social value… Describing aspects of the world in the language of citizenship is a legitimizing political act..." (Bosniak, 2008, p. 12). This is obviously the case when citizenship provides access to rights, but sadly, as it becomes the site of oppression, citizenship also normalizes wrongs.

Consider now the following example. In a certain US bank, a group of financial analysts receive their annual feedback via Zoom. The senior staff is international: a Russian supervisor and a French manager. The feedback was positive for Fernando, a 30-year-old Mexican analyst who receives significant praise from his French boss, Catherine, while the Russian supervisor, Yuri, asks the rest of the team to follow Fernando's example. Fernando is particularly praised for his excellent writing skills. Later, Tom, a white male US-native co-worker, jokingly tells Fernando how ridiculous it is for him, a native English speaker, to be expected to follow and learn from Fernando's writing skills. Tom and Fernando have the same position, and despite Fernando earning a performance bonus, the currency exchange rate between the US and Mexico means Fernando's salary still adds up to about a third of what get the other Mexican analysts receive.

In this case the liminal context of the holiday site and the borders themselves have been removed, as the interactions are sustained in virtual meetings; but the dynamics of discrimination, exploitation, subordination and other forms of oppression are nonetheless sustained by the difference of citizenship between Fernando and his colleagues. Perhaps it is now becoming clear that these cases have in common how they both show the conflictive nature of belonging in our current social world. In fact, one of the most pervasive particularities of our time is the fragmentation and multiplication of different ways of belonging. The ceremonial and traditional groups that used to be straightforward, decisive, and primitive in their determination of our membership and identity, appear now to clash and overlap with each other. Such groups make competing demands, produce conceptual contradictions, and challenge the coherence of our theoretical framework. Yet, the nation-state remains the core where all conceptions of citizenship still gravitate, so citizenship remains the main form of belonging and in-group configuration. But more and more, the international and intercultural interaction that our globalised world allows is providing us with opportunities to challenge legal-bureaucratic citizenship and its conceptions.

To certain extent this agenda would be also expansionist if it is not delimited by methodological constrains and normative aims. Indeed, this challenge I am highlighting entails a methodological shift to follow the unjust harm and moral wrongdoing we suffer, not despite our citizenship, but rather because of it. The idea is to employ a critical discovery approach to focus first on the structural injustice produced by different conceptions and domains of citizenship. This would help us acquire a more detailed idea of what citizenship should not be. The upshot is to establish a critical viewpoint to challenge inward-looking and border-conscious conceptions by highlighting the kind of structural injustices produced by both. However, in this case, the critical approach in itself is insufficient, as citizenship is a normative concept. It could not be enough to offer a diagnosis of the evils of being a citizen. Rather, as we go, we need to integrate the limits and boundaries we discover into the normative concept. The hope is a new model of citizenship that could live up to current challenges would emerge, or at the very least, we may construct a desiderata in order to discuss which kinds of citizenship conceptions we require to face our current situation.

POLETH (Political, Legal and Ethical Theories) is a multidisciplinary research group integrated by students and researchers that has followed an investigation agenda akin to the one I sketched above. After immersing ourselves in the concept of discrimination and the wrongs and harms that are distinctive of that kind of oppression, we decided we needed to take what we have learned about discriminatory acts and structural discrimination into the gravitational field of citizenship.[5] With this move, we hope we can find out more about the true site and dimension of persistent forms of injustice.

During the last year and a half, we have read and discussed different ways to map the kinds of oppression arising as a result of the practices and normative traits of citizenship. In order to contrast our diagnosis and normative conclusions, we asked other philosophers from abroad to join into the conversation. This exchange took place in June 2022 at the Institute of Legal Research (UNAM), where our distinguished guests and POLETH members exhaustively deliberated about the normative role of citizenship in the contemporary world and the different injustices and instances of oppression that it could originate.

The two papers delivering an approach that I believe fits more closely with the one I describe above were Michael Blake's on one side, and Luis

[5] The result of that research project can be found in Spanish in Muñoz and Camacho (2022). http://www.librosoa.unam.mx/bitstream/handle/123456789/3575/Trato%20de%20sombras.pdf?sequence=1&isAllowed=y

Xavier López-Farjeat and Tatiana Lozano's on the other. Lozano and López-Farjeat argue for a form of democratic confederalism that could establish a sort of Aristotelian golden mean between two problematic opposites: cosmopolitan citizenship and particularist or localist forms of membership. Both extremes tend to be detrimental to all who are not model-citizens or rather, those who do not fit perfectly into citizenship as an exclusionist category, such as migrants and first nations. According to López-Farjeat and Lozano in "Democratic Confederalism: An Alternative for Facing Tensions Between Global Citizenship and Localist Citizenship", a conception of cosmopolitan citizenship fails in taking into account real-world inequalities resulting from the global dynamics of race and culture because cosmopolitanism is largely constructed around an ethnocentric (Western) and metropolitan way of life. In contrast, a localist conception of citizenship, endorsed for instance by Zapatistas, may be heavily exclusionary to all who do not belong to the community or do not conform to their ways. Democratic confederalism stands as an alternative because it may establish forms of self-rule and cooperation on the side of official government institutions. This, in turn, should help process moral and legal conflicts and confrontations such as the one between the Wichís and Argentinian government.

Similarly, Michael Blake dazzled with a paper devoted to showing how international tourism may be a site of structural, distributive, and political injustice. To show this, he focuses on two main ethical worries produced by international tourism. First, he looks into the lack of reciprocity between locals and tourists that perhaps establishes good grounds for a case of epistemic unfairness. Importantly, the tourism industry makes local workers learn how to perform their culture for tourists. The lack of reciprocity or unfairness comes from the benefits tourists gain in terms of cultural and entertainment resources, which do not entail a similar cost in terms of the epistemic labour involved in the exchange. Thus, it appears to be a one-way street. Second, this kind of asymmetry may pose a harm to the locals' capacity for political agency and, ultimately, to fully participate as citizens in their own political community. According to Blake, this highlights a specific form of epistemic harm: these two problems may systematically diminish locals' competence in political involvement and engagement with fellow citizens. This kind of structural injustice implies morality may require an increased willingness of the tourist to be aware of his or her responsibility for people like Kente and his fellow workers for fair epistemic labour during her or his visit.

Presumably, Lopez-Farjeat and Lozano's democratic confederalism will require the means and technologies needed to perform a huge amount

of epistemic labour of their own if it could aspire to reconcile localist and globalist expectations. However, But as I explained above, the contradictions of citizenship do not remain inside the political community. Citizenship and its tension follow people on the move. So, before working on a detailed account of the epistemic work required for institutions to be global, perhaps we need to map forms of oppression with an international scope.

Alex Sager does just that by delivering "Radical Republican Citizenship for a Mobile World". Instead of tackling oppression as a whole, Sager focuses on the problem of domination by taking the republican approach. In this vein, he seeks a substitute for the familiar statist liberal democracy model by means of the historical examination of several alternatives. The standard employed in this historical examination is active and equal participation of people subject to power as it stands in radical republican theory that grounds non-domination. In his paper, Sager first establishes why the dominant statist model of political organization fails to address the collective dangers humanity faces, effectively preventing the overall achievement of justice. He then sketches a possible alternative from a radical republican perspective, providing some guidelines on the efforts more urgently needed to remake the world. Crucially, Sager argues for a form of transnational federalism against the vestigial forms of colonialism. In order to do so, he focuses on the conditions of migrants to claim that any set of institutions strongly guaranteeing non-domination will necessarily require mostly liberalized or open borders.

It will be most interesting to reflect upon the similarities and distinctions between López-Farjeat and Lozano's democratic confederalism and Sager's transnational federalism, particularly considering the challenges presented by real-world predicaments such as the refugee crisis. Indeed, international forms of oppression are particularly worrisome in the case of the most vulnerable people experiencing mobility conditions. In order to do so, we may consider "Refugeehood reconsidered: The Central American Migration Crisis", where Stephen Macedo surveys normative debates around the general question of who should qualify for refugee status. This will allow us to assess the standard used to decide who qualifies for refugee status or rather to Temporary Protected Status (TPS). The problem is the extension of the status, as it seems that morality requires that for long-term TPS recipients, as with the long-term undocumented, there should be some path to full US citizenship. In reality, the existence of this path remains elusive or, for the more optimistic, simply unclear. But in addition to the conceptual and normative queries around the standard, Macedo stresses that in the real world the challenge is to ensure powerful

countries cooperate in the solutions mainly by supporting international institutions. Macedo concludes "American migrants are held hostage to the deeply dysfunctional politics of the US, which must therefore be added to the list of things that threaten humanity".

At least some of the essential traits of this dysfunctionality are illustrated in "Citizenship Regimes and Exclusion: Historical Analysis of Legislation on Illegalized Migration in the US", where Rubén Chávez, Alejandro Mosqueda, and Camelia Tigau share a pessimistic view regarding citizenship due to the unequal distribution of its benefits across the globe. In this regard, citizenship is not much about inclusion but rather about the inclusion of some at the expenses of the many. This pessimistic view allows the authors to assess the fairness of the US citizenship regime by comparing different pieces of proposed legislation against unauthorized immigration. According to Chávez, Mosqueda, and Tigau, the US citizenship regime lacks fairness because the great majority of legislative proposals are motivated by electoral cycles rather than by the task of legislating on citizenship itself. Thus, politicians running for office mainly exploit anti-immigrant sentiments for political gain. At the same time, market pressures facilitate a vast incentive to prevent immigrants from gaining citizenship in order to preserve a low-cost immigrant workforce.

Both papers, the first by Macedo and the second by Chávez, Mosqueda, and Tigau, reached a similar conclusion, indicating we ought to rethink citizenship from an international, multilateral, and even cosmopolitan perspective. The reader will perhaps enjoy speculating about the ways in which either democratic confederalism (López-Farjeat & Lozano) or transnational federalism (Sager) could help in the problem and the context so brilliantly illustrated by Macedo, Chávez, Mosqueda, and Tigau. Perhaps in either case the international governance arising would need significant funding, which could be secured from migrants themselves through their societies of origin. In fact, in a fully normative approach, Doug Bamford has presented us with the claim that international migrants may retain the obligation to pay taxes to their societies of origin. In turn, receiving societies should acknowledge the duty of their international residents and ensure it is discharged to alleviate claims of justice from other relevant states. In "Duties in an International World: The Importance of Past Residence and Citizenship", Bamford explains how such a calculation could even help determine the normative proportion of a person's total lifetime tax obligation. Perhaps receiving societies may discharge this tax obligation on behalf of their international residents, not only as a form of compensation for states that lose out as a result of "brain drain", but also to face the financial challenges that establish the need for global institutions.

In any case, this kind of institutions will be much more vulnerable to the familiar problems of domestic institutions. Consequently, it is worth considering what Lucero Fragoso has to say about the detrimental effect corruption has on citizens. In "Citizen responsibility for structural corruption", Fragoso seeks to establish the kind of methodological approach appropriate to face a structural problem such as corruption in order to determine what we all ought to do against it. According to her, we do not need to directly participate in bribery or nepotism in order to be responsible in sustaining corrupt practices. Rather, corruption being a structural evil, we all share political responsibility for its existence and consequences. In this vein, an effective approach to deal with this kind of background corruption is the account of collective responsibilities. From there we see we have political responsibility as long as we implicitly accept the "schemas and ideology" sustaining and strengthening the social system of corruption. As a result, citizens not only have a duty to speak out publicly against acts of bribery or to organize themselves to pursue the transformation of institutional practices; crucially, they have a collective responsibility to take action in order to change the "schemas and ideology" that sustain the social system of corruption. Of course, political responsibility is a piecemeal conception; as much as everyone is guilty, not all can be held to the same degree of responsibility. Special responsibility needs to be distributed according to social positions. Perhaps this model of responsibility against corruption could be replicated to encompass international institutions, particularly considering the increased vulnerability these institutions show in the face of transnationals and powerful states.

Finally, a tour of the injustice entailed by the practices and institutions encompassing citizenship would not be complete without at least a view from the outside. Indeed, it is perhaps the literature on the moral stand of animals that helps the most to explore the limits of the concept of citizenship. In "The citizenship rights of Veracruz's roosters", Luis David Reyes aims to show that Mexico is leading the recognition of non-human animals as subjects of rights by acknowledging their citizenship rights. Although Reyes does not engage with the injustice suffered as a result of one's citizenship, he addresses the external limits of the concept. In the paper, he argues how a recent resolution by Mexico's Supreme Court regarding local legislation must be interpreted as conceding citizenship rights to the non-human animals living in the state where that legislation applies. The paper starts by discussing the context in which the relevant law was approved and then challenged. It also discusses the analysis and resolution carried out by the Supreme Court. The paper endorses this resolution

by arguing that, at least under certain specific conditions, animal rights should be interpreted as citizenship rights.

This vast tour across different kinds of oppression and injustices has produced, for each of POLETH's members, a variety of results. Speaking for myself, I am more convinced than ever that the core aspect of oppression is in fact discrimination. In particular, I've come to believe that in Latin America, most of us experience citizenship as a broken and corrupt institution that offers some protections and prerogatives, but also exposes us to other harms and wrongdoings. According to this intuition, structural discrimination incorporates most of the mechanisms and strategies society uses for social closure, that is, for keeping the access to resources and opportunities available mostly to the valued social groups. To that effect, I am currently in the process of finishing a book with Luis Muñoz Oliveira, from UNAM CIALC, were we develop a conception of structural discrimination as a form of corrupt citizenship.[6] Other POLETH members have, for the most part, reached the conclusion that we need a better understanding of how different kinds of oppression are related to each other in specific social contexts. A better understanding of the workings of oppression will hopefully clarify for us the meaning of suffering harm and wrongs because of one's citizenship and what a normative conception of citizenship requires from our current real-world memberships. In the meantime, I hope the reader may join us in this ongoing conversation as we continue to face the intricate dilemma of citizenship in the 21st century.

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[6] Hopefully, this book will be available at the end of 2023.

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Everybody Hates a Tourist: World-Traveling, Epistemic Labor, and Local Citizenship

Todos odian a un turista: viajes por el mundo, trabajo epistémico y ciudadanía local

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Abstract: Prior to the pandemic of 2020, global tourism accounted for over ten percent of global GDP, for a total of $9.6 trillion USD; one in every four jobs created that year, across the globe, was in the travel and tourism sector.[2] And yet the figure of the international tourist is often regarded with an attitude ranging from bemusement to outright contempt so much so that a series of books exists to guide tourists on how to avoid looking or acting like tourists.[3] Why, though, is the figure of the tourist —especially the international tourist— so disreputable? Given the sheer number of such tourists (over 1.4 billion, in 2018 alone) it seems odd to think that there is something shameful or problematic about tourism as a practice. What accounts for our seeming disdain for the tourist, even as so many of us engage in tourism ourselves? There are, of course, many obvious answers to this question. The tourist —especially the international tourist— is often a figure of some wealth and privilege; that tourist is likely to be clumsy, at best, in his or her navigating of a foreign society; and he or she is often likely to be less careful in her caretaking of the physical and social spaces into which she travels, given the fact that she is as it were on vacation.[4] These facts may be enough to engender some antipathy towards the tourist

[1] I am grateful to the participants of the discussion seminar organized by Problema on "Citizenship: The Legality and Morality of Inclusion and Exclusion" in June 2022. My particular thanks go to Luis Enrique Camacho, for inviting me into this forum and his kind assistance throughout the process.

[2] These figures are available from the World Travel and Tourism Council, at https://wttc.org/Research/Economic-Impact

[3] The series Don't Be a Tourist was developed by Vanessa Grail; see, for instance, *Don't Be a Tourist in Paris* (Roads Publishing, 2017).

[4] Hence, the antipathy felt by many local Hawaiians for the wasteful habits of tourists to

especially one who, as Jarvis Cocker noted thirty years ago, regards the local inhabitants as somehow amusing.[5] Tourists are likely to be —as the British aphorism had it about American GIs— oversexed, overpaid, and over here. In this paper, though, I want to suggest a slightly different story for our ethical disquiet with the figure of the tourist. I will argue that the practice of international tourism raises two distinct sorts of ethical worries —both of which reflect the fact that international tourism requires a local industry in which cultural difference is curated and made consumable by the foreign tourist—. This fact may lead to ethical disquiet, I argue, because it can represent a site at which there is a maldistribution of the benefits and burdens of intercultural conversation; the local who works in the tourism industry must become adept at performing his or her culture for the outsider, while that outsider gains the benefits of intercultural conversation without bearing a similar burden of epistemic labor.[6] A second reason for concern, however, stems from the ways in which this demand for epistemic labor can end up deforming and destabilizing local forms of citizenship and political agency. Those who spend their days performing a debased and simplified version of their cultural identity for outsiders may be, I believe, marked by that effort and their own ability to engage in political conversations with fellow local members may be made more difficult as a result. International tourism, in short, may be a site from which both distributive and political injustices might emerge. These concerns, I should note, may exacerbate already objectionable relationships reflecting colonial legacies of oppression; but they may exist even in the absence of any history of colonialism. The mere fact of a market in the curated experience of cultural difference may be enough to raise these worries; and international tourism, I believe, often involves exactly this form of market.

Keywords: Tourist, International Tourism, Citizenship, World-Traveling.

Resumen: *Antes de la pandemia de 2020 el turismo mundial representaba más del 10% d*el PIB mundial, por un total de 9.6 billones de dólares estadounidenses; uno de cada cuatro puestos de trabajo creados ese año, en todo el mundo, pertenecía al sector de los viajes y el turismo. Y sin embargo, la figura del turista internacional se contempla a menudo con una actitud que oscila entre la perplejidad y el desprecio absoluto, hasta el punto de que existe una serie de libros para orientar a los turistas sobre cómo evitar parecer o actuar como turistas. ¿Por qué, pues, la figura del turista —especialmente la del turista internacio-

Hawaii; tourists are more likely, report such locals, to abandon water bottles on the beach, drive unnecessarily large cars, and engage in similarly careless forms of disrespect for the natural environment in which they find them- selves. See Mzezewa, Tariro (2020, February 4). Hawaii is a Paradise, but Whose? *The New York Times*.

[5] See Pulp, "Common People", from Different Class (Island Records, 1995): "Everybody hates a tourist /especially one who thinks it's all such a laugh".

[6] In this paper, I do not distinguish between forms of international travel; it is, however, entirely true that distinct forms of international travel likely raise distinct forms of ethical worry. I am grateful to several participants at the discussion seminar for urging me to make this clear —which is, in the present context, really all I can do about that fact.

nal— está tan desprestigiada? Dado el ingente número de estos turistas (más de 1,400 millones, sólo en 2018), parece extraño pensar que hay algo vergonzoso o problemático en el turismo como práctica. ¿A qué se debe nuestro aparente desdén por el turista, incluso cuando muchos de nosotros hacemos turismo? Más allá de las respuestas obvias a esta pregunta, en este artículo quiero sugerir una historia ligeramente diferente sobre nuestra inquietud ética por la figura del turista. Así, sostendré que la práctica del turismo internacional suscita dos tipos distintos de preocupaciones éticas —ambas reflejan el hecho de que el turismo internacional requiere una industria local en la que la diferencia cultural se preserve y se haga consumible por el turista extranjero—. Un hecho que puede generar preocupaciones éticas. En síntesis, el turismo internacional puede ser un lugar del que pueden surgir injusticias tanto distributivas como políticas. Estas preocupaciones pueden exacerbar relaciones ya objetables que reflejan legados coloniales de opresión, aunque pueden existir incluso en ausencia de cualquier historia de colonialismo. El mero hecho de que exista un mercado en la experiencia de las diferencias culturales puede ser suficiente para suscitar estas preocupaciones, y el turismo internacional, creo, a menudo implica, exactamente, esta forma de mercado.

Palabras clave: turista, turismo internacional, ciudadanía, world-traveling.

> This drizzle that falls now is American rain, stitching stars in the sand. My own corpuscles are changing as fast. I fear what the migrant envies: the starry pattern they make—the flag on the post office— the quality of the dirt, the fealty changing under my foot.
>
> Derek Walcott, Midsummer XXVII

I. World-Traveling and Global Tourism

I will try to make this case in three sections. The first will discuss the concept, borrowed from María Lugones, of world-traveling-understood, here, not as literal global travel but (with Lugones) as the social process of entering into and participating in the lived reality of those who are unlike ourselves. Lugones emphasizes the ways in which world-traveling can be both playful and loving; but I want here to emphasize that such world-traveling also involves epistemic labor, and that such labor can be distributed in an unequal and exploitative way. The second section of this paper will understand global tourism as potentially a site of such inequality; the activities

of the tourist bring with them presumptively unjust demands for world-travel on the part of the one who labors for the tourist. This section of the paper will also discuss the ways in which such epistemic demands can give rise to deformations of self-understanding, and hence deformations of local citizenship, for the one who participates in servicing the foreign tourist. I will conclude, in the final section, with some thoughts about what might be done to render international tourism less objectionable and the limits on those proposals made so far in furtherance of such a goal.

María Lugones's concept of world-traveling differentiates two distinct ways of perceiving, and learning from, the lived experience of the other. The first, which —following Nancy Frye— is called arrogant perception, takes the world of the other as being uninteresting or interesting only through the uses to which it can be put; it is the form of perception which embodies the disrespectful focus to which women of color are subjected to by white perceivers:

> I am particularly interested here in those many cases in which White/Anglo women do one or more of the following to women of color: they ignore us, ostracize us, render us invisible, stereotype us, leave us completely alone, interpret us as crazy. All of this while we are in their midst (Lugones, 1987, pp. 3-19).

In arrogant perception, the world of the other is not entered into with an eye towards participation and play; it is, instead, simply assumed away. The colonial gaze involves arrogant perception; so, too, does the one who knows the other only through what is immediately comprehensible to her own frame of reference as, for Lugones, Aristotle takes the slave as knowable only though the interests and thoughts of the master.

The alternative mode of knowing the other entails the willingness to transformed by the encounter. The willingness to leave one's own frame of reference and the self constructed within that frame is the source of a distinct, more respectful, mode of entering into the world of the other. This mode of world-traveling entails, for Lugones, the playful willingness to become other than what one already is —to risk appearing, or being, foolish— in the service of learning what one might be in that other world, for that other person. This is a skill that has been learned, of necessity, by women of color in a white supremacist society —it is, says Lugones, a "matter of necessity and of survival" for such women. It is, however, also a source of joy and of self-building, insofar as it allows such women to build more complex, more plural, selves. It is also a form of love, insofar as the playful entry into the world of another is also a playing with that other, in a mutual process of self-discovery:

> [T]here are worlds that we can travel to lovingly and travelling to them is part of loving at least some of their inhabitants. The reason why I think that travelling to someone's "world" is a way of identifying with them is because by travelling to their "world" we can understand what it is to be them and what it is to be ourselves in their eyes. Only when we have travelled to each other's "worlds" are we fully subjects to each other.

Lugones understands world-traveling as a metaphoric process —one can, and should, world-travel even within one's own closest geographic relations— but it can also be applied to the more literal process of world travel and global tourism. The notion of arrogant perception, and potentially of world-traveling, match up in a powerful way to the epistemic attitudes that might be displayed by those who travel across national and cultural boundaries, in search of an authentic —and authentically foreign— experience.

Imagine, to see this, the "traditional" welcome to Hawaii offered to tourists from Japan; they are offered a floral lei upon arrival a garland traditionally used to mark out relationships of kinship and authority, but which is now transformed into a symbolic initiation into the culture of aloha. The tourist will be guided through a luau, generally featuring roasted pork —a dish less important in Native Hawaiian culture than ulu (breadfruit), and treated to performances by women dancing the hula in grass skirts (which were themselves introduced by Europeans in the 19th century, as a modest substitute for traditional Hawaiian garb.). Visitors are, in the words of tourism consultant Kainoa Horcajo, "spoon-fed what outsiders thought they wanted" (Murphy, 2021). This performance of cultural difference is, on Lugones's vision, a form of arrogant perception. It is arrogant, not in ignoring or obscuring the fact of Native Hawaiian culture's being distinct from that of the rest of the United States, but in insisting upon a particular, curated and often morally simplified vision of that cultural distinctness. It does not erase the difference between the Native Hawaiian and the tourist; indeed, it is that difference which is largely what is sought out by the tourist. It does, however, preclude genuine world-traveling on the part of that tourist; the tourist is not presented with another world into which he or she may genuinely enter, but with a simulacrum of a genuine and complex world. The arrogance of this perception consists precisely in the tourist's seeking out and being provided with a replication of a social world, one intended precisely to offer that form of world-traveling most amenable to the experience —but not reality— of understanding the culture and the history of the Hawaiian people.

If the tourist participates in arrogant perception, then the one whose employment is to service that tourist must of necessity participate in a cer-

tain sort of playful world-traveling if only to understand the world of the tourist, so as to understand what that tourist is seeking. The one who works in tourism must, in virtue of their participation both in the local culture and in the simulacrum of that culture, be capable of traveling between worlds —between the truth of the local, and the culture of the tourist to whom a simulation of that culture is directed. Those who are in the business of making tourists happy must, that is, understand enough about such tourists and their frames of reference to make them happy; the laborer must journey to and to be understood within those frames of reference. World-traveling, for Lugones, is a sur- vival skill, for those whose realities are obscured or ignored by racist norms within the United States. It is also, in a distinct but equally literal way, a survival skill for those whose profession requires them to mediate between tourists and the local realities they seek; they must learn how to be present both within the local culture and history, and within the reality of the tourist, so as to present some denatured version of the former to the latter. The history may be presented in a mechanical and repetitive mode —a script, repeated to each newcomer to the site on which tourism is undertaken. Even this, however, may require world-traveling; scripts must be updated, as tourist demands shift, and even what is mechanically repeated might eventually leave traces upon the one who repeats the words.

Why, though, is any of this relevant from the standpoint of ethics? It becomes relevant, I think, in the recognition that world-traveling, for Lugones, has at least two faces. It is, in the first instance, a form of loving perception of the other; the one who travels to the world of another is open to being trans- formed by that other, and so engages in a form of loving perception with that other. But such world-traveling is to put things most simply hard work. To enter into the reality of another requires the exercise of demanding capacities of identification and comprehension. We must identify with the lived experience of the one with whom we are engaged in conversation; we must seek to understand how that world is understood by them, and how we ourselves might be understood from within that world. This is, indeed, a form of loving perception. But it requires the exertion of enormous amounts of labor - both epistemic and emotional. One must be willing to learn about the other, and this requires the capacity to think of one's self through the eyes of another. One must also be willing to forego one's emotional responses, when one is misperceived or misunderstood in the eyes of that other. These are not trivial exertions of energy; man- aging one's own emotional reactions to the clumsiness of one's interlocutor is sometimes a source of enormous stress, and often

involves a significant exertion of will.[7] The tourist, to put things most simply, gets the enjoyable experience of world-traveling, without becoming subjected to the forms of labor required to genuinely experience the world of the other; the one servicing that tourist performs that labor, but does so in the interests of —and with an eye towards the cognitive limits of— that tourist.[8]

II. Ethics, Tourism, and World-Traveling

The initial response to these facts might be to respond that there is no injustice here, any more than there is an injustice in the one who bakes bread performing more labor than the one who purchases that bread. The tourist, after all, is spending money to experience the simulacrum of the culture in question; the worker who provides an experience to that tourist receives wages for his or her labor. Is this response ad- equate, to overcome the perceived inequality here?

This response is not wholly wrong; certainly, the centrality of tourism to such places as Hawaii would seem to demonstrate that the practices of tourism are not, at the very least, inherently worthy of abolition. But there is nonetheless something here that ought to lead us to feel disquieted. There are forms of labor which are ethically worrisome, simply in virtue of the ways in which the nature of that labor, and the wages for that labor, are incommensurable in their value. The sale of sexual services, for instance, are sometimes felt to be morally problematic, simply because they require those who sell them to take a particular perspective towards their own sexual bodies; the commodification of one's sexual self may, we think, often be such a wrenching experience that it is a mistake to think of such work as morally akin to more standard forms of waged labor (Radin, 1998).[9] Something similar, though, might also be true in the space of international tourism. Where the tourist industry exists primarily to provide a particular vision of curated and carefully presented cul-

[7] See, on this subject, Arlie Hochschild, *The Managed Heart: The Commercialization of Human Feeling* (University of California Press, 1983).

[8] t is not, of course, the only activity that requires such travel, nor even the only activity that might create cultural flattening; social media, for one, may produce a similar sort of cultural travel, with a similar exertion of will on the part of those who undertake to participate in the norms and practices of the globally dominant. I argue that intercultural tourism may have malignant effects upon domestic politics, but I am in no way suggesting it is the only institution that might do so. I am grateful to an anonymous reviewer for this journal for urging me to be explicit on this point.

[9] Dambisa Moyo, *Dead Aid* (Farrar, Straus and Giroux, 2009)

tural distinctiveness, then those who labor to present that vision might be required to alienate and commodify aspects of their particular heritage which they might otherwise want to refrain from seeing through the lens of money and commodity value. If there is nothing inherently pernicious in the sale of labor power —and I do not think all waged labor is exploitative— then we might nonetheless think that there is something wrongful about the sale of cultural labor, as found within many forms of international tourism. The one who purchases an experience in international tourism may be purchasing something that we should not ask the laborer in question to sell.

This, then, is perhaps the first source of our ethical disquiet with the phenomenon of global tourism. If everyone hates a tourist, it might be because the tourist is —under many circumstances— a consumer of a false and simplified form of cultural identity, which requires a difficult and alienating form of world-traveling on the part of the one providing those tourist services. More, however, might be said to explain our disquiet here; and some of this might emerge from the needs and requirements of local democratic discourse, within the community in which tourist services are sought.

To see this, examine the epigraph to this paper from Derek Walcott. Walcott was born in Saint Lucia, a Caribbean nation for which tourism represented an ever-increasing source of revenue; at present, over sixty percept of Saint Lucia's GDP is derived from tourism, with travelers from the United States representing more than half of the tourists voyaging to Saint Lucia. Walcott's poem speaks of the anxiety of finding one's own country being transformed into the image of the United States —not in any literal or Constitutional sense, to be sure, but simply in virtue of the importance to Saint Lucia of those American tourists and their wishes. Walcott's fear is, as he notes, the inverse of the emigrant's desire; the emigrant to the United States seeks out the United States, to become a resident or citizen of the United States. Walcott, in contrast, expresses the fear that his country is learning too much about how to make those Americans happy —and that such an education exerts a pressure to make Saint Lucia itself American in disposition and habits.

More than this, however, Walcott is frightened of his own transformation, his own corpuscles, as he says, becoming transformed as his nation is transformed. This, I think, reflects two distinct ways in which international travel and the distinctive epistemic burdens of world-traveling, in response to the phenomenon of global tourism can represent a site of democratic deformation. The first is the simple fact of economic domination, and the deformation of democratic discourse that may be occasioned by such

domination. When sixty percent of any given nation's GDP is derived from the habits of making outsiders happy, through catering to their particular wished and interests about the experiences they will have while present within that nation, then those outsiders will have a significant —indeed, outsized— influence in that nation's politics. The process is similar to that described by Dambisa Moyo, among others, as a pathology of foreign development assistance; the state whose GDP is determined by foreign development aid has a structural incentive to keep its donors happy —even at the cost of its own citizens' happiness (Moyo, 2009). The nation that is beholden to the curated and distorted history sold through tourism has a structural incentive to preserve that history, and to present it to the world as the truth —even against the interests, or will, of its own citizens. If citizenship entails genuine power to speak and to be heard, then the voices of the local citizens are inevitably muted by the outsized power of those foreigners whose wealth grounds Saint Lucia's economy.

The second way in which international tourism might undermine citizenship, however, is slightly more difficult to describe It involves the ways in which the phenomenon of world-traveling can leave, as it were, residue upon the character of the one who travels. In one sense, this is not regrettable; Lugones herself takes the process of loving and playful world-traveling to be transformative, and such transformation to be one of the benefits of such travel. But where the world-traveling is done —as it is with the workers in the tourist industry— on behalf of another, for money, then it is entirely possible that the residue that is brought back is not beneficial, but instead potentially a source of political loss. If Will Kymlicka is correct that all politics is, in his terms, politics in the vernacular, then the question of which vernacular is to be used —which particular set of concepts, cultural references, and historical touchstones will form the backdrop to political negotiation— becomes vitally important. Spending one's days working in a vocabulary designed to assist the comprehension of outsiders, however, may have the effect of transforming one's own vocabulary into that alternative form of speaking-taking the distinct form of discourse developed in response to the local community, and replacing it with the words and concepts used to converse with wealthy outsiders.

One example of this might be found in the writings of Hawaiian scholar Kamanamaikalani Beamer, who notes the ways in which the distinctively Hawaiian measures of distance —the ahupua'a and 'Ila— have been replaced, in Hawaiian political discourse, with the more globally comprehensible measures of miles and feet. The ahupua'a and the 'Ila reflect a particular vision of what is important, in orienting one's self in Hawaiian space; they refer to particular forms of watershed, and to the space be-

tween the mountains and the sea. Associated with these terms is a particular vision of place, in which one's origin story —the place from which one is said to be from— reflects not the jurisdictional vision of European cartography, but a more complex form of identification with particular islands or particular ahupua'a. Beamer notes that his generation, unlike that of his parents, has a tendency to use European cartography in situating themselves —to use the names of towns and cities, and to use miles to situate distances from those towns and cities. For Beamer, this is a loss which is reflective of a wider loss of culture. The precise contours of the Hawaiian construction of place encoded an exceptional amount of particular information —much of which is now in the process of being lost.

One need only open a Hawaiian language dictionary to the page that lists the English word wind to see how this generic term fails to capture the complexity and intimacy of air currents when they connect to specific places or seasons. For that one English word over three hundred options are available in Hawaiian… For a people to be able to give such detailed descriptions for different states of *'aina* [land or that which feeds], the ancestors also must have had extensive knowledge of place and the boundaries that gave each its unique identity. The boundaries did not necessarily manifest as lines on a map, but *palena* [place boundaries] associated distinctive characteristics with each place. Many ahupua'a and 'ili have distinct rain names. For instance, a rain name associated almost exclusively with Mānoa is Tuahine, whereas its neighboring valley Pālolo is famous for its Līlīlehua rain. Knowledge of palena would enable a person to know which of the two rains one was experiencing (Beamer, 2019). It would be an overstatement to ascribe such losses solely to tourism. Much of this loss would also have to be laid at the feet of broader processes of colonialism and imperialism —although it is instructive to note that Beamer associates this loss with the generation coming of age after the beginning of widespread tourism to Hawaii, in the 1960s. It seems true, to say the very least, that there is some likely pressure placed upon local citizenship from the world-traveling undertaken by those who work with international tourists. The pressures upon the local political community, given the outsized influence of those tourists —and the pressure upon the local cultural and linguistic heritage, given the flattening effect of the needs of communicating with those tourists— would seem of necessity to have some negative effects upon the forms of vernacular in which local political issues are understood and debated. Tourism, in short, may have some role in making citizenship less situated and more generic for the local citizen; those who travel between states, in the search of authentic experiences, may end up making the discourse less local and responsive for those who themselves remain situated in place.

III. Conclusions

At this point, it would seem useful to ask what —if anything— can be done about these issues. The problems associated with tourism are not like, say, the problems associated with child labor; we can comfortably hope for an end to child labor, however difficult such a goal might prove to be in practice. The elimination of tourism, however, seems less plausible as a theoretical goal against which policy might be judged. The same importance which lends it an outsized effect upon political discourse also tells against any simple insistence that tourism should be eliminated - or that the tourist is necessarily a participant in injustice.

We might therefore seek some principles by which the practices of international tourism are moderated, rather than eliminated. Some organizations have, in recent years, sought to introduce some principles for ethical tourist practices; the World Tourist Organization, in 2019, issued recommendations on ethical tourism in Indigenous communities, which includes such suggestions as an insistence upon partnership between "indigenous communities, governments, tourism destinations, the private sector and the civil society".[10] Such suggestions are useful, in that they may help stave off some of the worst excesses of exploitative forms of international and intercultural tourism; they might remind those who create institutions and sites of tourism to avoid those particular practices which have historically proven most damaging to the local community. On the logic I have presented here, however, it nonetheless seems likely that such appeals are adequte, taken as a response to the distinctive ethical problems created by tourism across cultural and national boundaries. If what I have said is correct, then the ethical difficulties created by such tourism are structural, and are unlikely to be corrected by any particular coalition between the tourist and the local community; the latter has entirely too much incentive to be changed, in a manner inimical to democratic practice, by its encounter with the former. The most adequate response to these worries, I think, may require an increased willingness of the tourist to be aware of his or her participation in —and responsibility for— the cultural and political effects of that tourism. Even here, the willingness to forego selfish pleasure is likely to be relatively weak, in favor of the distinctive pleasures offered by traditional forms of tourism. Increasing such will, however, may be one of the only levers available to us, in the search for methods by which the economic benefits of international tourism might be preserved while its social and political harms are mitigated. Our tools, in re-

[10] World Tourism Organization, Recommendations on Sustainable Development of Indigenous Tourism.

sponse to the distinctive harms of tourism, might be imperfect and partial, at best; but such tools might nonetheless be the only ones with which the work of remaking tourism might begin.

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Democratic Confederalism: an Alternative for Facing Tensions Between Global Citizenship and Localist Citizenship

Confederalismo democrático: una alternativa para afrontar las tensiones entre las ciudadanías global y local

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Abstract: This article explores the tensions between different conceptions of "citizenship." On the one hand, we point out the virtues and limitations of cosmopolitan citizenship in the terms in which Seyla Benhabib understands it in *The Right of Others…*; on the other hand, we delve into another notion of citizenship, namely, the localist, in a version that could be at odds with some cosmopolitan values, that is, localism as understood by some Mexican autonomous communities, particularly the Zapatistas. Although Benhabib's cosmopolitan federalism is inclusive in spirit, it is conceived within a preponderantly global perspective and ends up being asymmetrical. While her proposal has some positive aspects, it faces some difficulties in the case of Mexican autonomous communities. In this article, we shall introduce the notion of democratic confederalism as a form of sociopolitical organization that seeks to strengthen the self-organization of social actors and to recognize the practice of citizenship in the terms in which autonomous communities exercise it. We propose that democratic confederalism could be an alternative for decreasing tensions between global citizenship and the idea of citizenship within autonomous communities.
Keywords: Citizenship, Cosmopolitanism, Localism, Autonomous Communities, Zapatistas, Democratic Confederalism.

Resumen: Este artículo explora las tensiones entre dos concepciones diferentes de "ciudadanía". Por una parte, señalamos las virtudes y limitaciones de la ciudadanía

cosmopolita en los términos en los que Seyla Benhabib la entiende en "El derecho de los otros…"; por otra, ahondamos en una noción de ciudadanía distinta, la localista, en una versión que puede entrar en conflicto con algunos valores cosmopolitas, a saber, el localismo tal como lo entienden algunas comunidades autónomas mexicanas, en particular las zapatistas. Aunque el cosmopolitismo federalista de Benhabib es inclusivo en esencia, está concebido desde una perspectiva preponderantemente globalista y termina siendo asimétrico. Aunque su propuesta tiene aspectos positivos, se enfrenta con algunas limitaciones en el caso de las comunidades autónomas mexicanas. En este artículo sostenemos que el confederalismo democrático es una forma de organización sociopolítica que busca fortalecer la autoorganización de los actores sociales y reconocer la práctica de la ciudadanía tal como las comunidades autónomas la ejercen. Proponemos que el confederalismo democrático podría ser una alternativa para disminuir las tensiones entre la ciudadanía global y la idea de ciudadanía dentro de las comunidades autónomas.
Palabras clave: ciudadanía, cosmopolitismo, localismo, comunidades autónomas, zapatismo, confederalismo democrático.

I. Introduction

This article explores the tensions between two different models of citizenship. On the one hand, we point out the virtues and limitations of cosmopolitan citizenship in the terms in which Seyla Benhabib understands it in *The Right of Others…*; on the other hand, we delve into another notion of citizenship, namely, the localist, in a version that could be at odds with some cosmopolitan values. While there are a variety of localisms and some of them are not necessarily in conflict with cosmopolitanism, here we shall focus on localism as understood by autonomous communities, particularly the Zapatistas in Mexico. Indeed, several sociologists, anthropologists, and political theorists have recognized the importance of these kinds of communities and their exemplary forms of social and political organization.[1] Still, despite the recognition of their social and civic virtues, their understanding of citizenship may be troublesome for a cosmopolitan mo-

[1] See, for example, Burguete Cal & Mayor (2000); Harvey (2000); González Casanova (2001); Mora & Stahler-Sholk (2011); Cerda (2011); Harvey (2000); Mora (2017); Baschet (2018).

del engaged with global values. Autonomous communities mistrust some aspects of globalization (e.g., the global economy and free markets), while Benhabib's model of cosmopolitan citizenship seeks to adapt to the cultural and economic demands of the globalized world.

Benhabib argues that the demands of a cosmopolitan citizenship must take place within the framework of the local, the regional, and other forms of democratic engagement (Benhabib, 2004, pp. 171-174). However, we can ask to what extent autonomous communities are willing to engage democratically with cosmopolitan citizenship and global values. The question we want to raise is whether Benhabib's commitment to the right to political membership could lead to an alternative for dealing with those communities that, instead of demanding their integration into a national political community, argue for the recognition of their own autonomy and self-determination. Of course, it could be argued that this type of community is outside the scope of Benhabib's approach. She wants to focus on the rights of foreigners and aliens, and not on autonomous minorities residing in a particular country and owning an imposed national citizenship. Nevertheless, if we want to uphold the functionality of a cosmopolitan model, it is necessary to propose an alternative to acknowledge the demands of those communities with a robust localist conception of citizenship, as is the case with autonomous communities.

In what follows, we first point out the virtues of Benhabib's cosmopolitan model of citizenship, mainly, her transformation of the meaning of "political membership". We will argue, however, that as compelling as it may be, Benhabib's cosmopolitanism with its commitment to global values may restrict the rights of local communities and autonomous peoples to political self-determination. To deal with the case of autonomous communities we argue, in the second section, that an adaptation of Benhabib's notion of "democratic iterations" may be helpful in the process of negotiation with these types of communities. Certainly, the Mexican State has gradually recognized those communities and, in this sense, the interactions between both, the State and the communities, could be seen precisely as an example of democratic iterations. However, even though the Mexican State officially recognizes some autonomous communities, this arrangement does not suffice for a symmetrical interaction regarding decision-making and other political rights.[2] Thus, in the third section, we argue that a democratic confederalist model could provide a more

[2] There is an enormous amount of secondary literature devoted to the processes of recognition and negotiation between the Zapatistas and the Mexican State. Two studies that provide helpful data and information on this matter are Aparicio Wilhelmi (2009), and Mora (2020).

symmetrical interaction between autonomous communities and the State, since it brings to the fore the concerns of autonomous communities instead of the demands of a homogeneous state or the imposition of alien values.

II. Benhabib's Cosmopolitanism and the Problem of Autonomous Communities

Political boundaries define some people as members of a political community and others as foreigners and aliens. In *The Right of Others...*, Seyla Benhabib examines principles and practices for incorporating foreigners and aliens into established political communities.[3] As she herself explains, even though the modern nation-state still regulates membership in terms of the category of national citizenship, phenomena such as transnational migration and, in general, the movement of people across state borders, have weakened that category. According to Benhabib, liberal democracies need new modalities of membership if they really want to respond effectively to transnational migration. However, there is nothing easy about establishing how the liberal ideal of moral equality and respect for universal human rights can be harmonized with the idea of State sovereignty and democratic self-determination. Scholarly literature has extensively discussed this dilemma.[4] Benhabib endorses a democratic cosmopolitanism and a theory of justice willing to recognize the fundamental rights of migrants, regardless of their political membership.

According to Benhabib, the condition of being an alien violates fundamental human rights. Aliens-immigrants, refugees, asylum seekers, etc., are often discriminated against. This is incompatible with the idea of community as understood in the terms of a liberal democracy. If liberal democracies recognize the freedom of movement, a right held in the Universal Declaration of Human Rights, they should establish reasonable admission criteria. In other words, Benhabib argues that if the right to migrate is recognized, the right to membership should be recognized too (2004, pp. 134-143). In her argument, Benhabib upholds the Kantian cosmopolitan

[3] Although here we shall focus on *The Right of Others…*, Benhabib has expanded her views on cosmopolitan federalism in later publications. See, for example, Benhabib (2006; 2007). There were several reactions to *The Right of Others…*;in 2007, the *European Journal of Political Theory* devoted an entire volume to discussing Benhabib's book. There are highly relevant pieces in that volume, for instance, by Aleinikof (2007), Means (2007), and Sassen (2007).

[4] On this matter see Miller (2007, pp. 163-200); Benhabib (2017); Stilz (2019, pp. 187-215).

right, specifically the idea of "universal hospitality" that appears in the famous 1795 treatise, *Perpetual Peace*. She maintains that hospitality requires that international law not only admits and protects aliens, but even grants them membership in the communities to which they migrate (2004, pp. 25-43). Based on a moral argument inspired by Habermas's discursive theory, Benhabib argues that it is possible to recognize individuals as persons who deserve moral respect, regardless of race, gender, religion, ethnicity, language, community, or sexuality.

In her defense of political membership rights for foreigners and aliens, Benhabib debates with communitarians, civic republicans, and liberal nationalists who see a threat in transnational migration. In their view, cosmopolitans do not seem sensitive enough to the "special attachments" that people have to their homes and countries (Benhabib, 2004, p. 114). Michael Walzer, for instance, thinks that the globalist vision of cosmopolitanism could lead to the overwhelming of local communities by establishing a world of *deracinated* people, to use Sidgwick's words. Scholars such as Michael Walzer himself or Michael Sandel, among others, argue that given its support of economic and political globalization, cosmopolitanism can undermine the notion of citizenship and, consequently, diminish the nation-state.[5] For this reason, these scholars oppose Benhabib's idea of porous borders. Although they do not oppose immigration, they tend to favor foreigners or aliens capable of becoming model citizens by adopting the social and cultural values of the country that receives them.

Unlike communitarians, civic republicans, and liberal nationalists, Benhabib argues for the reconfiguration of the notion of citizenship, to make it more inclusive. This reconfiguration requires porous borders and the political membership of foreigners and aliens, abandoning ideas such as the homogeneity of peoples and territorial self-sufficiency. However, in her approach Benhabib acknowledges a clear tension between the global and the local. And of course, in each of these positions there is a different notion of "citizenship." While defenders of a local citizenship seek to underline the sense of civic virtue and identity —individual and collective—, those who argue in favor of a cosmopolitan citizenship seek to suppress the exclusionary character of unitary citizenship based on belonging to a specific territory, jurisdiction, or ethnic group.

It is striking, however, that both the localist and the cosmopolitan perspectives threaten the political and social rights of those who would or would not fall under the category of "citizen". On the one hand, a localist defense of citizenship leads to the exclusion of those who do not be-

[5] See Walzer (2001), and Sandel (1996).

long to a particular political community, excluding immigrants who are not likely to become model citizens. On the other hand, under a defense of cosmopolitan citizenship engaged with global values, there is a risk of restricting the rights of local communities and autonomous peoples to political self-determination. In this last case, the effect of the cosmopolitan model upon autonomous minorities could be similar to the effect that the nation-state model has upon autonomous communities. Both models reduce the political rights of those minorities by imposing on them a kind of citizenship far removed from the political and cultural values of their own locality. Mexican autonomous communities —the Zapatistas and other indigenous localities— are a good example. By including the members of these communities within the category of "Mexican citizen", the Mexican State excludes them from their right to exercise citizenship in their own terms. The imposition of a unitary form of citizenship could cause those who defend their local citizenship to lose the civic virtues that their authentic citizenship entails, and in turn, forces them to adopt an abstract, outlandish, and alienating form of citizenship. If, like the nation-state model, the cosmopolitan model intends to impose political and cultural values alien to autonomous minorities, we will find similar difficulties.[6]

Despite contrasting goals, the cosmopolitan model of citizenship and the local model of citizenship of autonomous communities share something in common: both maintain that the category of national citizenship supported by the nation-state system is no longer adequate for responding to the challenges of the global world or to the demands of autonomous minorities, respectively. While Benhabib argues that the modern nation-state system fails to respond in an effective way to transnational migration, and, similarly, the nation-state system has failed to factually recognize autonomous communities. In many cases, autonomous communities perceive national citizenship as a State-imposed membership that does not recognize their autonomy, political self-determination, and their practice of citizenship strongly linked to values and culture of their own lo-

[6] Throughout this article, we mention that the nation-state attempts to impose a model of citizenship in which autonomous communities are subordinated to the political structures of a central government. In this process, the exercise of citizenship in autonomous communities does not necessarily concur with centralist policies. For instance, in the nation-state model, political participation is commonly limited to electoral processes, narrowing values concerning self-determination, sociopolitical engagement, and sense of belonging. By contrast, citizenship practices such as regular assemblies to reach agreements related to internal political organization, the election of community leaders, the administration of local resources, etc., are deeply rooted in autonomous communities. These practices highlight the value of communitarian involvement —among other values related to political agency. In the global model, communitarian values of autonomous localities are also jeopardized by political and economic criteria and practices imposed for interests that exceed the local jurisdiction.

cality. Put simply, the notion of citizenship within autonomous communities could be widely different from citizenship imposed by the State. The notion of citizenship within autonomous communities is usually understood not as a legal status but as an identity, a place to live in community and in solidarity, fulfilling certain civic duties. This description sketches some of the characteristic traits of many of these communities' account on citizenship —for instance, the Zapatistas— which we identify with a localist perspective. However, this characterization should not be taken as a universal rule, since each autonomous community has its own way of understanding and exercising citizenship.

In the nation-state system, foreigners and aliens as well as autonomous minorities are perceived as a threat. In her defense of the recognition of a right to political membership for all people regardless of their citizenship status, Benhabib (2004, p. 213) develops the notion of *democratic iterations*, that is, "moral and political dialogues in which global principles and norms are re-appropriated and reiterated by constituencies of all sizes, in a series of interlocking conversations and interactions". In other words, cultural and political normativity can be reformulated, reinterpreted, and transformed to examine political practices of exclusion and inclusion. Benhabib (2004, p. 21) thinks that even though these democratic iterations can be messy and unpredictable, they could lead to "a post-metaphysical and post-national conception of cosmopolitan solidarity which increasingly brings all human beings, by virtue of their humanity alone, under the net of universal rights, while chipping away at the exclusionary privileges of membership".

III. Autonomous Communities and Democratic Iterations

As is evident, local citizenship as understood by autonomous communities could be troublesome for Benhabib's cosmopolitan model, and even for Walzer's version of local citizenship. We think, however, that an adaptation of Benhabib's democratic iterations could be helpful for dealing with the case of autonomous communities. Democratic iterations, as Benhabib understands them, have at least two drawbacks. First, democratic iterations take global principles and norms as a basis without questioning their legitimacy and adaptability to all contexts. Second, democratic iterations are led by democratic majorities at the risk of excluding minorities from the conversation and decision-making. Those minorities could be immigrants or, in our case, members of autonomous communities. To include such minorities into democratic iterations and decision-making, there

should be a symmetrical relationship between them and democratic majorities. Still, symmetrical interactions are rather uncommon and usually those who are affected by decisions are excluded from deliberation. Benhabib (2004, p. 15) herself detects the dilemma: those more affected by exclusionary or discriminatory norms of citizenship are often excluded from deliberation and decision-making.

Democratic iterations are basically dialogues and interlocking conversations and interactions. This interactive resource allows democracies to reinterpret their norms and principles so that democratic people can get involved in decision-making, acting both as subjects and authors of the laws concerning the regulation of their own public life. In many cases, democratic iterations allow agreements to be established, while in other cases they work as a democratic exercise that may be inconclusive but enables tensions to be recognized and conflicting points of view to be renegotiated.

In the case of immigration policies, the negotiation takes place between international laws concerning migration and the local laws of democratic states that receive foreigners and aliens. Benhabib holds that democratic iterations may help induce a formal political change and foment engagement with the rights of foreigners and aliens —migrants, refugees, asylum seekers— and their inclusion within liberal democratic states. She thinks that democratic iterations can lead to relevant changes to established understandings in policy. Democratic practices such as political dialogue, public argumentations and deliberations, and fluid social interactions open to negotiation can induce a change of mind. And Benhabib has great expectations: she believes that these democratic practices may lead to a transformation of the notions of political membership and citizenship.

Benhabib observes that the privilege of the nation-state to define the political notions of citizenship and non-citizenship has become dysfunctional and obsolete in a globalized world. If the idea of "national citizenship" is maintained and foreigners and aliens are seen as "others", discriminatory practices will continue to be justified. In a world characterized by global interdependencies, it is much more functional to maintain an inclusive and cosmopolitan idea of citizenship than a national and discriminatory notion of citizenship. Therefore, as mentioned above, Benhabib reacts to the nationalism and localism of Walzer and other philosophers. But for the purposes of this article, we want to point out that discriminatory practices are not reduced to the denial of citizenship. These practices do not only affect migrants but also autonomous communities who in several cases have been prevented from participating in the democratic decision-making process.

The conception of local citizenship of autonomous communities challenges both the notion of national citizenship and that of cosmopolitan citizenship. In other words, unlike migrants, refugees, and asylum seekers, autonomous communities do not demand their integration into a national political community; rather, they demand the recognition of their self-determination and autonomy. If, as Benhabib proposes, national citizenship is replaced by a cosmopolitan citizenship, the political self-determination and autonomy of local communities may be restricted. Just as autonomous minorities reject the imposition of a national citizenship, they also oppose the imposition of a cosmopolitan citizenship model engaged with global values.

Although the local citizenship of autonomous communities and Benhabib's cosmopolitan citizenship model seem incompatible, democratic iterations could lead to a promising engagement with autonomous minorities. Just as democratic iterations contribute to the engagement in democratic interactions that promote the inclusion of foreigners and aliens, this resource can also work to advance the inclusion of autonomous minorities in decision-making processes without restricting their self-determination and autonomy. Democratic iterations in this case should be more symmetrical and need to avoid the imposition of global values. If democratic iterations remain asymmetrical, it will be difficult to democratically interact with autonomous communities.

Although Benhabib's cosmopolitan federalism is inclusive in spirit, it is conceived within a preponderantly global perspective and, ends up being asymmetrical in our view. While her proposal has several commendable points, it would encounter difficulties in the case of autonomous communities. As we mentioned, we are thinking of Mexican autonomous communities, particularly the case of the Zapatistas in Chiapas. Although article 115th of the Mexican Constitution recognizes the rights of indigenous peoples, several communities still claim that this recognition has not occurred factually, and for this reason they demand real political autonomy, that is, the construction of their own institutions and the appointment of authorities able to legislate over their local affairs.[7] In addition, these communities seek the recognition of their right to administer the natural resources

[7] The provisions contained in article 115th rule all municipalities as the minimum unit of territorial jurisdiction conceived by the federation. In doing so, the Constitution circumscribes autonomous communities to the municipal jurisdiction where they are situated, so that they can be "coordinated and associated" according to the law. This constitutional article poses the terms for the inclusion —or tolerance— of these communities in the nation's jurisdictional scheme, ruled by a central administration. In this way, article 115th recognizes the existence of indigenous communities without laying the basis for autonomous regimes with a factually recognized territorial jurisdiction.

that they conceive as their own, and to demarcate their own territories. All these demands challenge their institutional relations with the Mexican State, both at the regional and federal levels.

IV. National and Local Self-Determination

Within the framework of the discussion of transnational migration, Benhabib acknowledges the tension in liberal democracies between sovereign self-determination and the State's commitment to universal human rights. In her attempt to overcome that tension, she argues that political membership must be a human right for those who have already crossed territorial borders. However, she asserts that liberal democracies can stipulate the requirements for acquiring membership. This option ensures the protection of immigrants and at the same time it grants the state the right to establish conditions and requirements that immigrants must observe so they can attain full membership in their host country. In our view, Benhabib tries to formulate these requirements in a positive way, as conditions that should facilitate full membership rather than hinder it.

In *The Right of Others…*, Benhabib focuses on the sovereign self-determination of the State against the global political order. In our approach, we want to focus on the conflict between the sovereign self-determination of the state and the self-determination of autonomous communities. These two forms of sovereign self-determination will come into conflict as long as the nation-state model persists. If we consider a general view of political self-determination as the right of a community to govern itself independently, both of these forms of self-determination —the State's and the communities'— would be irreconcilable under the current federalist subjection of autonomous communities to the State. The conflict seems inherent to federalism, since it stems from the interposition of two different sovereign entities.

The right of nation-states to self-determination is broadly understood and accepted, mainly based on their legitimacy as well-constituted (i.e., institutionalized) political entities, participants in the global order and economy. Generally, sovereignty is attributed to nation-states with no acknowledgment of the sovereignty of the peoples within those states. As we shall see, a state's population is not usually a properly unified people since diverse and plural communities integrate it. These diverse communities unite as a polity when they authorize their shared government. That is not the case for autonomous communities where the state's government is imposed over their own political institutions. In this paper, we are argu-

ing for the right to political self-determination of communities that have well-established forms of cooperation and governing outside the State's institutions, but which are subjected to the State's jurisdiction.

Mexican autonomous communities, for instance, the Zapatistas, Cherán, and many other indigenous communities or nations,[8] have built solid political institutions that could be understood as a form of democratic communitarianism. The members of those communities are often involved in the administration and ruling over their territory —often in dispute with the local and federal governments' intervention— in the creation of their institutions, and in activities beneficial to their community. The members of autonomous communities exercise their political duties with much more commitment to their polity than most Mexican citizens are expected —and allowed— to engage with their institutions, given the rules of representation and citizen participation laws. The involvement of citizens in their political institutions is crucial for justifying their right to self-determination.

According to Anna Stilz, peoples (i.e., communities) should enjoy self-determination "only when members engage in institutionalized political cooperation, and come to value that cooperation" (2016, p. 102). Such engagement should give the communities' members the status of "makers" of their own institutions, meaning they should be involved in their creation, reformation, and their functioning. From this perspective, members of autonomous communities, who share civic responsibilities and have common goals, exercise their citizenship in a more fully active and cooperative manner. By contrast, many members from any Mexican city are detached from common responsibilities and their ultimate political engagement is reduced to electoral participation.

Through the notion of citizen, the Mexican State designates individuals as members of their "representative, democratic, secular, federal republic". Although this notion is supposed to grant certain rights to those designated as citizens, it specifically allocates and bounds their political rights —as one is a citizen in his or her relation to a given constituency. The political rights granted to Mexican citizens by Mexican legislation[9] are largely aimed to constrain all political engagement to electoral participation and to the recently added popular queries (*consultas populares*).[10] Histori-

[8] While the Mexican State does not recognize "indigenous nations" as such, many members of those nations argue their nations are accidentally placed inside of the Mexican fictitious nation where they are seen as communities. See Aguilar (2018).

[9] Mainly specified in article 35 of the Mexican Constitution and in the local citizen participation laws for the states.

[10] Most citizen participation laws make it virtually impossible for citizens to engage in decision-making to a significant extent. Few exceptions give rise to a greater participatory citizenship, like the one issued in 2018 in the northern state of Chihuahua.

cally, the Mexican government has noticeably excluded its citizens from the decision-making process. This exclusion can be traced back to Mexico's vertical and centralist colonial tradition.[11] In its federalist, yet centralist tradition, Mexican federalism presupposes a sort of imaginary homogeneity of its peoples. The notion of "Mexican citizen" works as a conceptual vehicle in this process of homogenization. That explains why some members of autonomous communities seek to detach themselves from this notion. They are members of legitimate self-determining polities, and they do not see themselves as members of the Mexican State.

As autonomous communities have fought for their recognition and autonomy, the Mexican state has only granted them recognition as a form of "pretend autonomy". While the legislation recognizes their existence, many communities and nations consider that this recognition is not sufficient for an authentic regime of autonomy, since it does not liberate them from the State's intervention in their political institutions and territories. It also fails to acknowledge them as collective agents with a specific juridical situation. Instead, this form of autonomy grants them a limited catalogue of rights that focus primarily on freedom to exercise their "customs and habits". The Mexican government conceptualizes autonomy as jurisdictional autonomy within the states' jurisdiction. According to Héctor Díaz-Polanco (2009, p. 29), it is a special regime that shapes a community's self-government "which thus choose authorities from the members of the community, exercise legally attributed powers, and have minimal powers to legislate their own internal life and to administer their own affairs".

From the Mexican government's perspective, being an autonomous community is a way of belonging to the State and of being subject to its jurisdiction under "special conditions".[12] Autonomous communities are granted limited jurisdictional and administrative powers over their territories, and not autonomy in any sense that would grant them self-determination. The State does not recognize that these communities are, in the first place, self-determining peoples, and, secondly, officially members

[11] Seen from the perspective of indigenous communities and municipalities in general, both the Spanish colonial government and Mexican post-colonial government even up to present day, have concentrated much power over the most significant administrative decisions —including those over the use and abuse of natural resources— (Cruz Martínez, 2002; Medina, 2009).

[12] The 2nd constitutional article grants indigenous communities the right to self-determination as the prerogative to elect their own authorities —subordinated to the municipality and each state's rule. As we brought out previously, article 115th rules the municipality as the minimal territorial jurisdiction; in doing so, autonomous communities are constrained to subsume their institutions within the municipal structure and its law. There is no regime for an autonomous territorial jurisdiction, just the right of indigenous peoples to exercise their 'costumes and practices' inside a given municipality and state.

of the Mexican State (some might argue that they are so by virtue of being accidentally placed within its borders). On these grounds, the regime prescribed for the autonomy of communities inside Mexico only grants them autonomy as an external aspect of their relation to the State. This regime does not recognize that autonomy is "the internal manifestation of self-determination" (Aparicio, 2009, p. 15).

Alluding to these conflicting views on autonomy, namely the external aspect recognized (top-down) by Mexican legislation and the internal aspect consistent with the right to self-determination (bottom-up), the Zapatista communities and other indigenous nations have argued that the State's tolerance of their particular customs and habits does not factually amount to an acknowledgement of their autonomy and therefore it violates their political rights. For the Zapatista communities, autonomy is their way of exercising their right to self-determination through their solid structures for political organization and self-government, which are central to their lifestyle, values, and purposes, all encompassed within the notion of *mandar obedeciendo* (to rule as obeying) (Mora, 2017, p. 200).

Daily practices of self-government and political organization account for autonomy in its internal aspect. The Zapatistas have organized *juntas de buen gobierno* and assemblies for decision-making over their *caracoles* —the territories under their rule. Both the *juntas de buen gobierno* and the assemblies represent forms of collective authority for decision-making. The first level is integrated by representatives who rotate weekly, and the assemblies are integrated for specific problem-solving among communities. Every member of the community has the responsibility of participating in the community's activities and is expected at some point to represent a commission, municipality, or group in the *juntas de buen gobierno*. This arrangement is designed to integrate an actual form of collective authority where representatives rotate constantly so that every citizen governs.[13] Everyone is, at some point and to some degree, in charge of the administration of the resources and the ruling over different aspects of everyday life. These practices make room for dialogue over contending points of view and dissent among members of the community.

The Zapatistas' political organization is a great example of self-government and of the exercise of internal autonomy. Although the Mexican State has signed agreements (*Acuerdos de San Andrés*) for the constitutional recognition of their autonomy, it has not acknowledged their right to self-determination through a juridical reform; therefore, these communities exercise their autonomy as a form of rebellion. The *Acuerdos de San*

[13] See Mariana Mora (2017, p. 195).

Andrés are an example of what we previously described as "asymmetrical democratic iterations". This would be a case in which the State has taken advantage of its privileged position disregarding the demands of minorities by not legislating accordingly.

Both the self-determination of the nation-state and that of the autonomous communities denote both an external aspect, namely their right to govern the State or the community free from external intervention, and an internal aspect considering the people's right to rule themselves based on their values and priorities.[14] The actual activity of self-government that takes place within Mexican autonomous communities accounts for the internal aspect, without the acknowledgement of its external aspect. From a strict perspective on self-determination through the current legislation and federal arrangement, it seems that the communities' right to be free from the state's interference would collide with the democratic majority's right to choose a state government ruling over the territory as a whole.

Benhabib's democratic iterations for a federalist cosmopolitanism —where a nation-state's sovereignty copes with the international order's jurisdiction— proposes a strategy for managing these interactions democratically. Perhaps Benhabib's federalist cosmopolitanism and her democratic iterations could be adapted to contain this kind of conflict. However, if the cosmopolitan model were to be adopted, asymmetrical relationships should be avoided. This implies that, other than universal human rights, no values or interests should be imposed.[15] If we adopt Benhabib's cosmopolitanism we would need to face the fact that autonomous communities would find it difficult to accept global values. So, again, in view

[14] See Anna Stilz (2016).

[15] Since each autonomous community has a particular set of cultural beliefs and some of them could contend with liberal values, we consider that strict adherence to Human Rights should be the only "external" guiding principle at the core of their institutions to ensure both autonomy and the respect of fundamental rights. Kymlicka (1989, pp. 206-244) has discussed in depth the tensions between minority rights and the liberal tradition. He observes that, indeed, it seems that liberalism plays down the relevance of membership in cultural communities as contexts of choice. He mentions how even Rawls holds that in just societies self-respect is ensured by the recognition of equal citizens, and not by the membership to cultural communities. Certainly, there are different approaches to minority rights among liberal thinkers. We are sympathetic to Kymlicka's attempt to dissolve the conflict between liberalism and cultural minorities. To put it very simply, he advocates a form of liberalism in which many collective rights can be implemented. His position deserves further attention and indeed opens more possibilities to argue for minority rights. However, given the context of the two forms of autonomous communities mentioned here, that is, the Zapatista and the Kurdish, we have taken a different direction than Kymlicka. The peculiarity of the Zapatistas and the Kurds is that their struggle takes place in the context of fragile democracies, as in the case of Mexico and Turkey.

of the obsolescence of the nation-state model and the possibility of moving towards a cosmopolitan citizenship model engaged with global values, we should ponder an alternative to ensure the coexistence between cosmopolitanism and the self-determination of autonomous communities.

In order to deal with the case of Mexican autonomous communities we shall introduce the notion of "democratic confederalism". In general terms, democratic confederalism strengthens the participation of minorities; in our case, it strengthens the participation of autonomous communities, recognizing the very notion of "autonomy" and limiting the imposition of values and political conditions from external agents such as the State or democratic majorities. In the final section, we shall argue that democratic confederalism can be an alternative for overcoming the tensions that may arise between the cosmopolitan model of citizenship and the local model of autonomous communities in the framework of the exercise of democratic iterations. It is worth mentioning that intellectuals from autonomous communities have also proposed a form of confederalist model.[16]

V. Democratic Confederalism and Democratic Iterations

Up to this point, we have been raising some of the tensions taking place between two different models of citizenship, namely, the cosmopolitan model (as conceived by Benhabib) and the local (as conceived by autonomous communities, e.g., the Zapatistas). Although it seems that the two models of citizenship are incompatible, they share something in common: they aim to overcome the nation-state's structures of political exclusion. As we mentioned above, Benhabib's cosmopolitanism is inclusive in spirit, and we think she is right in her defense of political membership for immigrants. We also agree with her that, in view of global interdependencies, it is more practical to move from the nation-state model to a cosmopolitan model of citizenship. However, we also believe that, just as Benhabib's cosmopolitan model defends the political membership for foreigners and aliens, it must also consider alternatives for coexisting with legitimate forms of localism.

Benhabib's cosmopolitan federalism is open to multiple iterations in the context of which even localist conceptions of citizenship can be discussed. However, in the case of the autonomous communities to which we have referred in this article, we think that the democratic confeder-

[16] See, for instance, Aguilar (2018). The title of her essay is particularly illustrative: "Nosotros sin México: naciones indígenas y autonomía".

alist model is more functional and practical. The model we propose is inspired by the controversial Kurdish militant Abdullah Öcalan, who formulated the political concept of "democratic confederalism" as a solution to the recognition of Kurdish nationalism.[17] An adaptation of his notion of democratic confederalism proves helpful for strengthening the participation of autonomous communities, recognizing their self-determination and autonomy.

Democratic confederalism rejects centralism and the imposition of dominant cultural and sociopolitical values, whether these values are those of a nation-state or those of the global world. As is the case with cosmopolitanism, democratic confederalism is open to commitments that concern heterogeneous social structures; furthermore, it proposes an equitable coexistence between local political communities, and it is opposed to any kind of centralism or imposition of dominant cultural and sociopolitical values. Democratic confederalism shares values to some extent with cosmopolitanism, insofar as both are against the idea of peoples as unitary and homogeneous entities, and both conceive society as heterogeneous and inclusive. However, democratic confederalism seeks to strengthen the self-organization of social actors and to recognize the practice of political citizenship in the terms in which autonomous communities exercise it.

A democratic confederalist model provides autonomous communities a very broad autonomy, so both they and their members have inherent rights, and not only those granted to them by a central government. There is a highly relevant change of focus in this model: it is not simply a matter of recognizing the existence of autonomous communities in cultural and social terms. Rather, it is a matter of recognizing their right to exercise their political autonomy and self-administration. This change of focus radically modifies democratic iterations. We mentioned previously that democratic iterations, as Benhabib understands them, have at least two drawbacks. On the one hand, they assume that global principles and norms provide the leading model of citizenship; on the oth-

[17] Kurdish people are dispersed in a territorial portion that stretches from southeastern Anatolia to western Iran, parts of northern Iraq, northeastern Syria, western Armenia, and surrounding areas. The demand for a territory of their own and the fight for their political recognition have strained the relationship between the Kurds and the adjacent countries. The most difficult relations have been perhaps between the Kurds and Iran, Iraq, and Turkey. Öcalan founded the Kurdish Worker's Party in 1978 with the aim of creating an independent Kurdistan. He is controversial because his strategies included guerrilla activities. Nevertheless, as we show here, his political ideas and demands deserve more discussion. Among other things, Öcalan demanded territorial models of democratic autonomy, cultural rights, confederalism, and the formation of an independent state. As can be seen, there are some similarities between the Kurdish people and the Zapatista communities, mainly, their demand of the recognition of their autonomy (see Bengio, 2014; Çifçi, 2019).

er hand, they exclude minorities from democratic decision-making. This understanding of iterations, as we said, would make it difficult to establish more symmetrical interactions. By contrast, democratic confederalism gives voice to autonomous communities, positioning them as real agents participating in public debates, deliberations, and even decision-making processes, within the larger framework of a plural and heterogeneous political community.

Cosmopolitan values such as the recognition of pluralism and heterogeneity would make it possible for nations to assimilate other forms of citizenship and social organization that do not depend on the structures of the State or global values. Rather, there are autonomous communities with the right to preserve their own political autonomy, their local economy, as well as their local civic and cultural values. Indeed, the acceptance of local autonomous communities is not enough to eliminate the natural tensions that tend to arise in any sociopolitical space. We want to be clear about this: we do not believe that democratic confederalism would completely eradicate the tensions that arise in any context in which there are communities defending their own autonomy. What we do believe is that the change of focus we have proposed, that is, from the dominant agency of the State or democratic majorities to the real political engagement with autonomous communities, would favor a more equitable coexistence of communities with different conceptions of citizenship.

It is worth insisting that the participatory integration of autonomous communities in democratic iterations must be constituted from voluntary participation. Democratic iterations must be open to the participation of any cultural and political group respectful of human rights. Hence, these iterations perfectly fit the values of democratic confederalism that, in Öcalan's own words, "is flexible, multicultural, anti-monopolistic, and consensus oriented" (2011, p. 21). Democratic confederalism takes as central pillars ecology and feminism.[18] Here, we will not explore in detail the importance of these two pillars, but we want to note that in the case of several communities, it is important to think carefully about their attachment to the land and about the importance given to the political participation of women in those communities. In addition, Öcalan also refers to the necessity of an "alternative economy". This is an interesting pillar that fits

[18] Öcalan's ideas on ecology appear in several parts within his works; see, Öcalan (n. d., pp. 310-327). His approach to ecology has recently been discussed by Hammy and Miley (2022); see also Öcalan *et al*. (2020). For Öcalan's feminism and his ideas concerning the liberation of women, see Öcalan (2013). His promotion of the liberation of women has been analyzed in several recent scholarly works and media. See, for instance, Novellis (2018); Shahvisi (2018); Briy (2019); Al-Ali & Tas (2021).

with the local economy of autonomous communities, such as the Zapatistas. An alternative economy would be focused on increasing "the resources of the society instead of exploiting them", thus doing justice to the manifold needs of society.

Assuming the change of focus we have proposed for the democratic iterations is accepted, there remains a final relevant point concerning the dynamic of iterations: democratic iterations must look for a balance between the central, the regional, and the local. Again, this principle is also crucial for democratic confederalism. Iterations may change focus at different moments of the process, leading to a combination of vertical and horizontal interactions. However, democratic iterations shall seek the integration and participation of every political and social group, religious community, and intellectual tendency, avoiding centralism or any dominant positions of majority groups. Öcalan points out that

> ...the creation of an operational level where all kinds of social and political groups, religious communities, or intellectual tendencies can express themselves directly in all local decision-making processes can also be called participative democracy. The stronger the participation the more powerful is this kind of democracy (2011, p. 26).

Democratic confederalism, however, cannot be simply understood as a form of participative democracy. We share with Öcalan (2011, p. 27) the idea that a real democracy applies decision-making processes from the immediate local level to the global level. Thus, unlike the nation-state model or other forms of localism we even find in some liberal democracies, democratic confederalism is open to the association of different groups and communities that may have different political and cultural values. The democratic confederalist model applies to interacting with communities that, as is the case with the Zapatistas, are already involved in participative democratic processes in their internal social and political organization.[19] This being the case, it will be easier for autonomous communities to become part of democratic iterations, of negotiations, and of decision-making processes.

In conclusion, we think that Benhabib's model of cosmopolitan citizenship would be much more functional and practical, even for recognizing the model of citizenship of autonomous communities, if it adopts the "change of focus" we have proposed by introducing democratic con-

[19] As examples of the internal political organization of Zapatistas see Martínez (2007), and Larrosa *et al*. (2019).

federalism. Perhaps the materialization of this proposal requires several iterations.

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Radical Republican Citizenship for a Mobile World

Ciudadanía republicana radical para un mundo en movimiento

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Abstract: Migrants invariably and unavoidably experience domination under the nation-state centered concepts, categories, and institutions that structure our political thinking. In response, we need to build new forms of citizenship, including local, regional, transnational, and supranational forms of belonging, accompanied by meaningful, democratic, political power. In this paper, I examine historical and present-day alternative models of political organization as possible viable alternatives to state-centric liberal democracy. It begins the task of assessing these models using radical republican theory that grounds non-domination in the active and equal participation of people subject to power. I have three broad aims. First, we need to break down the native-migrant dichotomy to highlight commonalities and search for solidarities among migrants and other marginalized and oppressed groups, including indigenous groups. Second, I seek to awaken the political imagination. Many people do not believe there are viable alternatives to liberal democracy centered around the nation-state. In response, we should draw attention to the ways in which the nation-state's hegemony is fragile and fragmented and the ways in which sovereignty is complex and contested. Most importantly, we need to consider alternative models for inspiration. Third, we need tools for assessing the desirability of alternatives and for building new forms of citizenship. In what follows, first I explain why the dominant, nation-state centered model of political organization is unable to deliver justice in today's world, or, indeed, address the collective dangers that humanity faces. I next provide a sketch of a radical republican vision that provides normative guidance our thinking about alternative institutions. I end by using this radical republic vision to reflect on possibilities to guide efforts to remake the world.

Keywords: Migration, Migrant, Marginalized Groups, Democracy, Politics, Citizenship, Radical Republic.

Resumen: Los migrantes, invariable e inevitablemente, experimentan dominación bajo los conceptos, categorías e instituciones centrados en el Estado-nación que estructuran nuestro pensamiento político. En respuesta, necesitamos construir nuevas formas de ciudadanía, incluidas formas de pertenencia locales,

regionales, transnacionales y supranacionales, acompañadas de un poder político significativo y democrático. Este artículo examina modelos alternativos, históricos y actuales, de organización política como posibles opciones viables a la democracia liberal centrada en el Estado. Comienzo esta tarea evaluando estos modelos desde la teoría republicana radical que fundamenta la no dominación en la participación activa e igualitaria de las personas sujetas al poder. Tengo tres grandes objetivos: primero, romper la dicotomía nativo-migrante para resaltar los puntos en común y buscar solidaridades entre los migrantes y otros grupos marginados y oprimidos, incluidos los grupos indígenas. Segundo, busco despertar la imaginación política. Muchas personas no creen que existan alternativas viables a la democracia liberal centradas en el Estado-nación. En respuesta, debemos llamar la atención sobre las formas en que la hegemonía del Estado-nación es frágil y está fragmentada, así como las formas en que la soberanía es compleja y disputada. Lo más importante es que debemos considerar modelos alternativos para inspirarnos. En tercer lugar, identificar herramientas para evaluar la conveniencia de alternativas para construir nuevas formas de ciudadanía. En lo que sigue, primero expondré por qué el modelo dominante de organización política centrado en el Estado-nación es incapaz de hacer justicia en el mundo de hoy o, de hecho, de abordar los peligros colectivos que enfrenta la humanidad. A continuación, ofrezco un esbozo de una visión republicana radical que proporciona una guía normativa a nuestro pensamiento sobre las instituciones alternativas. Termino usando esta visión de República radical para reflexionar sobre las posibilidades de guiar los esfuerzos para rehacer el mundo.
Palabras clave: Migración, migrante, grupos marginados, democracia, política, ciudadanía, República radical.

I. The Need for New Models of Political Organization

The dominant model of sovereignty is grounded in a model of states in which a People exercises self-determination over a sharply delineated territory. Social scientists have criticized this model for its methodological nationalism, a bias in which scholars uncritically import the perspective and assumptions of the nation-state into their research (Beck, 2000; Wimmer & Glick, 2003). Under this bias, the "People" is conceived as a sovereign entity composed of citizens united by shared ethnicity and culture, bound together by obligations of solidarity in a particular, fixed place. This model of sovereignty and of the state has structured research, shaping the questions investigated and the evidence considered. It has also ren-

dered some phenomena (e.g., transnational processes, minority nations, the non-citizen population) invisible.

This dominant model is more than a tool for understanding the world. It is also a normative conception, defining notions of authority, legitimacy, citizenship, and justice. The descriptive and normative dimensions reinforce each other. Claims about the nature of sovereignty and political organization lead to notions of what is possible and how things should be. It shapes our responses to questions about who belongs, who can make and enforce rules, and who is owed what. These normative notions in turn shape the nature of sovereignty and political organization. For example, our conceptions of what citizenship *ought to be* affects political and legal decisions about *who counts* as a citizen; our account of political authority affects how we respond to proposals for increased supra or sub-national authority.

The complex ways in which descriptive and normative features are intertwined provides an entry point for a critical intervention. When a model fails to adequately reflect the reality of political society, this calls into question the adequacy of the normative account. Theoretical developments in the social sciences have drawn attention to the shortcomings of this model. These combine with political and legal developments that challenge its viability, particularly the ways in which space, place, and governance have been transformed. Few of these transformations are unique to the twenty-first century (though the exponential growth and sophistication of big data and algorithmic governance arguably provide governments and corporations with unprecedented capabilities for intervention). Nonetheless, the combination of their scope and intensity challenges the adequacy of conceptions of membership, sovereignty, and territory that developed concurrently with the rise of the nation-state.

The first problematic methodological nationalist fiction is the sovereign state, conceived as exercising power over and on behalf of an ethnically homogenous, territorially bound citizens. This ignores how many states have two or more nations, with varying levels of political autonomy and recognition. State territories have never mapped neatly onto ethnic groups and this fiction that states ought to do so has played no small role in ethnic cleansing and genocide. Moreover, this conception reifies settler colonialism, erasing indigenous people, who are often included on inequitable terms, while simultaneously possessing their own forms of sovereignty.

States are internally fractured in other ways. There are significant cultural and ideological divisions between rural and urban populations. Global cities are often more closely connected to peer cities at the other side

of the globe than to their rural neighbors (Sassen, 2001). Cities also exert power against state and federal governments, for example, when sanctuary cities extend protections toward immigrant populations or refuse to cooperate with federal law enforcement (Hoye, 2020; Paik, 2020). In all of these examples, competing political units fracture the unified notion of the state.

Similar problems arise for the idea of a People, which central to democratic and for republican thought, since it is identified as the source of legitimacy and authority. Under a methodological nationalist perspective, state power is justified on behalf of the People, to whom it is expected to be responsive. Citizenship is defined as membership in a territorial state, dismissing rather than engaging possibilities of subnational, supranational, or transnational political membership.

This conception of the people as a body of citizens does not reflect reality. Equal status is at the core of the ideal of citizenship, but it is far from realized. Even when people enjoy formal equal status, racism and anti-blackness continue to undermine real equality. Immigration also belies the ideal of citizens with equal rights, introducing hierarchies in which groups are assigned unequal rights and statuses (Cohen, 2009). Immigrants often lack core right of citizenship such as the right to vote in elections,[1] the right to remain indefinitely in the territory, and access to core social benefits. Nowhere is this more starkly illustrated than by illegalized populations, who form a precarious workforce that is often central to state economies.

The other dimension of the people is the ideal of shared ethnicity and culture. The prominence of indigenous peoples, minority nations, and immigrant groups puts to rest the ideal of shared ethnicity and culture. In many places, it is reasonable to speak of "super-diversity", in which people's lives are shaped by an interplay of ethnicity and many other factors, including immigration status (which assigns different rights), race, gender, age, language, religion, access to resources and services, spatial distribution, labor market experiences, transnational connections, and much else (Vertovec, 2007).

The other untenable fiction of methodological nationalism is the bounded territory. Many lives transverse state borders (Basch *et al.*, 1994). Millions of families are transnational and many people have dual or multiple citizenships. Even more central to this project is the way in which sovereignty is fragmented and dispersed, with power —including juridical power— exercised across borders in complex ways (Krasner, 1999).

[1] Though some states and many substate units allow immigrant voting (Pedroza, 2019).

The conception of borders promoted by nation-states does not correspond to legal jurisdictions, since states habitually shift legal borders beyond their official borders at their convenience (Albahari, 2015; Shachar, 2020).

Furthermore, technology has intensified the transformation of space. Many of us are familiar with workplaces and schools that have shifted into video conferencing, connecting us on screens that peer into each other's homes, often hundreds or thousands of miles away. Political organization has also moved online, both with transnational human rights movements (including transnational indigenous movements), and, alarmingly, terrorist groups and far right activists, who learned early on to use the Internet to foment their ideologies.

Finally, big data and surveillance has given governments and industry new ways to exercise power, largely unconstrained by borders or by public oversight. We don't need to invoke hyperreality or the metaverse to recognize that community and connection have changed and that, correspondingly, we need new forms of political organization and mechanisms to address abuses of power. As the rise of transnational far right and terrorist networks illustrates, some of the most pressing problems are both delocalized and interconnected by highly complex, causal chains (Beck, 2006). The most alarmingly is anthropocentrically-driven climate change, which connects to migration since it is presently leading to human displacement, sometimes across international borders. Not only does any credible response to climate change pose collective action problems that the state system has so far been unable to overcome, but it challenges us to rethink our relationship to land, borders (both human-made and ecological), and political authority (Ochoa, 2020). The combination of all of these developments demands that we construct new models to understand democracy, the legitimate exercise of power, equality, and much else.

II. Radical Republicanism

So far, I have claimed that features of political organization, law, and cultural division, along with problems that we face today call for rejecting the dominant model of sovereignty structured around an ideal of the nation-state. Two questions arise. First, what am I proposing in its place? Criticism isn't sufficient. We also need to experiment with potential viable, alternative models. Second, what normative resources do we have to guide our judgments about alternative models? What reasons can we provide

for why they might be better? In this section, I focus on this second question, drawing on the republican tradition.

Scholars differ on the core features of republican philosophy and who counts as a figure in the republican tradition. At its core is the ideal of non-domination, understood as freedom from arbitrary interference. Republicans insist on the equal status of citizens to guard against domination, along with institutional mechanisms that allow citizens to shape laws and policies limiting their freedom and to contest abuses (Pettit, 1997; Skinner, 2012) Of particular importance for most republicans is the active participation of citizens to prevent domination and oppression.

What distinguishes a *radical* republican tradition (Leipold *et al.*, 2020)? Radical republicanism, as I understand it, has at its core the conviction that existing structures of power are rotten and that structural change is necessary for justice. In other words, radical republicanism is revolutionary, aiming at disrupting and changing an unjust social order. Radical republicans insist on the active participation of all people in governance, which requires expanding the *demos* to empower disenfranchised and marginalized groups. Let me propose four features of this account: its anti-racism, anti-colonialism and anti-imperialism, anti-nationalism, and anti-sedentarianism.

First, radical republicanism is anti-racist (Mills, 2015). It adopts the perspective of groups such as African Americans and colonial subjects that have not only been excluded from the demos, but who have been denied recognition of their status as persons. Radical republicanism recognizes that white supremacy is at the core of injustice and that its abolition demands more than reforming legal, political, and economic institutions so they live up to their professed ideals; it involves shifting power so that people can insist that their demands be met.

Melvin L. Rogers draws on the nineteenth century African American thought of Frederick Douglass, David Walker, Hosea Easton, and Martin Delaney, demonstrating, *contra* Quentin Skinner and Philip Pettit (who are widely credited with rescuing republic thought from the shadow of liberal conceptions of freedom of non-interference), that republicanism was very much alive in the nineteenth century. He points out that for these thinkers, "To enjoy liberty requires not merely freedom from the arbitrary whim of particular agents of laws that limit arbitrary power, but a transformation of the system of cultural value in which blacks occupy a lower position of worth" (Rogers, 2020, p. 63).

Rogers distinguishes between political slavery and chattel slavery. The notion of political slavery, prominent in the Roman tradition, is based on the idea that people are denied a status that they are potentially owed.

In contrast, under chattel slavery, "The problem was not the denial of a status within a political community already acknowledged as one's due, but the denial of the very idea that any political status at all might be due to one" (Rogers, 2020, p. 79). Passing just laws and procedures for their enforcement is insufficient when the oppressors refuse to recognize that the people they are oppressing are possible political agents. Kimberlé Williams Crenshaw observes that "Because rights that other Americans took for granted were routinely denied to Black Americans, blacks' assertion of the «rights» constituted a serious ideological challenge to white supremacy" (Crenshaw, 1988, p. 1365). The radical republican approach centers marginalized groups who have had to assert their rights.

Second, radical republicanism is anti-colonialist and anti-imperialist. It is acutely aware of the ways in which colonial states continue to dominate colonized people. Decolonization is an ongoing project that needs to be actively pursued. Furthermore, imperialist states continue to exercise power abroad, depriving people in other political communities of meaningful self-determination. Adom Getachew has documented how, in the late 1950s and early 1960s, anticolonial nationalist such as Kwame Nkrumah and Eric Williams saw the need for postcolonial federalism to ward off domination from imperial powers, leading to the Union of African States and the West Indian Federation (more on this below) (Getachew, 2019).

Perhaps controversially, radical republican theory's commitment to anti-colonialism and anti-imperialism entails that it should also be anti-nationalist. This is controversial since anti-colonial struggles have often invoked nationalism, which is commonly seen as opposed to empire. Nationalism has indeed been strategically valuable to many groups struggling for recognition. Proclaiming one's self a nation, as opposed to a mere community or interest group, allows the group to justify claims to self-determination and special rights. Nonetheless, the strategic use of nationalism disguises its exclusionary nature or, as Andreas Wimmer puts it, "Nationalism was the main ideological tool to justify why the principle of equality doesn't apply to every human being but only to the citizens of the state" (Wimmer, 2021, pp. 4-5).

Mahmood Mamdani sees nationalism not as the culmination of a unified colonized people embodying its self-determination, but rather as a culmination of strategies of divide and rule imposed by colonial powers: "the emergence in the postcolonial situation of a violent nationalism following from the creation of minorities under indirect rule. The minorities the colonizer created in the colonies sought, after independence, to become the nation" (Mahmood, 2020, location 82, Kindle). Nandita Sharma sees nationalism not as opposing imperialism, but rather inheriting

its legacy, drawing on imperialist practices of separating groups of people through racist legal and social classifications (Sharma, 2020, p. 88). She argues that the nation-state not only has not, but that it cannot meet the promise of national self-determination (Sharma, 2020, p. 275). Similarly, in her colonial genealogy of the modern state, Radhika Mongia has illustrated how the British responded to the abolition of slavery by reproducing the racialized hierarchies of empire through the control of indentured labor (Mongia, 2018). Our contemporary understanding of national sovereignty emerges from a racial project, which continues today. Against the ahistorical view in which nation-states emerged in the European Treaty of Westphalia, Mongia reveals how "nation-states" bear the scars of empire.

Though radical republicanism is anti-nationalist, it does not necessarily call for the abolition of territorial states. Any plausible set of political institutions that will mitigate domination will be multilevel. Once we acknowledge the diversity and pluralism of individuals and communities within territories, it *may* turn out that territorial states remain a useful site for democracy, if there are issues can neither be plausibly resolved at a local nor a global level. Notice, though, that these territorial states will not be *nation*-states. Also, insofar as something resembling territorial states is justifiable, it will either be for practical reasons (e.g., it makes sense to build on existing infrastructure and institutions that are organized around states) or because it best permits realizing radical republican values.

Third, radical republicanism takes the migrant as a central, subversive figure (Nail, 2015). To fully grasp this point, it's important to recognize that, as E. Tuck and K.W. Yang emphasize, "Settlers are not immigrants" (Tuck & Yang 2012, p. 6).[2] Settlers erase indigenous peoples, using violence to impose their laws and epistemologies and to extract resources and usurp land (Wolfe, 2006). Immigrants join communities under the community's terms and do not have the power to impose their will. The figure of the migrant intimately connects to decolonial projects. Mongia writes:

> If the chief characteristic of colonial rule is a set of legal differentiations, which entail differential entitlements and differential treatment for different subjects, that today *all* states embody a *historically produced* colonial dimension, with the citizen/migrant distinction as a, perhaps *the*, primary axis of such differentiation. (Mongia, 2018, p. 150)

Nation-states embody this colonial legacy of differentiation and separation for the purposes of domination. As Jennifer Chacón, in her commentary on *Indian Migration and Empire*, observes, Mongia's genealogy

[2] See also Sharma & Wright (2008).

of how the British used nationality to implement a racist agenda resonates with legal scholarship that draws on critical race theory to show how migration regulation "carries out a continuing racial project using neutral language and technologies tied to nationality" (Chacón, 2021, p. 261, citing García Hernández, 2013; Johnson, 2000; Vázquez, 2015) The history of immigration enforcement is a history of racism, in which law and policy drew and redrew the boundaries of whiteness (Roediger, 2006). Nandita Sharma writes:

> A crucial first step toward decolonization, then, is dismantling the borders between people categorized either as National-Natives or as Migrants and rebuilding our solidary across —and more importantly *against*— the "nations" and nation-states that depend on these categories of their existence. (Sharma 2020, p. 276)

The migrant becomes a central figure for radical republicanism since it poses the challenge: how do we provide equal status for people excluded both by law and by the imagination from the political community? This is starkest for refugees, who are often *de facto* stateless people. At the same time, the figure of the migrant opens new conceptions of belonging.[3] The importance of migrants for radical republican thought is two-fold. First, while state power and structurally racist institutions exclude them from full membership, migrants simultaneously belong to the community. They experience differential inclusion, calling into question the pernicious dichotomy of legal/illegal that structures the state-centric imagination. Migrants may be excluded from the franchise and deprived of rights to protect them from invasive, unaccountable policing, but, at the same time, they are parents, workers, members of churches, school districts, neighborhoods, and much more. Moreover, they are often members of transnational families and communities. Attention to the many forms of migrant belonging helps free us from state-imposed conceptions of citizenship and encourages us to recognize the fluidity and complexity of membership.

Second, migrants often actively claim membership (Bloemradd, 2021; García, 2021). Migration itself is a claim to belonging, something migrants assert every time they cross a border. But migrants are also politically active, demanding recognition and asserting their rights (Casas-Cortes et al., 2015; De Genova, 2017; Isn & Nielsen, 2008; Sager, 2018b). Migrant demands are a resource to help us recognize what is wrong with our cur-

[3] Nicholas de Genova draws attention to the ongoing struggles around citizenship, in which states' effects to produce a people simultaneously creates states of exceptions

rent political structures, to redress wrongdoing, and to imagine new models of membership and politics. Indeed, migrants' decision to freedom of movement against state deportation regimes is not only a form of resistance, but an assertion of political possibility. As Nicholas De Genova observes, "freedom of movement supplies a defiant reminder that the creative powers of human life, and the sheer vitality of its productive potential, must always exceed every political regime" (De Genova, 2010, p. 59).

Taking into account anti-racism, anti-colonialism, anti-imperialism, and anti-nationalism and emphasizing the centrality of the figure of the migrant, we can highlight these central features of a radical republican account:

1) *Participatory imperative:* People must have significant influence, especially at the local level, to shape policy. This includes, where appropriate, the right to vote, run for office, the power to speak and to protest in public fora, access to a free press and social media, as well as the ability to exercise rights such as freedom of association and freedom of speech and expression.
2) *Contestatory imperative:* Robust mechanisms, including legal mechanism, must exist at every level to allow people to contest domination. People must also enjoy protections so that they do not suffer retaliation for contesting perceived injustices.

   These two imperatives are central features of every republican account. To them, I add a third.
3) *Anti-oppression imperative:* Our starting point is not an ahistorical, idealized world, but rather the world as it is, scarred by legacies of colonialization and imperialism, by anti-blackness, and by racialized and gendered oppression. Our baseline assumption is not colorblindness or the assumption that formal rights or sovereignty is sufficient to end domination. Rather, we acknowledge that the world is broken and that bandages and salve do not suffice to heal it.

   These imperatives must link to the design of political organizations, which, in turn, will need to resist the formation of rigid categories and identities and dichotomies of us and them. Solidarity needs to be grounded on common interests and connections and the need to overcome collective action problems, rather than shared ethnicity or culture. Additional features of this radical republican vision include:
4) Membership must be fluid, with low entrance and exit costs. Inclusion should be determined not be place of birth or the nationality of one's parents, but rather by subjugation to domination. Borders should be largely open and people should be free to travel, work, and settle

without the threat of state (or corporate) violence. As discussed above, fluid membership does not mean that we should abolish territorial political units. Nor does it mean that membership will be unstable. Place matters for many reasons, including the institutions that exercise power over where we live are the ones best positioned to dominate us.

5) Territorial-based governance is unlikely to be sufficient, so deterritorialized and transnational governance must be democratized so that people have real opportunities to participate in and to influence decision-making. Using sovereign states as proxies for people qualified to represent their interests is at best insufficient and, at worst, contributes to the domination of internal minorities.

The project is to found a new republic —a new *public thing*— in which the public corresponds to the actual people(s) and where people are free from domination. What follows can only be a sketch of possibilities and resources.

III. Building a Radical Res Publica

What models are available for building a *res publica* that is anti-racist, anti-colonialist, anti-imperialist, and anti-nationalist and that takes the migrant as a central figure? If we are to determine a more adequate set of institutions, norms, and laws for today's world, we need to interrogate different levels and units of analysis (e.g., local, regional, transnational, global) and agents (e.g., corporations, NGOs, international and transnational organizations, entrepreneurs, diaspora, etc.). Citizenship will need to reconceived; instead of belonging exclusively to nation-states, it will need to track the many associations and institutions that exercise power and influence over people's life. This means reviving and constructing models of multilevel citizenship of overlapping and nested polities that were the norm before the rise of the nation-state (Bauböck, 2018; Maas, 2013). Just as membership will need to be fluid, we also need to recognize that institutions should change as capacities for domination change.

We also need to recognize that identifying the relevant political units and their rules for membership is insufficient to secure non-domination. Participation and contestation are necessary, but insufficient conditions for non-domination. Anti-racism and resisting white supremacy must be at the forefront of institutional design, so we will need to be alert to the ways in which allegedly inclusive polities systematically exclude and dominate parts of the population and take action to mitigate this. At times,

this will involve giving groups special rights, including self-determination rights when this serves the ideals of non-domination and anti-racism. In many contexts, there is a need for significant, forward-looking reparations (Táíwò, 2022).

The topic of reparations should not be seen simply as occurring within states and directed to individuals. There are large questions of distribution of resources. An important, anti-capitalist strain of republican thought calls attention to the dangers of economic dependence and corporate domination (Kohn, 2022; Laborde, 2010; Thompson, 2019). These distributions are troubling regardless of their origins, but they often have colonial and imperial histories of political domination and resource extraction. A commitment to non-domination calls for us to redress these inequities and to change institutions so that they are unlikely to reoccur.

Furthermore, institutional design cannot just be a matter of designating types of political organization (e.g., world government, multinational federalism, transnational governance, urban polities, etc.). It also needs to mediate between them. Access to multiple polities can be a form of anti-power, providing sites to contest injustice and exit rights to escape it. Contrary to myths of absolute sovereignty, jurisdictions can and frequently do overlap. Nonetheless, there need to be mechanisms for resolving disputes.

What institutions does a radical republican perspective support? Let's begin with the claim that any set of institutional structures must guarantee people's capacity to exercise and enjoy universal human rights. This is a fundamental precondition for non-domination. Non-domination depends on people's access to basic rights to life, liberty, and security, as well as freedoms of speech, expression, association, and movement, among others. In conventional liberal accounts, the nation-state gains its legitimacy because it guarantees these rights. The default institutional arrangement is the sovereign, territorial state that is responsible for the people within its territory.

Centering the figure of the migrant and the anti-racist imperative casts doubt on this arrangement. Lukas Schmid has argued that even if states have the right to use force to exclude immigrants, they only have the moral right to enforce these rules if the institutions of exclusion robustly respect basic human rights (Schmid, 2022). Schmid adds that dominant conceptions of sovereignty that prioritize control and authority makes *robust* support for human rights unlikely. States' abysmal record in respecting migrants' rights bears this out (Jones, 2016); this requires radically rethinking our conception of sovereignty.

If we center the figure of the migrant —as I claim a radical republican account should— any set of institutions that robustly guarantees non-domination will have largely open borders (Hoye, 2018; Sager, 2020). Non-domination demands both exit-rights and easy access to full membership rights through the principle of *jus domicile* (Bauder, 2012). This follows from the participatory and contestatory imperatives: any political unit that has the power to dominate people (and this will be all political units that exercise power over people in particular places) needs to give people substantial powers to shape and contest policy. Mandating that groups of people such as immigrants have fewer rights is an example of divide-and-rule that is intolerable under a radical republican vision.

Similarly, a commitment to anti-racism and serious engagement with the realities of colonialism and its ongoing legacy demonstrates the inadequacy of the sovereign state model. As James Bohman observes, anti-imperial republican thinkers recognized that the domination of the colonies was a transnational problem and called for extending republican institutions into a transnational federation against European imperialism (Bohman, 2008; c. f. Muthu, 2003). In *Worldmaking after Empire* Adom Getachew revisits the model of postcolonial federation that she sees as central to anticolonial worldmaking (Getachew, 2019, p. 108). Kwame Nkrumah and Eric Williams "viewed the creation of regional federations as a mechanism for achieving nondomination within the international sphere" (Getachew, 2019, p. 108). The formal equality of the international state system does not translate to substantive equality. In response, Nkrumah and Williams put forward the Union of African States and the West Indian Federation as institutional means to address the limits of the postcolonial state:

> As small economies tethered to metropolitan and global markets, postcolonial states were unable to achieve self-reliant economies. Governing a larger political space and operating at a regional rather than national scale, a federation would create a larger, more diverse regional economy that would slowly begin to undercut relations of dependence and could pool resources for regional economic development. (Getachew, 2019, p. 107 and 108)

Whatever the long-term prospects of a world state (Wendt, 2003), we need intermediary political arrangements that respond to the real inequalities that rive our world.

So far, I have pointed to general features of a radical republican world (e.g., open borders) and mentioned transnational federalism as a form of anti-colonial worldmaking. Political organization at a regional and even global scale will be necessary, especially for tackling global problems, such as climate change. We should not lose sight, though, of how place

matters. Domination is often most acute when it reaches into the places we live. In many aspects of our lives, local politics is what is most significant and where they are likely to have a substantial opportunity to participate in decision-making. Even without more radical experiments such as participatory budgeting (Fung & Wright, 2011), people have an opportunity to organize and to participate in governance through town hall or school board meetings. Most people in the world today live in cities, so we need forms of urban citizenship (Bauböck & Orgad, 2020). Given the increasingly prominent role that cities play and their transnational connections, it no longer (if it ever did) make sense to conceive them as political units directly subordinate to regional governments or to states. Indeed, cities can serve as important buffers against regional or national domination (though, at the same time, this also means they have the power to dominate the people in their sphere and to resist attempts from larger political units to remedy this).

I will end with a few remarks about virtual spaces. As has become acutely clear in recent years, social media platforms poses both a threat to and an opportunity for democracy. While it is a mistake to ignore the ways in which the digital world relies on material processes (e.g., resource extraction, infrastructure [Crawford, 2021]), we are still a long way from coming to terms for the ways in which power operates independently of particular places. Big data, AI, and the Internet are by their very nature transnational, eluding effective intervention by any single country. We have yet to figure out how to design digital spaces that support, rather than undermine democracy (see, e.g., Forestal, 2017). Nor have we sufficiently explored the ways in which cyberspace is a sphere of domination, both in what it enables (e.g., anti-democratic interference) and who it excludes (e.g., those without resources to access the online world or the savvy to navigate it).

I suggest that radical republican thought provides resources for thinking about the virtual world and its regulation. The virtual world in many ways exemplifies fluid membership, with low barriers to participation and many opportunities for inclusion. But it also poses dangers. Anonymity provides protection for political dissenters, while simultaneously enabling abusive trolls (Véliz, 2019). In designing online architecture, we should highlight the participatory imperative, which support access to online spaces, and balance them with the contestatory and anti-oppressive imperatives, which mitigate against their abuse (e.g., through spreading fake news and hate).

What I have sketched here is the beginning of the larger research project. I have tried to show how a radical republican vision can begin

to bring together diverse traditions of thinking about political organization and citizenship, revealing common threads between anti-colonial and anti-racist thought and approaches to political theory that center migrants. By highlighting the ways in which groups of people have been excluded, we can begin to work toward a world that minimizes non-domination, in large part by bringing about the conditions for inclusion and meaningful participation.

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Refugeehood Reconsidered: the Central American Migration Crisis[1]

Reexaminando el refugio: la crisis migratoria de centroamérica

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Abstract: The number of refugees in the world amounts to more than one percent of the entire world population. This essay is an attempt to think about this question and assess the literature that addresses it, especially from the standpoint of ethics and political theory, and a grounding in real-world problems. The paper is intended as an introductory discussion for those interested in the debates about who should qualify for refugee status, especially in light of the predicament of Central Americans fleeing from the disorder. It pays special attention to the claim that the US has reparative obligations to Central American countries owing to US interventionist policies.
Keywords: Refugeehood, Migration Crisis, Central American, Justice, Migrants.

Resumen: El número de refugiados en el mundo asciende a más del 1% de la población mundial total. Este ensayo es un esfuerzo por reflexionar sobre esta cuestión y evaluar la literatura que la discute, especialmente desde el punto de vista de la ética y la teoría política, con base en los problemas del mundo real. El artículo busca ofrecer una discusión introductoria para aquellas personas interesadas en los debates en torno a quién debería calificar para el estatus de refugiado, en especial a la luz del predicamento de personas centroamericanas que huyen del desorden. Se presta especial atención a la afirmación de que Estados Unidos tiene

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obligaciones de reparación hacia los países centroamericanos debido a sus políticas intervencionistas.
Palabras clave: *Refugio, crisis de migración, Centroamérica, justicia, migrantes.*

I. Introduction

In late October 2019 it was reported that more unaccompanied minors had been detained trying to cross the southwest border of the US over the previous 12 months than in any previous year on record. This was 76,020 children and adolescents travelling without their parents, mostly from Central America: 52% more than during the previous fiscal year. During that same time Mexico, under pressure from the US, detained around 40,500 underage Central Americans, bringing the total to 115,000. Many families headed North as well (Villegas, 2019). And they were part of a much larger global phenomenon.

The world now has more forcibly displaced persons (refugees and internally displaced persons) than any time since World War II. The European Commission in July 2022 put the total number at 89.3 million, of whom 27.1 million were refugees, 53.2 million internally displaced persons (who have fled their homes but not left their countries), and about 4.5 million each of asylum seekers and Venezuelan refugees and forced migrants.[2] That figure amounts to more than one percent of the entire world population. 85% of those designated as refugees under current international law are hosted in "neighboring and developing countries, often for many years", or even decades.[3] The good news is that nearly 99% of the people in the world are not displaced from or within their home countries.

[2] UNHCR "Figures at a Glance": https://www.unhcr.org/en-us/figures-at-a-glance.html ; see also: https://civil-protection-humanitarian-aid.ec.europa.eu/what/humanitarian-aid/forced-displacement-refugees-asylum-seekers-and-internally-displaced-persons-idps_en

[3] See https://www.unhcr.org/en-us/news/press/2021/5/60a2751813/unhcr-warns-against-exporting-asylum-calls-responsibility-sharing-refugees.html

The bad news is that rich nations' responses have been, in general, hard-hearted. Indeed, refugee intake and support has gotten worse in the US and many other Western nations. After leading the world in refugee resettlement for decades, the Trump administration slashed the numbers by more than three-quarters. While the Trump administration is harshly criticized for its migration policies, the Central American migration crisis began under President Obama, dubbed "the deporter in chief". President Biden is also being condemned in progressive quarters for not doing more to reverse Trump policies. Meanwhile, the political discourse around refugees and asylum seekers has grown harsher across the West: in the UK, Hungary, Austria, Germany, and France, among other places, as far-right leaders enjoy increased support and influence thanks in part to popular hostility to immigration and refugee admissions.[4]

There may be no area of public policy in advanced Western states more fraught with deep moral and practical dilemmas than immigration. The United States has general humanitarian duties to people in need, and it also has more specific obligations under international law to those who make credible claims for asylum to the United States. The scope of both our moral duties and legal obligations are at stake in the ongoing debates, surveyed here, on the question: "who is a refugee?".

This essay is an attempt to think about this question and assess the literature that addresses it, especially from the standpoint of ethics and political theory, and a grounding in real-world problems. To do so, we need to consider the various moral grounds or categories that must be considered by policymakers or citizens who aspire to support morally defensible refugee policies. Those who are well off, whether individuals or states, have *general humanitarian duties* to aid those in great need; these exist quite apart from any past or ongoing relations with people in need. In addition, our past and ongoing relations involve certain basic requirements of *fair dealing* or at least decent treatment in our interactions with others. The violation of those standards, especially when powerful states like the US wrongfully and illegitimately harm the basic interests of poor and vulnerable states, may create obligations of *restitution and repair*. We must also consider that more specific obligations arise from our undertakings as a country in signing on to *international agreements*, such as the refugee convention. And finally, the very existence of the *state system* itself, as a global regime of governance from which we benefit, implicates us in the plight of refugees and gives rise to additional grounds for claims by those seeking asylum and resettlement.

[4] *https://www.pewresearch.org/fact-tank/2019/10/07/key-facts-about-refugees-to-the-u-s/*

This essay is a brisk survey of the moral and practical terrain, aiming to clarify the issues but not to settle them. It is intended as an introductory discussion for those interested in the debates around who should qualify for refugee status, especially in light of the predicament of Central Americans fleeing disorder. It pays special attention to the claim that the US has reparative obligations to Central American countries owing to US interventionist policies. Some of these historical relations, spanning much of the 20th century, are discussed by Enrique Camacho-Beltran, under the rubric of providing "a more complete normative panorama" of the migration crisis now confronting the US (Camacho, 2022, pp. 159-188). The catalogue is extensive and includes CIA involvement in coups, abusive practices of US corporations, unfair trade agreements, US contributions to climate change and worsening environmental disasters, and drug laws that help enrich and empower murderous drug cartels. We might add to this extensive catalogue those asymmetric, neocolonial power relations that scholars like E. Tendayi Achiume (2019) argue undermine Third World sovereignty to the benefit of wealthy developed countries.

One additional consideration should be noted. Even progressive policy makers in the US who are sincerely motivated to repair historical injustices and provide succor to the neediest of would-be migrants must confront other factors with potentially profound significance. I refer to the various threats of domestic backlash associated with white nationalism and nativism. Michael Blake (2020) refers to these as "the bigot's veto".

What then should political leaders do? Simply act on their moral duties as best they can discern them and leave the consequences to take care of themselves? And what about citizens deciding which candidates to support, for example in Democratic primaries? Should they favor the moral idealists or the more pragmatic realists? It is easy to urge that we need more "non-ideal" political theory, but it is a messy business, as my discussion will illustrate.

I begin by laying out the various relevant moral grounds mentioned above. I endorse the liberal view of domestic and global justice as defended by scholars such as John Rawls, Michael I. Blake, and Anna Stilz, and (to some degree) Michael Walzer (Rawls, 2019), members of self-governing political communities have special obligations to one another, but they also have outward looking duties and obligations based on general humanitarian considerations and also more specific relations with others.

I then examine the decades-long controversy surrounding the question of "who is a refugee", and its relevance to the Central American migrants. Whereas the canonical 1951 Convention conception of refugeehood can be claimed only by those with a credible fear of persecution

by their home state revisionists have argued that this arbitrarily excludes those —such as many of the Central American migrants— fleeing mortal peril owing to generalized disorder and insecurity, extreme poverty, or prolonged natural disasters such as those following from climate change. Having discussed the revisionists and their critics I then turn to a third position which I call "contingent revisionism" which asserts that claims to refugeehood should widen when states do not act on their duties to assist those in dire need.

I then discuss another ground for claims to asylum and resettlement: the notion that refugees should be thought of as "orphans of the state system". The idea strengthens the force of states' obligations to admit refugees though it is also apt to be misunderstood.

I turn finally to the issue of specific US responsibility for the Central American migration crisis and our reparative obligations. While some such obligations seem hard to deny, settling their scope and content raises complex and contestable questions. I conclude by advancing tentative suggestions about a way forward.

I hope in the end to have provided a useful overview of this complex terrain, highlighting some issues for further inquiry.

II. Justice among Members and Non-Members: the General Normative Context

The fullest mutual obligations of social justice hold among members of states because of the special relationship they share as members of collectively self-governing political communities. The institutions for which we are jointly responsible as citizens shape our interests and prospects comprehensively, from cradle to grave and beyond. Our government claims the authority to make final decisions on the most consequential matters. Legitimate states are answerable to their citizens in a special way, and they in turn bear special joint responsibility for what their government does in their name. The principles of domestic justice are designed to make the exercise of state power justifiable to the citizens over who it is exercised. When it comes to states' obligations to secure fair equality of opportunity, for example, this is something that the Mexican government owes to Mexicans and the American government to Americans (Macedo, 2004, pp. 1721-38).[5]

[5] For a more extensive defense of this idea see Macedo, S. (2018).

We stand in morally significant relations of various sorts to non-members as well. Our outward-looking relations with non-members are often significant but also different from those that face inward. Indeed, our obligations to outsiders while different in content may be in some instances more urgent. Among the most urgent claims that we may confront from non-members are those that advanced by people claiming to be refugees, as I explain below. And moral claims from non-members may even have priority over the claims of domestic justice when basic needs are at stake and claimants have good reason to press their claim against a particular state.

Our duties and obligations to outsiders fall into several categories, as mentioned in the introduction.

At the most general level, well off societies owe a *duty of assistance* to very needy or "burdened societies", as Rawls calls them. *Humanitarian assistance* fulfills a universal moral duty of "mutual aid, which Walzer describes as a form of Good Samaritanism": to assist the stranger fallen by the side of the road when we have more than we need and can relieve suffering at modest (or moderate) cost to ourselves. How much cost to ourselves? There is no precise answer. We should bear a "significant burden" (a reasonable or moderate cost) and help countries get to the point where they can provide decent lives for their citizens. An important feature of our universal humanitarian moral duties (or duties of beneficence) is that they would seem to have a *target*, which is helping societies get into a position where they can provide decent lives for their members. Once that threshold is reached (and again, it is admittedly vague), our duties to assist are at an end.

In addition to general humanitarian duties of aid on the part of the well-off toward those whose basic needs are unmet, we have a variety of moral duties and obligations arising from our *relations* with others who are outside our political community.

It seems right to say that we have duties of *basic fairness* or at least decency in our dealings with others, and these would seem especially important in the dealings of wealthy and powerful states in the dealings with poor and vulnerable ones. Duties of fair dealing with other persons and states include *fair trade and also cooperation* to solve common problems, such as climate change and other problems that are matters of serious global concern. And so too, we also have both shared interests and shared duties to promote *institutions to facilitate* and stabilize cooperation globally, especially on the most urgent issues, including those related to international political conflicts, economic and trade arrangements, and the global climate crisis. As others have argued, we should cooperate

and institutionalize that cooperation, when we can do so at reasonable cost, so as to avoid the circumstances in which injustice will predictably prevail.

To fail to support institutions capable of regulating our relations with others on the basis of fundamental fairness, when such institutions are feasible and their cost reasonable, is to be complicit in allowing conditions to prevail in which the weak will be dominated and abused by the stronger.[6]

We also have reparative obligations arising from past and ongoing wrongful harms: unjust military interventions or our contributions to the climate crisis with uneven impacts globally.

Part of what we owe to non-members has been codified in the international human rights agreements which we have signed. We should respect and promote the human rights of all and do at least our fair share under our international commitments, and when we have entered publicly into international agreements, those duties become more specific obligations that we have undertaken and announced to the world.

Finally, I have come to agree with those who argue that the very existence of the global state system implicates us morally in the plight of refugees, and that is independent of our general humanitarian duties and our specific commitments under international law (discussed below). The existence of the state system, from which we benefit as members of decently functioning states, makes stateless people worse off in some respects by constraining their movements. I discuss this at greater length below

There is nothing original in this brief sketch of our outward looking duties and obligations. All of this is widely acknowledged by liberal democrats, social democrats, and others, and contested by those with more cosmopolitan sensibilities. The sort of global institutional architecture that we need in order to secure even a rough approximation to global justice is surely far more extensive than what we have. Nevertheless, once we do develop a more adequate global "basic structure", it seems very likely that those supra-national institutions will remain much less comprehensive and less directly coercive than state institutions in relation to citizens (consider the European Union for example, in which states retain primacy) (Moravcsik, 2022, pp. 603 and 624). I emphasize all this simply to make clear my judgment that even with an urgent need to develop

[6] For an illuminating recent account, see Montero, Julio. (2022). *Human Rights as Human Independence: A Philosophical and Legal Interpretation*. University of Pennsylvania Press. Montero specifies seven positive international duties that are necessary to protect "the more fundamental negative duty to respect the independence of human persons", and their decent political communities (pp. 82-89). His account seems to me persuasive and valuable.

more robust global institutions to address the climate and migration crises, among others, we should not expect an end to the primacy of nation states, nor should we expect the dawning of an age of open borders.

III. Who is a Refugee?

Substantial controversy surrounds this question. It came up when a group of students and I met with the head of a refugee aid organization in Amman, Jordan, in January 2019. "That's an interesting question", he said, "if people are paying thousands of dollars to smugglers and they tell you their ultimate destination is Sweden, are they refugees?".

What did he mean exactly?

There is little question that people fleeing famine and political instability are desperately needy. Yet desperate need is not the basis for classification as a refugee in international law. Article 33 of the 1951 Refugee Convention defines a refugee as someone who has crossed an international border because of a well-founded fear of persecution in one's own country. At the core of refugeehood strictly conceived are persecution and "alienage".[7] "Alienage" refers to "a person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence".[8] So far as persecution is concerned, the home state need not be the actual agent of persecution: refugee status could also be satisfied if officials simply stood by while private actors engage, for example, in genocide. Note too that not any form of persecution will satisfy the convention definition, which describes a refugee as a person who,

> ...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such a fear, is unwilling to avail himself of the protection of that country.[9]

[7] See Shacknove, A. (1985, pp. 274-84, footnotes 1 and 5). The 1951 Convention limited its protections "to people who had been displaced as a result of events occurring before 1 January 1951", the 1967 Protocol made those protections universal, see: https://www.kaldorcentre.unsw.edu.au/publication/1967-protocol

[8] Convention, art. IA [2], quoted in *ibid*.

[9] Convention, art. 1 A (2). The United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, p. 14), states that: "a threat to life or freedom on account of race, religion, nationality, political opinion, or membership of a particular social group is always persecution", and that "other serious violations of human rights —for the same reasons— would also constitute persecution". And see discussion in Shacknove, footnote 5.

Those who are persecuted on one of these five protected grounds qualify under the "Convention conception" of refugeehood, as I shall call it.

Some countries have gone beyond the Convention conception and adopted wider definitions of refugeehood. Signatories to the Cartagena Declaration on Refugees of 1984 agreed to include "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order." Signatories include all but one of the Central American and Caribbean countries and several Latin American countries.[10] Similarly, the MERCOSUR countries of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Peru, and Uruguay, also extend refugee protections to people on account of, "generalized violence, foreign aggression, internal conflicts, massive human rights violations, or other circumstances that disturb the public order".[11] Colombia now provides refuge to over a million Venezuelan refugees.

People may apply for refugee status via state-based procedures, or they may apply to the offices of the United Nations High Commissioner for Refugees (UNHCR). Applicants are entitled under international law to a fair adjudication of their claims and, if judged to qualify, have a right to *non-refoulement* or non-return, as well as to refuge somewhere (not anywhere they wish).[12]

The UNHCR has the authority to adjudicate claimants' status but not to resettle them in a new state, and this once again in no way guarantees that registrants will be resettled in the country of their choice. This path can lead to placement in a UN administered refugee camp, such as the overcrowded Moria camp on the island of Lesbos in Greece. Designed for 3,200, it grew to over 20,000 refugees who lived in crowded, dangerous, and generally appalling conditions until it was destroyed by fire

[10] See "Cartagena Declaration". www.glossary.unhcr

[11] http://www.acnur.org/fileadmin/Documentos/BDL/2013/9080.pdf

[12] States have the right to transfer refugees to other states for protection: "countries may agree to transfer asylum processing and protection responsibilities between themselves… Under international law, the transferring State is responsible for ensuring that obligations to protect transferred asylum seekers are met fully by the receiving state… [S]afeguards include protection against refoulement, access to fair and efficient asylum procedures, health care, employment, education, and social security, and the right to freedom of movement". The UNHCR acknowledges but discourages these transfers as they often fall short of providing for guarantees and they can over-burden the developing states that receive transferees. Moreover, the UNHCR observes that developed countries host only 15% of the 26 million refugees worldwide, see: https://www.unhcr.org/en-us/news/press/2021/5/60a2751813/unhcr-warns-against-exporting-asylum-calls-responsibility-sharing-refugees.html

in September 2020. Placement in refugee camps is very often anything but short term: people may be housed in a camp for as much as 20 years or more.[13]

Zaatari camp in Jordan has over 80,000 inhabitants, some of whom have been there since it opened in 2012. According to the UNHCR, as of April 2022 fewer than half have received even one dose of the Covid vaccine.[14] The average stay in the Bidibidi camp in Uganda, one of the largest in the world, was around 10 years. "It was formally closed to new settlers, but the existing population is in it for the long haul —it's becoming a city" (Strochlic, 2019). The structures are becoming more permanent and foreign aid organizations are ceding local control to inhabitants where possible. Uganda is providing development assistance and sees the camp as a net positive (Betts, 2017). With 270,000 residents, Bidibidi is a rare but far from insignificant example of what is possible when refugees are welcomed and integrated.[15]

IV. Shacknove's Revisionism

In an influential 1985 article, Andrew Shacknove argued that the conception of refugeehood at the base of the 1951 international law convention is arbitrarily narrow owing to its historical origins in the mid 20th century European experience, especially Hitler's genocidal policies against Jews, gypsies, and others. The moral and conceptual background of the conventional definition is that legitimate states are expected, at a bare minimum, to protect citizens' basic rights and secure their fundamental interests in return for compliance with law. *State persecution* severs irrevocably this normal protective relationship between legitimate states and their citizens. Yet, as Shacknove pointed out, persecution does not exhaust the ways in which this "normal bond" between states and citizens can be severed.[16]

Shacknove proposed broadening the conventional conception of refugeehood in two ways. First, he argued that a well-founded fear of perse-

[13] On Moria camp and its fire, see: https://www.theguardian.com/world/2022/apr/21/disaster-waiting-to-happen-moria-refugee-camp-fire-greece-lesbos And from https://www.unrefugees.org/refugee-facts/camps/: "In protracted refugee situations, or situations lasting more than five consecutive years, refugees can spend nearly two decades in a camp and it is common for children to be born and grow up in camps". See also: https://blogs.worldbank.org/dev4peace/2019-update-how-long-do-refugees-stay-exile-find-out-beware-averages

[14] https://www.unhcr.org/jo/refugee-camps

[15] https://www.unhcr.org/en-us/news/stories/2021/3/604a30024/uganda-shows-including-refugees-lift-whole-society.html

[16] This is my elaboration on Shacknove (1985, pp. 274-284, 275-276).

cution based on one of the five protected grounds is a sufficient but *not a necessary* condition of refugeehood. Drawing on the conception offered by the Organization for African Unity, Shacknove proposed to include not only state persecution but also state collapse or weakness: people can be forced to flee not only from state ferocity or tyranny but also state frailty that issues in chaos and human misery. State frailty or failure may arise from natural disasters, or misgovernance, or some combination of these and other factors. The crucial thing, argued Shacknove, is that in these cases, as with state persecution, the normal protective bond between states and citizens is severed.

Shacknove's second revision was to argue that *alienage* —which is to say, flight and arrival at the doorstep of another state— is not essential. People in great need may be internally displaced or suffering on the ground in their home territory, therefore, "Alienage should be considered one manifestation of a broader phenomenon: the access of the international community to persons deprived of their basic needs" (Shacknove, 1985, p. 283).

So, the crucial criteria for refugeehood on Shacknove's revisionist account are that the normal protective relationship between the state and its citizens is severed and that people's basic needs are unprotected whether owing to state persecution or state failure, "tyranny or chaos", *and* that they are available to international assistance: meaning that either they come to us, or we can *go to them* and assist them in protected areas in their own states (Shacknove, 1985, p. 283).

To sum up, on Shacknove's revised conception refugees' status should be granted to those who meet three criteria:

- First, their "government fails to protect their basic needs".
- Second, they "have no remaining recourse other than to seek international restitution of those needs".
- Third, they "are so situated that international assistance is possible" (Shacknove, 1985, pp. 284, 277).

Shacknove's argument is relevant to the Central American migrant crisis, for it would appear that few of those families fleeing political instability, food shortages, or lack of opportunity are being persecuted by their state on one of the five protected grounds specified in the refugee convention (race, religion, nationality, membership in a particular social group or political opinion).

What about those fleeing gang-related violence? Determining the scope of claims under the convention is not always easy. "Membership

in a particular social group" has proven the be a sort of "elastic clause" in the determinations of some immigration judges. For example, gangs prey upon abandoned street children by pressuring them into unwanted gang activity or, especially in the case of girls and young women, sexual activity. Matthew Lister points out that "particular social groups" deserving of protection may well include abandoned street children preyed upon by gangs, and also those with gang-related tattoos. Such claims may be especially likely to succeed when people have sought the protection of governments without success or have previously suffered from violence without obtaining government protection (Lister, 2008, p. 827). The Convention conception is not without flexibility.

Should those fleeing persisting poverty, political instability, or generalized disorder nevertheless have a claim to refugeehood based on Shacknove's wider conception? This is important because the legal status of refugee is a privileged position in international law. Those who qualify are not mere supplicants for aid but have rights claimable under international law: a right to asylum, a fair adjudication of their claims and, if granted, rights to non-return, and permanent resettlement.

One further status is relevant to the current migration crisis at the Mexican-US border. As an alternative to refugeehood, citizen-residents of some Central American countries and some other countries have been granted Temporary Protected Status (TPS) by the US. TPS status is granted to citizens formerly resident in a designated country who are in the US at the time of designation. This category of protection against return has been granted on the basis of "ongoing armed conflict (such as civil war), an environmental disaster (such as earthquake or hurricane), or an epidemic, other extraordinary and temporary conditions."[17] Fourteen countries have qualified for TPS status in the US, in the past or currently, with some being so designated first by Congress and others by the Secretary for Homeland Security. TPS country-by-country designations are for up to 18 months and once granted are renewable. To be eligible, a person must have resided in the US continuously since his or her state was designated as eligible for TPS. People from Honduras and Nicaragua resident in the US were first granted TPS status in 1999, and those from El Salvador in 2001. TPS status for those individuals has been renewed since. Newer arrivals from those states could only qualify for TPS if their country were "redesignated" allowing newer arrivals to apply during designated periods.[18] The Trump administration sought to terminate TPS status for people

[17] https://www.uscis.gov/humanitarian/temporary-protected-status

[18] *Ibid*.

from El Salvador, Haiti, Honduras, Nepal, Nicaragua and Sudan, but the move was enjoined by a federal judge. The Biden administration has reversed that policy and continued protections for those granted TPS status in the past.[19]

All rights granted under TPS, unlike those available to refugees, are temporary and revocable, even if in practice long-term. Few if any new arrivals qualify for TPS. We will see more about this later.

On the face of it, Shacknove's proposed expansion of the category of refugee seems like an obvious moral improvement. People can be in urgent need of assistance on grounds other than state persecution: when fleeing starvation for example. Indeed, peasants fleeing drought can be more urgently in need than, for example, a businessman fleeing persecution.[20] Shacknove further points out that his revised and expanded conception "accounts more exactly for those persons who are in fact taxing asylum states", thereby furthering the "erosion of minimum order" in receiving states like Lebanon, Jordan, and elsewhere (Shacknove, 1985, p. 277); a designation of people fleeing persistent extreme poverty and disorder as refugees might help spread the burden. It seems plausible, moreover, to attribute the arbitrary narrowness of the 1951 Convention to its "Euro-centric" origins. It also seems telling that the basis for a broader conception would be found in Africa, a more likely source of insight into the needs of the global south.

Of course, a byproduct of Shacknove's widened conception is that many more people will qualify for refugee status. There are currently over 53.2 million "internally displaced persons" in the world: counting them would nearly triple the number of refugees worldwide.[21] Nearly 700 million people in the world live on less than $1.90 per day:[22] how many of them might qualify as refugees? The resettlement system is already overwhelmed.

Shacknove (1985) recognizes this problem, and characterizes prudential concerns about further straining wealthy countries' limited generosity as the danger of "premature cosmopolitanism" (p. 281).

There are good reasons to try and gain a clearer understanding of the reasons for and against the widened conception. We need to sort competing claims based on sound priorities. A too hasty embrace of the wide conception may contribute to both system overload and backlash. It may even be that among some migration activists and migrants themselves,

19 *Ibid*.

20 Cherem's example (2016, p. 189).

21 See https://www.unhcr.org/en-us/figures-at-a-glance.html

22 https://www.worldvision.org/sponsorship-news-stories/global-poverty-facts

the attractions of the widened conception and hopes that it will be acted upon contribute to increased migration flows.

There is a powerful case for resisting Shacknove's proposal with political implications for the status of Central American migrants.

V. Resisting the Revised and Expanded Definition

Shacknove's expanded conception of refugeehood helps call attention to the moral urgency of assisting people who are not persecuted on one of the protected grounds but who are in great need. There remains, however, a central question: if people are not *persecuted* by their home state, *why is asylum and resettlement in another country* the appropriate form of assistance? David Miller (2016, p. 80) points out that Shacknove's expanded conception says nothing about home state complicity in creating the dire need. A state that is incapable of securing its citizens basic needs may welcome assistance. If so, providing aid may be a preferable response, on several grounds.

One reason is cost-effectiveness. Refugee adjudication and resettlement are very expensive. The alternative "aid and development approach" of helping needy people in their home countries is, as Matthew Lister notes, "more likely to be able to help more people" (Lister, 2013, pp. 645-671) and, in addition, with *less of a risk* of the sort of political backlash that often greets refugee resettlement.[23] Lister joins Thomas Pogge in citing yet a third reason to help poor people "in place": those most likely to be able to find their way to wealthy countries to apply for refugee status are unlikely to be the "truly economically destitute". The refugee agency head I mentioned at the outset also observed this.[24] That last consideration should be underscored: by encouraging the flight of the relatively able and well-resourced, we may be worsening the condition of those left behind. We may not only be depriving the sending country of needed skills and able bodies, we may be providing a safety valve that could lessen the domestic pressures and resources available to be brought to bear for social and political reform.

Let's keep that last *safety valve* concern in mind.

[23] Lister (2004, p. 660), citing Gibney, M. J., *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, Cambridge UP, and see chapters 3-6, on the history of backlash against refugee programs narrower than those advocated by Shacknove

[24] Lister (2013, p. 661), quoting Pogge, T., "Migration and Poverty", in V. Bader (Ed.). *Citizenship and Exclusion* (Palgrave MacMillan. 1997), 12-27, p. 14

Lister argues that so long as "we work to meet our obligations" through development assistance and aid, as a principled matter we "have no obligation as such to grant refugee status and asylum to those suffering from severe poverty".[25] This is an important point: in the face of dire need abroad, states with duties to assist generally have a choice of means. Resettlement abroad is only one option, and we have now surveyed several reservations concerning resettlement.

Of course, we may worry that these reservations about resettlement will be all too appealing to public officials looking for excuses to turn away those seeking asylum even while having no intention —or no ability— to provide sufficient and effective aid. Let us keep in mind the worry that *aid will be insufficient*, for it will be important later.

The aforementioned considerations are important but we have not yet stated clearly the core of the principled case against Shacknove. Lister and Max Cherem pointed out that persecution by one's home state is a unique justificatory basis (or nearly unique basis) for the *specific remedies* of the international refugee convention, which include the procedural right to fair adjudication of one's claim and then, if successful, substantive entitlements to *non-refoulement* (or non-return) and *permanent resettlement* in another state where one's basic rights will be protected. Persecution on group-based grounds, Cherem insists, *uniquely entitles* a person to the "very specific and durable remedy" of membership in a new state because it decisively severs the normal relationship between states and their citizens. This simply may not be true of people with "unfulfilled basic needs" (Cherem, 2016, pp. 184 and 185).

In addition, the "protected grounds" specified by the 1951 convention (race, religion, nationality, political persuasion, or membership in a particular social group) make sense, even while they should not be seen as exhaustive. These are all deeply rooted and enduring aspects of our identities: features that, as Lister says, we cannot easily change and should not have to change. Persecution on the basis of these sorts of grounds is therefore "more serious or threatening" (Lister, 2013, p. 670) and less possible to evade, than persecution on other grounds, such as, for example, owning particular assets that are coveted by high public officials. For these same reasons, we should extend the protected grounds to, for example, sexual orientation and gender identity as among the "particular social groups" covered by the refugee convention.It is by persecuting people on grounds that are deep-seated and immutable or fundamental, such that people cannot or should not be expected to change them, that the state irrevocably signals that it "has actively turned against them"

[25] *Ibid.*

and is their enemy. Then the state repudiates all concern for their well-being in a way that is deep and irrevocable (Lister, 2013, pp. 661 and 662). Membership in a new state is the only possible remedy when the normal protective bond between states and their citizens is not merely severed but *repudiated* by states in this way.

In contrast, people who are merely in need, no matter how desperate the need, cannot claim that membership in a new state is their only resort. Their state lacks capacity, but it has not renounced concern for them as it does when it resorts to persecution on the immutable or deep-seated group-based grounds, so the possibility of their being assisted at home is not foreclosed, as it has been for *bona fide* refugees.

An additional consideration bolsters the importance of both persecution and alienage (or flight) for refugeehood and the duties to which it gives rise. Humanitarian intervention may seem to be an alternative means of helping those who are persecuted by their home states but who have not fled from it. However, intervening against a policy of state persecution is liable to require military means, and Lister rightly points out that such interventions very rarely pass the test of "proportionality". Interventions often either require the intervenors to bear unacceptable costs, or they risk imposing greater and disproportionate harm on the "residents of the offending state", as compared with the harm that might be prevented (Lister, 2013, pp. 663 and 664). Such would seem to be the case with Western military intervention in Libya, and also the second US war in Iraq insofar as that 2002 invasion was partly, even if secondarily, justified by humanitarian concern for the domestic victims of Saddam Hussein's dictatorship. In both cases, the costs of the intervention have been severe and long lasting. Thus, there is wisdom in the refugee convention's emphasis on both persecution and *alienage*.

Whereas Shacknove seemed to claim that it was an advantage of his broader conception that it included more of those who are "taxing" the system of refugee resettlement in Turkey, Jordan, Lebanon and elsewhere, Lister and Cherem describe this as one of its central flaws. Given that the insufficient number of slots available for refugee resettlement, allowing the merely needy to qualify risks displacing those facing persecution who have no other remedy. When states feel overburdened by refugee claims, they often turn asylum seekers away, and direct them toward processing by the United Nations or elsewhere. While the UNHCR can adjudicate refugee claims it cannot, as we saw above, provide the remedy of permanent resettlement nor can it compel states to provide resettlement. The human costs of over-inclusiveness and the misallocation of scarce resources are seen in the hundreds of thousands of people lan-

guishing, often for decades, in UN-sponsored refugee camps. As Cherem puts it: "camp refugees can't go home, yet every country rejects their appeal. They exist in a limbo between a repudiated membership and hopes for one that may never come" (Cherem, 2016, pp. 193 and 194). When needy migrants fill slots allocated for refugees that is an unfairness to the refugees because membership in a new society is their only remedy, whereas the needs of "refugee-like" strangers in great need can be remedied by aid, or Temporary Protected Status, or in other ways. There is, Cherem asserts, a distinct unfairness when the "specialized tool" of refugee law is "used for something it wasn't made for" (Cherem, 2016, pp. 191, 195 and 196).

VI. "No Recourse" to One's own State?

It turns out that, contrary to initial moral intuitions, there are significant weaknesses in Shacknove's proposed broadened conception of refugeehood.

But there is one clear category of people in need who do not fit the Convention criteria of persecution and alienage who obviously do need the "specialized tool" of permanent resettlement because they can have no recourse to the protection of their own state. These are the climate refugees whose homelands have been degraded beyond repair or which face the near prospect of being submerged under the seas: Buxton calls these "total land loss" climate refugees. They also require membership in a new state, or the relocation of their political community elsewhere: for protection of their basic needs they have no recourse to their home states, at least as it is currently located (Buxton, 2019, pp. 193-219).

A crucial consideration in the case of climate refugees is whether one has a realistic, reasonable, or *adequate prospect* that one's own state will become able to secure one's basic interests. If one does have that prospect —perhaps with outside assistance— to some adequate degree, then one may not have a good claim to permanent resettlement.

What does an *adequate prospect of recourse* to one's own state for protection require? Luara Ferracioli has recently proposed a way of sorting and delimiting some of the relevant cases. She argues that many people might be said to have no decent prospect of securing some of their basic needs. These may include the low wage worker without adequate health insurance in the US who faced the prospect of falling below the poverty line as the consequence of an illness, and also the homeless (or unhoused) person in Sydney or Melbourne who is unable to access decent housing because of high immigration and rising prices (Ferracio-

li, 2022, p. 86) In these cases a crucial consideration is that the channels of political protest and reform are not closed off to those individuals. Their political agency has not been altogether undermined, and so their membership in their society is not (as she says) meaningless.

Thus, in assessing whether potential claimants to refugee status have adequate recourse to their own state to eventually secure their currently unmet basic needs, important weight should be given to political agency: can basic rights be fought for with some reasonable, realistic, or decent possibility of success? If so, that should be the favored option.

Ferracioli cites two important considerations in favor of that conclusion. One is that, "human rights protection is not «manna from heaven»… [it] is always an ongoing political project on the part of citizens". Human rights protections and decent governance more broadly often need to be fought for, and we should encourage those with a modicum of agency to be and remain engaged politically. Indeed, we should also worry about the out-migration of those with the capacity and resources for agency from societies that stand in need of repair: the exit of the relatively young, energetic, and resourced can worsen the prospects of those left behind. This addresses the safety valve worry I mentioned above.

It is not unreasonable for the international community to incentivize members of struggling states to exercise their agency in favor of reform at home: in Albert O. Hirschman's famous formulation, to exercise voice and loyalty to the other members of their community rather than exit (Buxton, 2019, pp. 193-219).

Ferracioli also mentions additional categories of persons who might not be especially good candidates for exercising agency. She mentions pervasively misogynistic societies, such as Afghanistan, with high rates of gender violence and in which women are very often denied freedom of choice in politics, marriage, and family life. Such women, she suggests, ought to be regarded as having no realistic prospects for political agency and therefore as candidates for successful refugee claims (Buxton, 2019, pp. 193-219).

Exactly when one has "no recourse" to one's own state for protection, or "no adequate prospect of success" in reforming one's own society in concert with others, are difficult questions to answer. There are obvious dangers here of instrumentalizing people or treating them as resources for political reform rather than autonomous agents with their own lives to lead. Finally, many of those who flee from their home countries may already have profound feelings of remorse and guilt, even if unwarranted. So, I raise these issues to flag the need for further inquiry, not to draw any conclusions.[26]

[26] I benefited here from conversations with Joseph Chan, who himself fled his home state

VII. A Third Conception: Need-Based Refugeehood as a Contingent Claim

The debate we have just surveyed is relevant to the status of many of the Central American migrants, including those whose plight is a consequence not of persecution but of generalized violence associated with drug cartels, gangs, generalized political incapacity and corruption, and natural disasters including some that are worsened by climate change. And then too we have the issue of specific responsibility on the part of the US, which I address below.

Under Shacknove's broadened conception many of the Central American migrants would qualify for refugee status who may not under the narrower Convention conception. In light of the preceding discussion, it could also be interesting to consider whether those in flight have adequate prospects for political agency, but I cannot pursue that question here.

Matthew Gibney suggests a possible way of bridging some of the gap between Shacknove and his critics, and in a way relevant to the Central American crisis.

Gibney disagrees with Lister on the adequacy of offering "temporary protection" to those fleeing persisting "random or generalized violence". Surely the crucial thing, he says, is that like the persecuted, many equally face "death if they stay where they are" (Gibney, 2018, pp. 1-9-30). On that basis —facing mortal peril— they are equally entitled to protection.

Yet there is the now familiar rejoinder: those fleeing generalized violence, unlike the persecuted, have not been repudiated by their governments. Corrupt or incompetent officials may be failing to protect them, but other forms of assistance may be possible, and indeed may be welcomed by the remaining uncorrupt officials. Temporary protection accompanied by assistance to frail governments could be adequate even in these cases of people fleeing mortal peril.

In response Gibney suggests that refugees are persons whose basic "human rights cannot be protected except by moving across a border, whether the reason is state persecution, state incapacity, *or* prolonged natural disasters" that the state cannot cope with. Yet he adds, taking account of the possibility of aid in place: "People who can be helped in their own state —such as victims of natural disasters and poverty— have no right to asylum if states are willing and able to help them where they are. If protection is not forthcoming, however, individuals may legitimately

of Hong Kong, and from conversations at the London-Latin America Workshop on Rights Theory in Santiago, Chile, in December 2022

claim to be refugees moving to protect their [most basic] human rights" (Gibney, 2018, pp. 1-9-30).[27]

This proposal accepts provisionally that *aid can be a substitute for the flight to refugee status*, and then conditions the granting of status on whether the states who can assist actually step up and provide effective assistance. While victims of generalized violence or mayhem, or natural disasters, can *in theory* be helped in place, the crucial thing on this view is whether they are in fact helped and their plight relieved.

The resulting account of refugeehood has the advantage of building in an incentive for states to give aid, and it thereby addresses a worry I mentioned above: that states would eagerly embrace the narrow conception of refugeehood (whose premise is that people who are needy but not persecuted can be helped via aid) but then not provide the aid. On this "contingent conception" of refugeehood, if effective aid is not forthcoming in the face of persistently unmet basic needs —or enduring mortal peril— then people have the right to refugee status.

The upshot is that states with the capacity to help those in dire need can preclude claims to refugee status by sending effective aid. States thereby acquire an incentive to provide aid as an alternative remedy for those fleeing general insecurity, state collapse, or a natural disaster.

Neat as this proposal may be in theory, its implementation in practice requires that states actually buy into it: commit to it and act on it. Attractive as it may be, it has no teeth.

In addition, it must be noted that government-to-government foreign aid has a lousy track record (Easterly, 2006). Nevertheless, there may be things that wealthy states like the US can do to help Central Americans in place, I will return to that issue in the end.

VIII. Refugees as Orphans of the State System?

Near the outset I provided a brief general account of the grounds for states' moral duties and obligations to people in great need. To recap, the first was the familiar general humanitarian "duty of rescue" or what Walzer calls "mutual aid," which we owe to the needy stranger, per the Good Samaritan parable: we who have much should offer assistance to those in great need when feasible without serious risk or great cost to ourselves. This is a very broad but also a fairly weak principle in that it can be claimed by any-

[27] See Miller (2016, pp. 82 and 83), which also specifies "prolonged natural disasters" combined with state incapacity as a proper ground for a claim to refugee status; it meets the "no remaining recourse" to one's home state condition.

one in great need, but the duty it implies against any particular state holds only up to a point. Once we have borne a sufficient burden, and assuming that we have no substantial relation to the needy strangers' plight, we can say "no more". We are morally required to bear some cost but not great cost.

We also have the more specific and focused obligations arising out of our signing the Refugee Convention. Those obligations are more focused because the convention specifies the relevant categories of persons who are eligible, and tells those people what they have a right to expect when they present themselves to a state signatory. By signing we have announced and undertaken that we will provide those asserting claims under the convention with a fair hearing and, if successful, asylum and resettlement. We are now obligated to adjudicate the claims of those who present themselves to us with a credible case.

Before we get to the issue of specific obligations of repair to Central Americans arising out of past US actions, I want to consider one other ground of states' responsibility for refugees independent of the two just mentioned.

Refugees exist in part as a consequence of global system of sovereign states. They are in effect *orphans of the state system*, as Joseph Carens first argued: they lack "effective membership in one state with no positive entitlement to join another" (Carens, 1991, pp. 18-29) This, says Gibney quoting David Owen (2020) (who has developed the position at length), "poses a normative problem for the legitimacy of the state system, particularly if… we conceptualize «the international order of states» as a «global regime of governance»".[28]If this is correct then the duty to "respond to refugees" and provide them with protection, is not merely a general humanitarian duty holding among strangers but rather, "part of the «political obligations» of states generated by the common system of governance that they uphold".[29] Gibney observes that, "The legitimation of this mode of governance requires a collective obligation on the part of states to incorporate refugees back into the system, if necessary through the provision of asylum".[30] These observations seem to me correct: they have some force, though they can also be overstated as it seems to me that Emma Haddad does:

> This book maintains… that the existence of modern political borders will ensure the constant recreation of refugees. Accordingly, it regards the refugee

[28] Gibney (2018), 4 quoting David Owen (2012)

[29] *Ibid*.

[30] *Ibid*.

> as a contemporary concept that was made a permanent feature of the international landscape with the consolidation of the modern system of nation states. (2008, p. 3)

It goes too far to say that "the existence of modern political borders will ensure" the constant recreation of refugees. Refugees are not an inevitable result of the state system any more than orphans are the inevitable result of the family system, at least if by "inevitable" we mean necessarily created or presupposed by the system. The state system no more *requires* refugees than the family system requires orphans. Refugees are created by failures or abuses of governmental power in particular places. Those failures are (again) not an inevitable result of the state system, nor are they presupposed by it. A world of states without refugees is perfectly conceivable, and what we should be aiming for.

Nevertheless, it is true that stateless persons are left out of the state system and unprotected by it. As compared with the state of nature in which everyone is in the same condition, today's stateless persons are in some ways worse off, because more constrained as a consequence of the state system than they would be in the state of nature Stateless persons cannot range freely over the earth as they could have in the state of nature. Many are denied the option of moving and resettling in a new state by states who are not taking anything like their fair and proper share of refugees, and also not acting as they should to repair the conditions that generate refugees. They also have the prospect of being better off if they can secure membership in a legitimate and effective state, which is much better than the state of nature.

We who are members of decent and legitimate states benefit greatly from the existence of the global state system, and to enforce its terms we exercise power over members in our political community and non-members, including stateless persons. We must justify the global state system to all who are directly affected by it, including those who are left out of it, and especially those over whom we exercise power. We owe everyone on earth a justification for the state system in part because other systems are conceivable: one global state, or a regime of free movement across states. So Haddad is correct to say that refugees "are the result of erecting boundaries, attempting to assign all individuals to a territory within such boundaries, and then failing to ensure universal representation and protection".[31] So yes, refugees are owed incorporation into the global

[31] *Ibid*. 59, and see discussion in Gibney, 2018, p. 4). Emma Haddad was appointed Director General for Asylum and Protection in the UK Home Office in February 2021. I am indebted in this discussion to comments by Anna Stilz and an anonymous reviewer.

system of states partly *because* so many others benefit from the state system that leaves them out, and because that system makes them in some respects worse off —more constrained— than they would be in a global state of nature, and finally because we exercise power over them in enforcing the terms of entry into and membership in our state.

What do these observations add to our discussion?

Insofar as the claims to of stateless persons arise from the general circumstance that the world is now organized by states with borders, their claims are against states in general, and not specifically against any particular state. Their claims are in that respect diffuse rather than focused. Yet they are not merely claims for humanitarian assistance: the global state system implicates us and our states in their plight, and an adequate response to their claims is a precondition of the legitimacy of the global state system. This makes our moral duties to refugees more stringent. There are still limits to any particular state's obligations —a fair share or reasonable cost proviso— but I think we can go further.[32] Because these obligations arise out of the imposition of the state system, and thereby implicate us, we have a stringent obligation to create and maintain a systemic response, that is, effective coordinating institutions (Montero, 2022). Claims arising from the relation we share as subjects of a global state system may be addressed most pointedly to those states that are not rendering adequate assistance to the needy and not supporting and promoting improved global governance for all.

I have so far discussed the generalized duties and more specific obligations to assist those in need arising from humanitarianism, from international legal obligations, and from the existence of the state system. One topic remains: the more specific *obligations of repair* on the part of states arising out of responsibility for the conditions causing people to flee their home states and seek asylum and refuge. I turn to these next.

IX. Reparative Obligations, the US, and the Central American Migrants

First a brief word on recent migration trends to the US.

The combined decline of labor demand associated with the Great Recession of 2008-9, and the increased difficulty in crossing the border have meant that, since around 2012, "net flow of migrants from Mexico

[32] Unless these can be conceptualized as reparative obligations, which seems possible at least in part

to the United States have essentially stopped".[33] The reasons for the cessation of Mexican migration to the US are several, and include the decline of economic opportunities in key industries like construction in the USA; increased border security; improvements in economic opportunities in Mexico; decline in fertility in Mexico and with it a somewhat lower dependency ratio.[34]

Over the last decade, with lower migration overall across the Southern border, a much larger portion of those seeing to enter the US have been families from the so-called Northern Triangle states of Honduras, El Salvador, and Guatemala. Since 2014, more than 2 million people are estimated to have left these three countries, the large majority of whom (80-90%) have sought entry to the US.[35] Flows have varied from year to year. In 2014, approximately 239,229 people from the Northern Triangle were apprehended at the U.S.-Mexico border; in 2019 apprehensions at the border almost tripled to 609,775 people.[36] Whereas an estimated 691,000 people left the region in FY2019, that dropped to 112,000 in the Covid year of FY2020, before rising again subsequently.[37] Specific obligations of repair —or *reparative obligations*— depend on a given state's past or ongoing involvement and responsibility for the circumstances that give rise to refugee situations or forced migration of various sorts. Those circumstances include relatively weak state capacities, corruption, instability, generalized disorder, the power of criminal organization, and climate change. Responsibility for harms to governance capacity in any of these forms (or others), may give rise to reparative obligations to rectify the harms, at least where the policy involves wrongful or illegitimate harms.

Reparative obligations are distinctive in their force and extent as compared with generalized humanitarian duties and claims arising from the existence of the state system.

How so?

Whereas humanitarian duties are in principle claimable against anyone, but they are also diffuse —claimable against no one in particular— excepting perhaps those who are close enough to be accessible to would-be asylum seekers, or otherwise specially situated to help. Proximate coun-

33 Villarreal (2014). See also: Passel, D'Vera, & Gonzalez-Barrera (2012).

34 See Villarreal (2014).

35 https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle#chapter-title-0-6 And percentage of emigrants heading to the US in 2020: El Salvador = 88.2%; Honduras = 78.5%; Guatemala = 89.6%, see International Labour Organisation Fact Sheets for El Salvador; Honduras, and Guatemala.

36 https://www.csis.org/analysis/alliance-prosperity-20

37 https://sgp.fas.org/crs/row/IF11151.pdf

tries who bear no special responsibility can fall back on limitations concerning the costs they must bear.

Claims grounded in the "orphans of the state system" argument are also claimable against everyone, but they have greater stringency than general humanitarian duties because those who benefit from the state system are implicated in the plight of those who are excluded and hemmed in by borders. The claims of those left out of the state system are diffuse, in that they are not specifically directed at particular state, but these claims strengthen the reasons for states to sign on to refugee resettlement arrangements and to make good on their commitments.

In contrast to the previous, reparative obligations are claimable against *specific responsible agents* —they are focused rather than diffuse— and in addition the "low cost" proviso does not apply: the obligations depend on the extent of the harm caused, the debts may be substantial. While reparative obligations may not require satisfaction in the specific form of asylum and the granting of refugee status, they may provide an especially powerful case for activating the contingent revisionist account described above. That is, if a responsible country does not make good on its reparative duties via aid and effective development assistance, it may have an *especially powerful default obligation to accept migrants, at least assuming that this provides general benefits to the political community to which duties are owed*.

The US and other Western states such as Australia have sometimes taken their reparative obligations seriously, including in response to Western military intervention in Vietnam, Cambodia, and Laos in the 1960's and 70's. After the fall of Saigon in 1975, the US Congress and the Ford administration authorized 140,000 refugee admissions. It soon became clear that the refugee crisis would be far greater. Eventually, 2.5 to 3 million people fled these war-torn countries, and it is estimated that as many as 50,000 drowned at sea. From 1979-1999 the United States accepted an additional 500,000 refugees from Vietnam.[38] Those numbers contributed to the US leading the world in refugee admissions. Given the horrors inflicted by the US military the response may still be judged inadequate.

We have been far less responsive in the case of Iraq in the aftermath of our 2002 invasion.

Obligations of repair for past and ongoing wrongful harm may then appear then as a promising basis for justifying claims to entry on the part Central American migrants. A practical problem arises however. In order to identify and specify reparative obligations it is, as Gibney says, "first necessary to explore the specific and sometimes complex causal relation-

[38] https://www.history.com/news/vietnam-war-refugees Need STATS.

ships that exist between specific states, structures of power, and particular groups of refugees" (Gibney, 2018, p. 54). In many cases the relevant causal relationships and questions of culpability, will be multiple, complex, and subject to reasonable disagreement.

Enrique Camacho-Beltran provides an impressive bill of particulars with respect to US involvement in the Central American region, and in El Salvador in particular. Early in the 20th century, Teddy Roosevelt asserted the right to exercise an "international police power" in Latin America, which involved violations of national self-determination and various forms of manipulation to promote US interests in the region. American and British nationals "owned most of the coffee plantations and railways which had detrimental effects on the local economy". When indigenous farmers rose up to support a guerrilla insurgency led by Farabundo Martí in 1932, "the US sent naval support to contain the peasant rebellion and support dictator Maximiliano Hernández Martínes". The US intervened several more times to support Martinez and other corrupt dictators. In 1981, "the US-trained Atlacatl battalion was involved in the El Mozote massacre where almost a thousand unarmed civilians (women and children included) perished. During the 80s, an estimated number of 80,000 people died in this US-fuelled war". The CIA provided millions to help influence the 1984 election. On the economic side, to mention just one factor, the Central American Free Trade Agreement increased US "influence over domestic trade and regulatory protections", over the protests of "unionists, farmers, and informal economy workers" (Camacho-Beltrán, 2022).

So, in the case of Central America, and specifically that of El Salvador, it seems clear that US past and ongoing involvement in encouraging democratic overthrows, looking the other way at authoritarian regimes' human rights violations, enactment of arguably unfair trade agreements, and refusal to curb the abusive powers of US corporations, add up to a substantial debt, based on wrongful harms, even if the precise magnitude of the debt is hard to specify.

Another factor influencing poverty in Central America for which US bears part of the blame is *climate change*. Yet here too there are complexities and uncertainties. US contributions to climate change are part of a larger pool to which many have contributed. How should responsibilities be apportioned? Rebecca Buxton (2019) considers three classes of agents liable for shares of reparative obligations for climate change: the polluters, the beneficiaries (that is, consumers or consuming nations), and the able. All three categories seem relevant, with qualifications. Some of the polluters may be very poor, as in India, and poverty may be at least a partial excuse for polluting. On the other hand, insofar as the polluters

are also beneficiaries and rich —and therefore able— the case for obligations of repair seems strongest.

One general conclusion would seem inescapable: the United States is obliged to do more than it does —much more— both with respect to climate mitigation and climate-induced migration.

These are yet additional relevant factors driving Central American migration. Migration is being driven by generalized disorder, gang violence, and "feminicide," much of which seems related to illegal activity associated with drug cartels. The drug cartels are enriched and empowered as a side effect of the US war on drugs, which turns drug production and sale into a highly lucrative criminal activity. Most of the illegal guns seized in Mexico are also US made.

But US anti-drug laws, even if unwise, may nevertheless be legitimate policies. The vast majority of governments in the world make the possession and use of drugs like cocaine illegal. Fewer than 10 countries have legalized the possession of small amounts of cocaine for recreational purposes (the US and a few others have legalized it for medical uses), and even they generally prohibit the cultivation, transport, and sale of cocaine. US policies concerning cocaine are not unusual.

The costs imposed on Central American states and Mexico as a consequence of our drug laws would seem to be considerable. The US should consider the externally imposed costs when weighing the overall justifiability of such laws, if we do not that would seem to be a moral failing. But is it clear that our drug policies are illegitimate? I am not sure. Mexico has its own war on drugs, notwithstanding that in 2019 a judge in Mexico ruled that two people had a right to use (but not sell) recreational cocaine.[39]

The question of responsibility for the plight of the Central American migrants is complex. Some argue that poverty, corruption, and economic underdevelopment in Central America owe not only to the malign influence of outside actors *but also* to choices and factors that are endemic to the region and its culture, including endemic local corruption and high rates of feminicide.

Luis L. Schenoni and Scott Mainwaring, in an article cited by Camacho-Beltran, provide an empirical examination of hegemonic influences over democratization and democratic breakdown in Latin America after 1945. Schenoni and Mainwaring argue that: "While past work has attributed responsibility to the US for the waves of democratic breakdowns from 1948 to 1956 and 1964 to 1976, an examination of the 27 breakdowns from

[39] https://www.bbc.com/news/world-latin-america-49416357

1945 to 2010 gives reason to doubt this interpretation" (Schenoni & Mainwaring, 2018).

Indeed, contrary to Camacho-Beltran, Schenoni and Mainwaring provide partial exoneration for the US role. Their research suggests that the US may have played a role in certain breakdowns when it sensed a communist threat, and the US at least weakly supported 12 of 27 authoritarian coups, but they argue that US support was by no means a sufficient condition for the success of such coups. Even when there was support, US embassies' messaging on the ground always opposed authoritarianism. Furthermore, given that the US opposed many coups, the article takes a largely neutral stance, arguing that while US support may have been helpful in certain cases, the US was not responsible for triggering or ensuring the success of either wave of democratic breakdowns: "The waves of authoritarianism that rocked Latin America from 1948 to 1956 and from 1964 to 1976 were not a result of consistent US indifference toward democracy or support for authoritarianism" (Schenoni & Mainwaring, 2018, p. 272).

In another assessment of US responsibility for mass migration out of the Northern Triangle states, Michael Shifter and Bruno Binetti survey and credit many of the same factors cited by Camacho-Beltran: CIA involvement in coups, US drug policy, trade and economic policies that concentrate gains at the top. While they also attribute blame to corrupt and self-serving elites in these countries,[40] that fact does not obviate US culpability: responsibility is not "zero sum".[41]

I discuss these essays not to debunk Camacho-Beltran's overall argument, but to suggest that the project of assessing, gauging, and assigning responsibility is bound to be complex and contested. Likely the US does far less than it should to address the root causes of migration from Latin America, but it is not easy to say what should be done. I would join those who condemned the Trump administration for combining highly punitive border security measures with efforts to terminate $500 million in aid to Central American states in retaliation for their failing to stem the flow of migrants. The Biden administration is making an effort to address the region's problems by engaging regional governments and especially grassroots and faith-based civil society organizations in a "Root Causes Initiative" to improve economic development and governance.[42]

[40] Shifter, Michael & Binetti, Bruno. Panic at the Border: U.S. Relations with the Northern Triangle. *Great Decisions 2020*. https://www.thedialogue.org/wp-content/uploads/2020/05/Great-Decisions-Panic-at-the-border-US-Relations-with-the-Northern-Triangle-Jan-1.pdf

[41] Thanks to Anna Stilz for comments here.

[42] https://www.devex.com/news/hurdles-remain-for-biden-s-root-causes-strategy-in-central-america-102592

Deliberative engagement with Central American states and societal representatives seems like a far more promising and humane path, and more consistent with redressing past harms. But whether these efforts will bear fruit remains to be seen.

X. Conclusion: From Moral Reflection to Action?

I have spent most of this essay surveying normative debates around the general question of who should qualify for refugee status. These principled debates are relevant to the question of who among those fleeing from the Northern Triangle states might qualify for refugee status. Some undoubtedly do qualify, and many others should be admitted on the basis of policies required to satisfy our humanitarian duties, obligations arising from the existence of the global state system, and duties of repair for past US state policies.

On the other hand, insofar as the US accords Temporary Protected Status to those fleeing natural catastrophes and generalized disorder — that is, to those facing mortal perils that may be temporary, and who have not been renounced by their own states— this seems not unreasonable. The problem with TPS is that many people have been in this "temporary status" since the 1990's. Many are now more or less fully integrated into US society, have had children and families here. For long-term TPS recipients, as with the long-term undocumented, there should be a path to full US citizenship. Another problem is that TPS has been a narrow window open to a select few only.

More pressing than the problems of refining our moral and legal assessments is the challenge of getting countries, especially powerful countries like the US, to act.

Ideally we should apportion responsibility fairly across global contributors to the problem and devise enforcement mechanisms. But all such international efforts are plagued by contestation, uneven compliance, and shirking on commitments. These are especially nettlesome problems in the absence of a trusted 3rd party with authority to decide and the power to enforce.[43] Powerful countries like the US should support the institutionalization of such authorities in the form of multilateral organizations with teeth, as we have done in the case of the World Trade Organization,

[43] See the helpful suggestions in Doyle, Michael W. *et al*. (2017). *The Model International Mobility Convention*. Columbia University; see also Montero's "Program for Global Political Reform" (*Human Rights*, 143-147).

the international protocol on ozone-depleting gasses, and on some other matters. The problem is that whereas elites in powerful states came to perceive an interest in lowering trade barriers and protecting the ozone layer, this is not yet the case with respect to refugee flows and climate change, among other global problems. The people of the entire globe, and not only the Central American migrants, are held hostage to the deeply dysfunctional politics of the US, which must therefore be added to the list of things that threaten humanity.

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Citizenship Regimes and Exclusion: Historical Analysis of Legislation on Illegalized Migration in the US

Regímenes de ciudadanía y exclusión: análisis histórico de la legislación sobre migración ilegalizada en los Estados Unidos

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Abstract: Citizenship regimes are institutionalized systems of formal and informal norms that define access to membership, as well as associated rights and duties. This paper studies illegalized migration as one of the major tests to assess whether citizenship regimes are fair institutions, based on a historical analysis of legislation meant to reduce illegalized migration in the United States between 1995 and 2022. We build our empirical research starting from a simple observation: despite the great number of bills introduced to reduce illegalized migration to the US, most of such initiatives fail to become law. In fact, 93.5% of all immigration initiatives did not even pass the chamber of Congress in which they were originally presented. Such a high rate of failure shows that these proposals are motivated by

electoral aspirations, rather than coming from a genuine wish to help migrants or grant them citizenship. Furthermore, there is also an economic interest that justifies the maintenance of low-cost disposable immigrant labor, with no right to citizenship. Our analysis is an example of how state regulation processes seem to work to formalize, rather than alleviate or eradicate, the precarious legal statuses of illegalized migrants. We conclude that a globalized phenomenon such as citizenship requires going beyond merely institutional and formal conceptions. We need to rethink the institutional notion of citizenship, as a merely status held under the authority of a state and consider it from a cosmopolitan perspective and a multilateral basis. But as long as citizenship remains under the responsibility of states, illegalized migrants will continue to experience precarious citizenship.
Keywords: Citizenship Regimes, Illegalized Migration, Precarious Citizenship, Immigration, Membership.

Resumen: Los regímenes de ciudadanía son sistemas institucionalizados de normas formales e informales que definen el acceso a la membresía, así como a los derechos y deberes asociados. Este artículo estudia la migración ilegal/no autorizada como una de las principales pruebas para evaluar si los regímenes de ciudadanía son instituciones justas, con base en un análisis histórico de la legislación destinada a reducir la migración no autorizada en los Estados Unidos entre 1995 y 2022. Construimos nuestra investigación empírica a partir de una simple observación: a pesar de la gran cantidad de proyectos de ley presentados para reducir la migración ilegal a los Estados Unidos, la mayoría de dichas iniciativas no llega a convertirse en ley. De hecho, el 93.5% de todas las iniciativas de inmigración ni siquiera pasaron por la Cámara del Congreso en la que se presentaron originalmente. Una tasa de fracaso tan alta muestra que estas propuestas están motivadas por aspiraciones electorales, más que por un deseo genuino de ayudar a los migrantes u otorgarles la ciudadanía. Además, también existe un interés económico que justifica el mantenimiento de la mano de obra inmigrante desechable de bajo costo, sin derecho a la ciudadanía. Nuestro análisis es un ejemplo de cómo los procesos de regulación estatal parecen funcionar para formalizar, en lugar de aliviar o erradicar las precarias condiciones legales de los inmigrantes ilegalizados. Concluimos que un fenómeno globalizado como la ciudadanía requiere ir más allá de las concepciones meramente institucionales y formales. Necesitamos repensar la noción institucional de ciudadanía como simplemente un estatus bajo la autoridad de un Estado, y considerarla desde una perspectiva cosmopolita y una base multilateral. Pero mientras la ciudadanía permanezca bajo la responsabilidad de los Estados, los inmigrantes ilegalizados seguirán experimentando una ciudadanía precaria.
Palabras clave: Regímenes de ciudadanía, migración ilegalizada, ciudadanía precaria, inmigración, membresía.

I. Introduction

The concept of "citizenship" is an essentially contested one. Walter Bryce Gallie defines essentially contested concepts as those whose proper use "inevitably involves endless disputes about their proper uses on the part of their user" (Bryce, 1955-1956, p. 169). In this sense, there is no theoretical problem with the fact that there are many ways to define citizenship. It is, as Gallie points out, part of its nature that the definition of this concept is in constant dispute. What is important to note are the political, cultural, spatial, temporal, and social notions that are assumed when we define citizenship as either membership, status, practice, or even performance.

Citizenship is considered as a national institution that mediates rights between political subjects and the polity, to which these subjects belong, that may have international ramifications depending on the legal frameworks by which states may be bound (Guillaume, 2014; Brubaker, 1992; Soysal, 1994; Isin & Nyers, 2014). Although authors such as Engin Isin and Peter Nyers (2014) use the notion of "polity" to move away from the idea that the state is the only source of authority to recognize and legislate citizenship rights, in most countries it continues to be the state that, through legislation, grants citizenship membership and with it the implied rights. "This understanding of citizenship… puts emphasis, if not solely concentrates, on this formal picture of citizenship's institutional dimension, whether domestic or international" (Guillaume, 2014, p. 150).

In modern societies the relationship between the citizen and the state is defined by three types of rights and three types of obligations. Rights can be civil, political, and social; while some obligations are conscription, taxation, and participation. "Civil rights include the right to free speech, to conscience, and to dignity; political rights include franchise and standing for office; and social rights include unemployment insurance, universal health care, and welfare" (Isin & Nyers, 2014, p. 2). In this way, citizenship becomes the institution from which political, civil, and social rights are enacted and enjoyed by political subjects.

Membership is an essential component of citizenship. To be a citizen is to be a member of a certain political community. The rights associated with such membership plus the participation in the political, social, and economic processes of the community are some of the ways that have been used in modern democracies to establish the condition of civic equality. Civic equality

> …consists of membership of a political community where all citizens can determine the terms of social cooperation on an equal basis. This status not only secures equal rights to the enjoyment of the collective goods provided by the political association but also involves equal duties to promote and sustain them —including the good of democratic citizenship itself. (Bellamy, 2008, p. 17)

The rights provided by citizenship have historically been tied to the state. Since the late 20th century, states have monopolized the authority to grant citizenship membership through citizenship regimes (Lori, 2017, p. 748; Isin & Turner, 2002, p. 6).

Citizenship regimes are "institutionalized systems of formal and informal norms that define access to membership, as well as rights and duties associated with membership, within a polity" (Vink, 2017, p. 222). Citizenship regimes refer to the specific institutional regimes domestically or internationally delineating and regulating the formal rights and obligations of citizens. They are informed by underlying state-centric views of citizenship that put emphasis on the institutional dimension. Two authors who have influenced the debate on the institutional dimension of citizenship are Rogers Brubaker and Yasemin Soysal. Rogers Brubaker emphasizes the essential, necessary, and inherent sovereign capacity that states possess to define citizen membership (Brubaker, 1992, p. 31). In this sense, citizenship is a legal mechanism by which states define the boundaries that distinguish citizens from non-citizens. Yasemin Soysal shows how citizenship has become an international institution. She emphasizes that the institutionalized rules and definitions of the global system provide models and constraints to the policies of states regarding access to citizenship (Soysal, 1994, p. 6). For example, deportation is an international government practice of citizenship. "In the face of patterns of international migration, deportation serves to sustain the image of a world divided into «national» populations and territories, domiciled in terms of state membership" (Walters, 2002, p. 282).

Citizenship regimes use immigration policies to define access to membership. Matteo Gianni distinguishes between issues of admission or "immigration policies", and issues of inclusion and integration of immigrants or "immigrant policies". The main aim of immigration policies

> …is to regulate immigration flows and, indirectly, the composition of society, of the nation and of the polity. In this perspective, through the recognition of access, the state defines the criteria allowing immigrants to enter into the territory, defines the reasons for and the actual modalities of their stay, and determines the criteria and the procedures that will allow immigrants to become citizens. (Gianni, 2021, p. 26)

Authors such as Michael Walzer (1983) and David Miller (2016) argue that states have the right to limit access to citizenship to protect the interests of their members such as shared values, identity, security, etc.

Since citizenship regimes affect fundamental human interests such as rights, freedoms, and protections, they inevitably present moral dilemmas. Human movement across borders is certainly one of the major tests to evaluate the justice of citizenship regimes.

> …consideration of the long-term patterns of exploitation, North-South inequalities, conflict, and so forth, that lead to the increasing migration flows further challenges traditional conceptions of citizenship, putting these to a strenuous test, and in the process pushes the conceptual boundaries of what has hitherto been understood as a "citizen". (Giugni & Grasso, 2021, p. 1)

Modern citizenship has systematically created groups of strangers and outsiders. As we have mentioned, to be a citizen is to belong to a certain political community. This membership is granted by states through citizenship regimes. In this way, the state becomes the source of authority to recognize and legislate the rights of citizenship. It makes citizens part of a selected/elite group, who enjoy privileges (rights granted by citizenship) denied to non-members. In this paper, we will focus on illegalized migrants in the US, as a way to showcase citizenship and membership exclusion.

Although citizenship implies more than legal status, formal legal citizenship remains important for accessing citizenship rights. Our analysis is an example of how citizenship regimes proceed to regulate and delineate citizenship rights through immigration policies on illegalized immigration. Our paper is structured in two parts. First, we offer a discussion of citizenship regimes and goes on to showcase the rejection of initiatives to grant citizenship to illegalized migrants in the US. Second, we proceed to a historical analysis of legislation meant to reduce unauthorized/illegalized migration in the US. Our analysis included legislative initiatives on unauthorized migration presented in the US Congress between 1995 and 2022, followed by a discussion of approved initiatives and success stories. We build our empirical research starting from a simple observation: despite a very intense production of legislative proposals to reduce unauthorized immigration in the US, most of such initiatives fail to become law or, even worse, when they are approved it is due to their restrictive character. In fact, the legislative failure is so evident that 93.5% of all immigration initiatives did not even pass the chamber in which they were originally presented.

II. Citizenship Regimes and Illegalized Migration

One of the main challenges of this research was the decision about the correct concept to describe our target group, previously referred to in the academic literature as irregular/unauthorized/undocumented, illegal migrants (Düvell, 2016, p. 484; Castles, 2010, p. 52) or illegalized immigrants (Faulk, 2010; Bauder, 2014).

Many destination countries use the term "illegal" in their laws, as it is considered that these migrants have either crossed the border illegally or overstayed their visa (Orrenius & Zavodny, 2016, p. 1). The term "illegal migration" implies legal contradictions to the human right to life and free movement. For Mae Ngai the term suggests a degradation of the human personality and is particularly associated with racism towards Mexicans and other migrants of Hispanic origin (Ngai, 2014, p. XIX). Other renowned scholars have tried to save the term "illegal" (Papademetriou, O'Neil & Jachimowicz, 2004) to signal the responsibility of the state to give those persons a legal status: if they are illegal, the country of destination should make them legal.

The second option —that of irregular migration, adopted by the IOM (2006)— also has problems in terms of the regulatory framework and the vague juridical application, particularly in the case of asylum seekers. In the US case, asylum has two figures, the affirmative asylum application and the defensive application. Generally, any foreigner present in the US or having arrived at a Port of Entry (POE) can seek asylum regardless of their immigration status and must apply within one year of their arrival. The affirmative way is requested through a United States Citizenship and Immigration Service (USCIS) asylum officer, while the defensive way is done in response to removal proceedings before an immigration judge from the Department of Justice Executive Office for Immigration Review (EOIR) (DHS, 2019). In other words, a migrant who enters the United States irregularly is no longer irregular upon formally requesting asylum.

Thirdly, "undocumented/unauthorized migrants" "can be defined as persons who reside in a country in which they have no legal permission to be present" (Swerts, 2014, p. 295). This notion, considered by many as a less pejorative term, is basically criticized because an unauthorized migrant may have documents, whether valid or not, in the country of destination (Orrenius & Zavodny, 2016, p. 70 and 71). Frank Bean and Lindsay Lowell (2007) opt for the use of "unauthorized migration" as a less biased term to refer to illegal migration. For the specific case of the US, Bean and Lowell have pointed to the variations in its use in various legislative periods. For example, before the Immigration Reform and Control

Act (IRCA) of 1986, it was legal in the United States to hire unauthorized migrants. However, between the IRCA of 1986 and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, the US federal government did not have the necessary provisions to make it "illegal" to hire unauthorized migrants (Bean & Lowell, 2007, p. 71).

All of the previously described concepts have limitations in terms of their power to explain the phenomenon and have been criticized for their ethical implications and bias. In our analysis, we add the concept of illegalized migration (Faulk, 2010; Bauder, 2014) as a more encompassing term that tries to do justice to the migrants without putting the burden on their process of obtaining a legal status. However, we also accept the term "unauthorized" immigration for its methodological virtues, since a large part of the legislation is intended to restrict migratory flows of persons that, despite the redundancy, are not authorized to enter or remain within the territory.

III. Historical Analysis of Legislation on Illegalized Migration in the US, 1995-2022

There has been broad media coverage promoting the idea that the restrictions imposed by Donald Trump on certain types of immigration, especially illegalized migration, were new. However, we find that the increase in legislative activity to restrict rather than regularize unauthorized migration has been growing since 1995, with very few pathways to citizenship for almost 12 million migrants. In other words, legislating in this way is part of a long-term migration policy process.

This historical evidence reinforces the affirmation that the configuration of US immigration policy and its restrictive profile are not per se a product of Donald Trump's ascension to the presidency, and that very likely the same kind of policy would have been implemented if Trump's presidential opponent, Democrat Hilary Clinton, or any other presidential candidate, had been elected in 2016. In part, this affirmation is reinforced by the analysis of Barack Obama's presidential period. During his campaign, Obama emphasized the need for comprehensive immigration reform, in addition to having a discourse in favor of immigration; however, there was a significant increase in the number of deportations during his term in office. The initiative for DACA (Deferred Action for Childhood Arrivals) was introduced through executive order, rather than as a law approved through by the Congress and it only defers deportation for two

years. However, the Dream Act[1] that would provide a path to citizenship for this same population, has been constantly rejected. In what followed, Joe Biden was pictured as the "migration president", but finally reintroduced the Migrant Protection Protocols (MPP), also known as "Remain in Mexico" to prevent Central American migrant caravans from crossing the US's southern border. In a similar manner as Paik (2020), we found that undocumented migration is a by-product of the law that both precedes and extends beyond the Donald Trump Administration.

In addition to restrictive and racialized executive orders, Congress' activity in the 20th century has only been permissive towards highly skilled migrants and nationals from certain countries with whom the US has free trade agreements, such as Canada. Mexico, however, has not benefitted in the same way from being part of NAFTA, which was renegotiated in 2020 as the USMCA.

Our paper understands the US immigration system as a long-term mechanism that responds to the electoral process and therefore, to electoral bias. A large segment of public opinion in the US would like to see something done to deal with the issue of illegalized migration. However, migration is not the first object of concern in their everyday lives. Many people prefer those immigrants who they believe don't pose problems of integration, preferably white, skilled, and coming from traditional families, but unaccompanied by other family members; in other words, temporary migration is preferred over permanent settlement.

In the United States, as in other democratic regimes, decision makers are subjected to continuous elections in which they seek to have the greatest possible support from the electorate. In this sense, this paper provides elements for understanding legislative activity related to migratory issues not only in the United States, but also in many other liberal democracies. In the US case, the reelection of legislators further accentuates their need to build a solid base of voters that will allow their presence in the Congress to continue.

This electoral need has been confronted with at least two paradoxical outcomes. In the first place, more restrictive measures have eliminated temporary migration, giving incentives for migrants to stay rather than return to their countries of origin, for fear they may not be able to return to work in the US. In the second place, the US economy and businesses need skilled as well as semi-skilled and low-skilled workers. In other words, intendants, agricultural workers and waiters are needed as much

[1] The Dream Act (also known as the Bill S. 1291) was first proposed by Senators Dick Durbin (D-Illinois) and Orrin Hatch (R-Utah) in April 2001. Since then, the proposal has been constantly reintroduced and rejected in at least one of the chambers.

as IT engineers; therefore, they should have similar rather than different paths to citizenship.

IV. Statistical Analysis of Immigration Laws in the US

This paper started with an in-depth search at the virtual archives of United States Library of Congress, which hosts archives of legislative activity from 1973 to the present. This page has a thematic filter search engine that allowed us to select the files to be further analyzed. Our analysis began with a general revision of laws produced in the period 1995-2022 through a combination of filters and the word "immigration". All legislative initiatives must follow a 5 stages process, as summarized in figure 1.

Figure 1. The Five-stages process for initiatives presented to the US Congress

Source: Authors' elaboration.

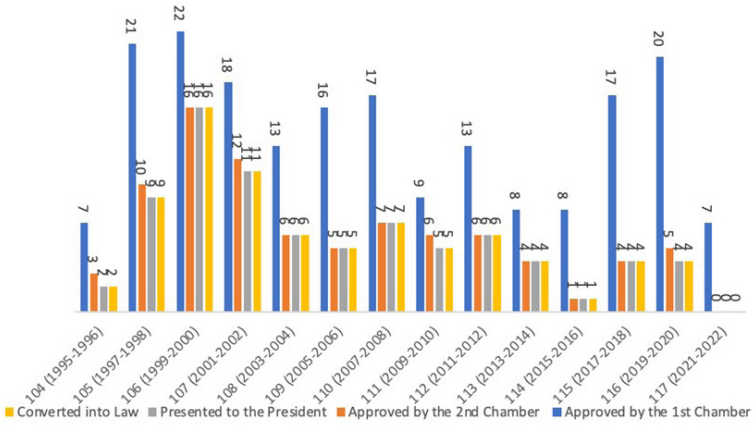
The first step is when a bill is presented in either of the two chambers, the House of Representatives or the Senate. The initiative must be approved in its chamber of origin and, subsequently, in the other chamber (second and third stages, respectively). Once the bill has been approved by both chambers of Congress it is turned over to the president, who can approve or veto it (fourth step). If approved, the initiative becomes law (fifth and last stage). It is only in very few cases that immigration bills approved by both chambers have been rejected, or vetoed, by the president. This tells us that the bills approved in both chambers of Congress have already gone through a very extensive job of lobbying and political negotiation, and it is most likely that a broad consensus has been reached on the content of their provisions. On the contrary, most of the initiatives presented show that they have an underlying or non-explicit purpose, which is not so much to reform the immigration law system, but rather to simply place the issue on the domestic political agenda.

Considering this five-steps process, the bills presented in both chambers of Congress displayed with the Congress page's search engine re-

sulted in a total of 3,343 initiatives that sought to reformulate, correct or amend the immigration policy of the United States in the period 1995-2022. Figure 1 shows that the production of legislative proposals on migration matters has been increasing over the last 28 years.

These results confirm a broader process of intensification of immigration policy that precedes and extends beyond the mandate of President Donald Trump. The number of initiatives presented clearly shows cycles related to the federal elections in the US, both presidential and intermediate congressional elections. The cycles consist of an increase in legislative activity on migratory matters the year prior to the federal elections, linked to an intensification of the debate on migration and citizenship. This finding reinforces the claim that electoral gains are related to legislative output in the US Congress.

Figure 2. Number of immigration initiatives and their process to become law in the US



Source: Authors' elaboration based on analysis from the US Congress, 1995-2022.

When analyzing these bills by the party that presented them, we observe a slight difference in favor of the Republican Party, which presented 52.4% (1,751 initiatives) of the total initiatives, while 47.3% (1,579 initiatives) were presented by the Democratic Party, 0.3% (9 initiatives) by independent Congress members, and 0.1% (2 initiatives) by members of the Libertarian Party. The difference, despite being minimal, is more notable when it is broken down by congressional periods, in addition to showing certain historical changes. Since 2013, the Republican Party has presented more initiatives on this issue, and in the 114th Congress (2015-2016) it was

more than double the number of such initiatives presented by the Democratic Party. It is worth mentioning that both the Republican and Democratic Parties publicly express different positions on the issue of migration, especially on unauthorized migration. The Democratic Party tends to position itself in favor of greater mechanisms to support documented immigration. In contrast, the Republican Party favors restricting these mechanisms as well as combating unauthorized immigration. In fact, in the 114th and 115th Congresses, the Republican Party had control of both chambers and since then is the one that has most promoted the legislative agenda on immigration matters. In the last two Congresses, 116 and 117, despite having divided control of the congressional chambers (the Senate was controlled by the Republicans, but the House of Representatives was controlled by the Democrats) the Republican Party is still the one that presented most initiatives on migration. Nevertheless, before Donald Trump assumed the presidency there was increasing legislative activity, from both political parties, aimed at controlling unauthorized immigration and such efforts have continued since then.

In general, the US electorate considers that restrictive measures are the best way to combat illegalized immigration. It is due to these attitudes and opinions of the American electorate regarding illegalized immigration that members of Congress in the United States have chosen to legislate at least in appearance, although in reality the immigration issue is being taken into consideration in the same way that it is reflected in opinion polls: even though immigration is one of the issues of concern for public opinion in the US, it is not as important as the economy or national security (Rosentiel, 2007; Keeter, 2009; Pew Research Center, 2009; Gallup, 2019).

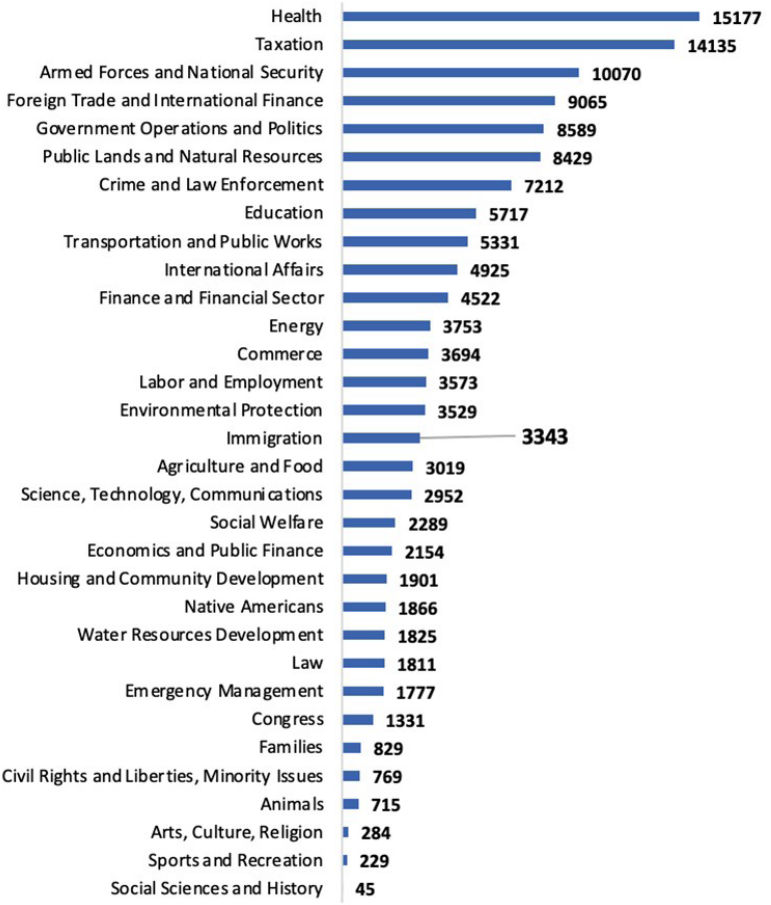
According to a survey conducted in 2009, by the Pew Research Center, the main priority for Americans were the state of the economy, followed by employment and factors such as terrorism, social security, education, energy and the "Medicare" program, among others. Immigration did not seem to be a very important issue even among the population of Hispanic origin, even when most unauthorized immigrants are of Hispanic origin.

For instance, employment, one of the top concerns for the American population, could be reinterpreted as many voters fear that immigrants could take away jobs from native Americans. Regarding the health system, social security and education, among others, coverage for illegalized immigrants is an issue that worries an important sector of US citizens, because they are financed by taxes.

More recent opinion polls show that immigration was ranked as the 10th issue dealt with by the President and Congress, after economic is-

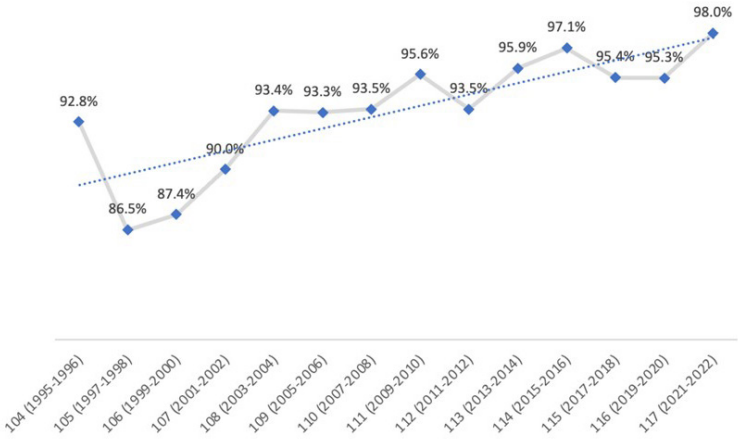
sues and terrorism (Pew Research Center, 2022). As a matter of fact, immigration is still not one of the first topics of initiatives presented to the Congress, and it lags far behind health, taxation, and national security issues (figure 3).

Figure 3. Total of legislation initiatives presented to the Congress in the period 1995-2022, by topic



Source: Authors' elaboration based on analysis from the US Congress, 1995-2022.

Figure 4. Percentage of immigration initiatives rejected in the Chamber of origin, 1995-2022



Source: Authors' elaboration based on analysis from the US Congress, 1995-2022.

In general, legislation initiatives on any topic have a low percentage of approval in Congress (figure 4). According to the analysis of the initiatives presented between 1995-2022, the migration issue ranked 16th of all the public policy issues that Congress uses to classify legislative activities. Although legislative intensity depends on many variables (type of issue, group interests, windows of opportunity, agendas, among many others), it does give us an idea of how important an issue can be on the political agenda of any country. Migration seems to be a relegated problem compared to other issues on the political agenda. However, a different look at the public opinion polls allows for a deeper interpretation of migration concern, as many of respondents worry about economic or employment issues, that are in fact very much connected to migration.

Migration bills are also more rejected than other initiatives. Although bills on any subject have a low percentage of approval in Congress, immigration initiatives have a lower percentage of success than other subjects such as economics and public finances (7.4%), trade (4.4%), social sciences and history (4.4%), armed forces and national security (3.7%), and finance and financial sector (3.3%).

V. The Approved Initiatives: Some Success Stories

Another important aspect to consider is the content of legislative initiatives meant to control immigration in the US. For many years, the need for a Comprehensive Immigration Reform that would regularize illegalized immigrants has been widely discussed in the political and legislative debate; however, most of the initiatives approved restrict illegalized immigration. Most of the initiatives approved and signed into law do not modify the US immigration system as a whole, and very few address the regularization of illegalized immigrants (or as some laws define it, "illegal migration").

The immigration initiatives approved in the United States Congress generally present at least one of the following characteristics: 1) they are directly connected to other relevant issues on the political agenda, such as the ones linked to terrorism; 2) they are lobbied for as an issue of national interest; 3) most of them are restrictive, rather than permissive with respect to illegalized immigration.

For instance, the Immigration Reform and Control Act (IRCA) of 1986 set the pathways to legalize most undocumented immigrants who had arrived in the country prior to January 1, 1982, but also made it illegal for employers to hire unauthorized aliens. Chain migration was a byproduct of this law, since many of those who had recently achieved legal status in the US were soon followed by friends and relatives, who had not been authorized to enter or to remain in the country. In this way, IRCA did not necessarily succeed in reducing unauthorized immigration. In the 90s, unauthorized migration continued to be a hot potato, a political background that allowed for the adoption of IIRIRA, meant to be a radical reform to control unauthorized immigration, rather than offer pathways to citizenship and work permits.

The IIRIRA initiative was presented on June 11, 1996, under the nomenclature "H. R. 3610 Omnibus Consolidated Appropriations Act, 1997" in the House of Representatives by Republican Party legislator Charles William Young, then representative of the 10th district of the state of Florida. It is worth mentioning that this legislator was a federal representative for 4 decades until his death in 2013, having served 1971-2013. He had previously been a member of the Florida Senate for 10 years, from 1960-1970. He was the longest-serving Republican legislator at the time of his death (Schudel, 2013; US Congress, 2018), having shown great leadership during his tenure in Congress. This reform tightened the enforcement of immigration law, increased penalties for immigration-related crimes, provided expedited means for removal of inadmissible noncitizens of the United States, prevented the re-entry of illegalized migrants for long periods

of time, and imposed requirements for relatives of migrants who wished to enter the United States. The IIRIRA also had the US government track the entry and exit of foreign visitors (Hipsman & Meissner, 2019).

The 1996 IIRIRA also focused on deterrence, approving funds to build two fences in San Diego and enacting tougher penalties for smugglers and undocumented immigrants. While the trend to crack down on illegalized immigrants did not start with the IIRIRA itself, it did reinforce the punitive aspects of US Immigration Law already in place, which was seen as necessary at the time. The IIRIRA erected much of the legal and operational infrastructure that underlies deportation and removal plans in place to the present time. In essence, it was a relevant political issue that benefitted from political consensus based on the argument of "necessity" to protect the political, economic and security interests of the US.

The H. R. Initiative 4821 (1998), that extended visa processing for security reasons, was yet another success in terms of approval by Congress and the US President alike. The HR initiative 4821 was filed on October 13, 1998, by Republican Congressman Lamar Smith of the 21st district of the state of Texas. Like the H. R. 3610, this initiative was proposed by a congressman with consolidated political leadership and a notable political career. Lamar Smith was a member of the Texas State Congress from 1981-1982, and served as a federal legislator for 32 years, from the 100th to the 115th Congress (from January 3, 1987, to January 3, 2019) (US Congress, 2018b). Smith was known for having a position against abortion and a conservative legislative agenda, in which the immigration issue was always present (Smith, 2018). The initiative was a response to the terrorist attacks that occurred in Africa on August 7, 1998, at the US Embassies in Tanzania and Kenya, in which members of the Al-Qaeda terrorist organization were involved. As an immediate action, the Diversity Visa Program (Lottery Visa) was suspended in the countries where the attacks occurred. Afterwards, the H. R. 4821 established new conditions of issuance for diversity visa applicants.

This controverted initiative went through a rapid legislative process because it responded to the terrorist attack that killed 224 people in Tanzania and Kenya (CNN Editorial Research, 2018) and would be part of a series of attacks that preceded those of September 11, 2001. Also, because it addressed a very specific need for regulating visas after the suspension of activities at the affected embassies. In this sense, H. R. 4821 deals with a relevant and urgent security issue, which explains its fast track approval.

The same year, Republican Lamar Smith also proposed an automated entry-exit control system of migration for management, administrative and legal purposes (The H. R. 4658 initiative of 1998). This initiative took

a very short time to become law, as it basically corrected an administrative aspect of the IIRIRA enacted two years before. The need to have more automated checks on the entry and exit of foreigners to combat and reduce illegalized migration was a political issue that was established with the IIRIRA of 1996 and prevails to this day. This automated control system for the entry and exit of foreigners would allow for a record of departures from US territory for each foreigner, which would be combined with the records of arrivals of foreigners and thus allow the Attorney General to identify "legally" admitted non-immigrants who remain in the United States after the expiration of their authorized period of stay. This system had been mentioned in the IIRIRA, but the H. R. 4658 was approved fast-track in 15 days, in order to speed up its implementation.

At the beginning of the 21st century, the US adopted the H. R. Initiative 4489 (2000), to improve data management regarding immigration and naturalization. This initiative was also introduced by Republican Lamar Smith and was signed into law in just under a month. This law replaced the requirement to collect information from each foreigner who entered or left the country, with a new one that would involve an integrated entry and exit data system; second, it stated that no additional authority was permitted to collect such information, besides the Department of Justice and third, it extended the implementation deadlines. One of the most striking elements of this initiative is that it expressed the need that the Attorney General, together with the Secretaries of State, Commerce and Finance, "consult with the affected foreign governments to improve border management" (US Congress, 2000). This border externalization reflects the climate prior to the September 11 attacks, when the migration issue was not yet so closely related to terrorism.

VI. Discussion

This research revealed a clearly restrictive trend to control illegalized migration, that spans at least 28 years (from 1995 to 2022), and it is most likely to continue. In fact, and in relation to more recent events that exceed the timeline established in the objectives of this research, we can say that the process of migratory restriction against illegalized flows continues, and it has been increasingly reinforced. Events such as the suspension of the DACA program in the United States, the expedited removal processes for illegalized migrants, the Safe Third Country agreements between the United States and Central American countries, and the reintroduction of the Migrant Protection Protocols with Mexico are clear ex-

amples of the restrictive nature of US immigration policy, in which selective citizenship prevails, signaling the precarious status of many labor migrants and asylum seekers.

Most of the initiatives to offer legal pathways to residence and citizenship for illegalized migrants were rejected after 1995. The high tendency of failure rates confirms that these bills have an electoral purpose, rather than coming from a genuine wish to help migrants or grant them citizenship. For congressmen/women, it is important to take a position on the immigration issue for the sake of public opinion and show to that they are attempting to legislate in favor of reducing illegalized immigration, since this position generates electoral dividends, regardless of whether these initiatives become law or not. The legislative failure is so evident that 93.5% of all immigration initiatives did not even pass the chamber of origin in which they were presented. Even the initiatives that do pass the chamber of origin are not guaranteed a positive vote in the second chamber. The percentage of rejection has not changed much in the last three decades, although it does show a slight increase that corresponds to the higher legislative intensity on immigration matters.

This way of legislating on illegalized migration is also replicated at a local level. In this regard, Rodrigo Villaseñor and Luis Acevedo (2009), have found that there is intense legislative activity to control immigration at a local/state level in the US, just before elections; but only very few (16%) of the initiatives are approved, as these authors show. Rodrigo Villaseñor and Luis Acevedo (2009) explain the high number of rejected initiatives based on what they consider as an "ineptitude" of the state legislatures in migratory matters. Unlike Rodrigo Villaseñor and Luis Acevedo (2009), we believe that rejecting the initiatives on immigration is a rather deliberate exercise of electoral nature. As shown in the statistical analysis, we found considerable effort invested into the legislative production to control this type of immigration. The United States Congress is one of the largest legislative institutions in the world, so it can hardly be said there is a lack of information to implement these laws. In fact, urgent initiatives of a restrictive nature —such as the one linked to terrorism— pass quite quickly through both chambers and are soon approved by the executive.

Apart from the electoral explanation, there are also economic interests that justify the maintenance of low-cost disposable immigrant labor, with no right to citizenship. We rather agree with other scholars such as Jorge Bustamante (2007), who explains this legislative intensity as an electoral strategy, further complicated by economic recessions and contraction of employment. In this context, illegalized immigration is problematized

for the electoral public, to gain notoriety among the anti-immigrant electorate. In the same vein, Eduardo Torre-Cantalapiedra (2015) finds that congress members and politicians benefit from the so-called "temporary illusion" and "confuse" public opinion due to "informative asymmetry", but they have no real interest solving illegalized migration or providing paths to citizenship to a large part of this population.

Indeed, most of the initiatives presented show that they have an underlying or non-explicit purpose that is not so much to reform the immigration law system, but to position this issue on the national political scene. In fact, many of the initiatives that were successfully turned into law address very specific issues or are intended for certain sectors of the immigrant population. As opposed to the much-expected immigration reform to regularize irregular migrants, many of the approved initiatives reinforce the immigration laws that restrict illegalized immigration. It should be noted however, that restricting is a form of regulating.

The current national composition of illegalized migration in the United States goes beyond a nationality group and was partly a byproduct of the laws in 1970, which privileged skilled over unskilled migration (Douglas Massey, 1995). Despite constant lobbying and efforts to reduce the rights of illegalized migrants, that included proposals of amnesty, there is a clear and defined tendency to restrict the rights of illegalized migrants under the slogan of reducing and even eliminating this type of immigration.

It was the economic rather than the political aspect that reduced illegalized migration, as proven during the 2008 financial crisis (Krogstad, Passel & Cohn, 2017). However, after the economic recovery, the US continued demanding cheap labor from abroad. Furthermore, during the last pandemic crisis (2020-2022), some illegalized workers were categorized as "essential"; their labor was needed in the food and health industries. However, most of them continue to be illegalized and live in a long-term situation of vulnerability.

The importance of having electoral support means that decision makers do not always seek adequate solutions to immigration, but rather electorally profitable solutions; in many cases, these are intermediate solutions, simulations or deceptions meant to satisfy voters. This situation can be explained by looking at the role of the state in immigration policies, in a global neoliberal context. In the case of the United States, as in other main countries of destination for international migration, deportation regimes have been successful, as has regulation concerning freedom of movement. As Nathalie Peutz and Nicholas De Genova (2010) state, it is no coincidence that in many countries in the world, as in the United States, deportations have become a widely generalized phenomenon. This also

explains the legislative activity of countries with deportation regimes, such as the United States, which focuses on legislative actions to restrict freedom of movement of non-citizens and constantly modify and update the prerogatives of those who are citizens.

We conclude that the major restrictive trend in immigration policy is not correlated to a transition from one administration to the next nor to a change of the party in power. Rather, it is part of the US immigration system to restrict migration and allow citizenship in exchange for skills (Shachar, 2011) and based on racial criteria (Paik, 2020). This can be seen as a global trend in globalized migration policies, where the slowdown in the world economy has also contributed to maintaining a low-cost immigrant labor force. These interpretations of legislative activity are in tune with the hypothesis of Doris Meissner *et al*. (2013) about the functioning of the US immigration system as a "machinery", specialized in enforcing the Immigration Law in the United States (law enforcement), rather than based on a true will to allow migrant workers to attain citizenship.

VII. Conclusions: Precarious Citizenship

Citizenship can be a hopeful thing when seen as the institution through which civil, political, and social rights are enacted and enjoyed. But, at the same time, it can generate some pessimism when we see how these rights are distributed. The "pessimism about citizenship is often framed in relation to the increasingly restrictive barriers that are being placed on international mobility and on attaining citizenship itself" (Isin & Nyers, 2014, p. 2). This pessimism is generated by the inability of the state to go beyond some fundamental exclusions that it maintains based on an individual's birthplace, race, gender, abilities, capacities, etc. "Citizenship in this view is not just a name for membership, but a title or a rank that separates, excludes, and hierarchizes" (Isin & Nyers, 2014, p. 2). Citizenship, understood as a dynamic institution that mediates rights between political subjects and states, defends the inclusion, membership, and permanence of certain individuals at the expense of others who are excluded by being considered non-members and who are consequently marginalized from the rights that this institution grants. In part, this is due to the historical connection between citizenship and the state. This "historical connection has always been made from the perspective of not the excluded (strangers, outsiders, aliens) but the included (citizens)" (Isin & Turner, 2002, p. 5). Citizenship regimes are a locus of exclusion as long as they are based on the sovereign power of the state to make distinctions between citizens and non-citizens.

Since the civil, political, and social rights of individuals have historically been tied to the state, it is often thought that the rights of illegalized migrants and other excluded groups (native and aboriginal groups, stateless groups, and refugees) will be guaranteed as basic human rights. Unlike the rights of citizens that states must guarantee for all of their legal members, human rights are presumed to be universal rights. Nevertheless, in "the absence of a global state with legitimate juridical powers around the world that can over-ride state legislation, it is difficult to see how human rights legislation can have authority over the legal rights of citizens of legitimate states" (Isin & Turner, 2002, p. 7). Citizenship rights are distinct and justiciable, while human rights are vague, and not enforceable nor justiciable. Citizenship provides the right to have rights because "membership of the citizen body gives access to the… «institutional» rights offered by a given political community" (Bellamy, 2008, p. 87); and "the exercise of political citizenship offers a means for claiming rights and shaping the ways they are conceived and implemented" (Bellamy, 2008, p. 87). By being denied access to citizenship, illegalized migrants are deprived of the right to have rights.

As states have monopolized the authority to recognize and legislate citizenship, they have created contingents of marginalized people who lack access to citizenship rights. Consequently, illegalized migrants experience what Noora Lori calls "precarious citizenship" (Lori, 2017). She uses this term to "refer to the structured uncertainty of being unable to secure permanent access to citizenship rights" (Lori, 2017, p. 745). Citizen membership is critical because precarious citizenship goes hand in hand with the erosion of social protections and labor rights. One of the most common routes to precarious citizenship is illegalized migration. Illegalized migrants inhabit a precarious position because they are unable to invoke any state's protection. Instead of being formally incorporated, illegalized migrants persist with precarious citizenship status. Our analysis is an example of how state regulation processes work to formalize, rather than alleviate or eradicate, the precarious legal statuses of these groups. The high tendency of failure of the initiatives to offer legal pathways to residence and citizenship for illegalized migrants shows "a strategic government response to avoid resolving dilemmas about citizenship (especially questions about the incorporation of minorities, refugees, or labor) by postponing those decisions, perhaps indefinitely" (Lori, 2017, p. 762). This is the primary injustice of the precarious citizenship experience, that the state which should grant them citizenship will, for some reasons, not do so. If citizenship regimes produce precarious citizenship, they do not meet the moral standards of justice.

A globalized phenomenon such as citizenship requires going beyond merely institutional and formal conceptions. We need to rethink the institutional notion of citizenship as merely a status held under the authority of a state. The reality of international migration has prompted increasing recognition of citizenship as a transnational matter. "The nation-state and the national level of citizenship may no longer be adequate units of analysis in the contemporary world, in which globalization, particularly the creation of a global capitalist economy, is such a powerful long-term dynamic" (Roche, 2002, p. 73). Citizenship not only has to do with the institutions that define and protect national borders. "Studies have demonstrated how illegalized immigrants can achieve various forms of social and civic integration despite being formally excluded. Irregular migrants are often integrated at the local level —in schools, churches, community groups, art collectives, and political associations" (Lori, 2017, p. 756). It should not be forgotten that they make an important economic contribution in the destination countries. But as long as they remain legally excluded by citizenship regimes, illegalized migrants will continue to experience precarious citizenship.

The main underlying objective of citizenship regimes is to maintain a massive, low-cost immigrant labor force. A true change would not only lead to minor adjustments on illegalized migration, but to a total adaptation and reengineering of the US economic structure, that would truly recognize the human rights of millions of migrants. This historical denial of migrants' contributions and labor has been promoted through misinformation and campaigns by ultra-conservative groups, who mainly claim that illegalized migrants do not have potential for integration and assimilation.

This situation is part of a broader international context of inequality, in which the economies of developing countries that feed illegalized migratory flows to the United States are unable to offer decent living standards for their fellow citizens. Unfortunately, these flows will continue if citizenship, nationality and migration continue to remain under the responsibility of states, rather than be negotiated on a multilateral and cosmopolitan basis.

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Duties in an International World: the Importance of Past Residence and Citizenship

Las obligaciones en un mundo internacional: la importancia de la residencia pasada y la ciudadanía

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Abstract: This paper argues that international citizens can retain their obligations to past states and societies, and that this obligation has implications for their state of residence. While some people remain in the same state for their entire lives, international individuals generate relationships with more than one state. The paper presents the argument that individuals are obligated to their state for at least one reason. One particularly relevant implication of this obligation is the duty to pay taxes. In regard to international individuals, these considerations apply to states with which they had historic relationships as well as the state in which they currently reside. The paper offers a rough proposal as to how to calculate the relative relationship that an international individual has with their past and present states and societies. This can be used to determine what proportion of a person's total lifetime tax revenue should be shared. Although the analysis here is presented in terms of the duty of the individual towards past states, the individual need not change their behaviour to discharge the duty. The duty impacts on *current* states, which should acknowledge the duty of their international resident, and make sure that this is discharged appropriately to the other relevant states.
Keywords: International Citizen, State, Political Obligation, Taxes, International Residents.

Resumen: Este documento argumenta que los ciudadanos internacionales pueden conservar sus obligaciones con los Estados y sociedades del pasado, y que esta obligación tiene implicaciones para su estado de residencia. Mientras que algunas personas permanecen en el mismo Estado durante toda su vida, los individuos internacionales generan relaciones con más de un Estado. El documento presenta argumentos acerca de que los individuos están obligados con su Estado por al

menos una razón. Una implicación particularmente relevante de esta obligación es el deber de pagar impuestos. En lo que respecta a las personas internacionales, estas consideraciones se aplican a los Estados con los que tuvieron relaciones históricas, así como al Estado en el que residen actualmente. El documento ofrece una propuesta aproximada sobre cómo calcular la relación relativa que un individuo internacional tiene con sus Estados y sociedades, pasados y presentes. Esto se puede usar para determinar qué proporción de los ingresos fiscales totales de por vida de una persona se debe tributar. Aunque el análisis aquí se presenta en términos del deber del individuo hacia Estados pasados, el individuo no necesita cambiar su comportamiento para cumplir con el deber. El deber impacta en los Estados actuales, que deben reconocer el deber de su residente internacional y asegurarse de que éste cumple adecuadamente con los otros Estados relevantes.
Palabras clave: *ciudadano internacional, Estado, obligación política, impuestos, residentes internacionales.*

I. Introduction

What duties do migrants have to their country or birth or past residence? More importantly, what duties do receiving states have to the states in which their immigrants have previously lived? The issue of brain drain has been much discussed by moral and political philosophers (Brock & Blake, 2014) (Sager, 2014) and my aim is to supplement that literature with an argument based on states respecting the duties international residents have towards their past states.

In his influential work on immigration, Joseph Carens proposed a theory of social membership which generates duties towards immigrants. Other political philosophers have recently emphasized the importance of time and its relationship to justice. In this paper I will argue that migrants can retain duties to states in which they lived in the past. However, it is their current state of residence that should acknowledge and act on this duty. The argument is based on the idea that migrants have multiple memberships and relationships. Citizenship is an important factor in this calculation, but not the only one.

I will begin by setting out an example of two individuals who live, work and pay taxes in a state. I will present some of the justifications for political obligations, and obligations to pay taxes. Next, I will explain the importance of time and summarize Carens' argument of social membership. I believe that this time-based membership theory should be applied

backwards as well as forwards, in the case of tax revenue. After presenting my proposal on how to do this, I will consider some criticisms before concluding.

II. Two Taxpayers: An Example

Jay and Tanuja both live in state A, where they work and pay taxes. Jay has lived there his whole life. Tanuja, however, was born in state B and spent her first nine years there. She then moved to state C where she continued her schooling and eventually became a dual citizen of B and C. At age 18 she became a University student at state D, studying there for four years. After graduating she took her first job in state A where she has remained ever since. She is settled and plans to apply for citizenship in the future, giving up her existing dual citizenship.

When Jay and Tanuja work, contribute and pay their taxes the benefits go to state A. They currently enjoy the benefits of living in state A, after all, and so we might think that this is fair enough. However, there is also a difference between them. Jay only has a relationship with state A. Tanuja has relationships with states A, B, C and D. However, under most current systems and rules, only state A receives the benefits of her work and taxation.

If states B or C tax on the basis of citizenship then Tanuja may have some tax obligations, though these might be met by paying the tax in state A. However, this is extremely rare. Very few states tax people based on citizenship, largely due to the administrative difficulties involved and the concern that this would give citizens an incentive to renounce their citizenship.[1] So, if we assume that only state A receives tax revenue for Tanuja as it does with Jay, is there something wrong with this? Do international residents, non-citizens and those with historic relationships to other states really have the same duties as those such as Jay who only have a single relationship? Let's see by considering where such duties arise from.

III. The Obligation to Contribute

Political thinkers have long considered the question of why people should follow the law, obey their state, and to pay any taxes that are demanded.

[1] The USA taxes its citizens on their global income, though it offers a credit on the basis of taxes paid elsewhere, so if citizens pay more tax outside the USA than they would have done inside they will not pay anything to the US government.

Indeed, discussion of this can be traced back at least to the work of Plato, with Thrasymachus' challenge about justice and Socrates decision to face the death penalty rather than take the option to leave Athens.[2] There is not space to discuss this extensive literature here, but I will mention some of the key types of theory (Dagger & Lefkowitz, 2014; Horton, 2017).

Many theories of obligation hold that people have a duty to obey and contribute due to the benefits that the state provides or produces. According to consent theories, people have obligations because they have consented to exchange the benefits of participation in the state for the contributions they are then required to make. This could be an explicit contract, but in the absence of explicit signature, tacit consent (Locke, 1988) or hypothetical consent (Kant, 1991) have been proposed as alternatives. There is a stronger claim with regard to immigrants that they have explicitly (or tacitly) consented to their society. After all, they voluntarily moved there.

Former citizens who have permanently left may be considered to have renounced the contract, and hence all duties. However, I think it is too quick to say that emigrants cease to have obligations to their past societies. Rather, we might say that they have ended their contract with one state and begun a contract with a new state. Ending a contract might stop someone from generating further obligations but it does not completely end the obligation that remains. If I move out of my rented house and into another one I cannot claim that the rent I previously paid should be returned to me. Any benefits received and obligations arising from that past relationship will remain, so if I have not paid all that I should, then that past landlord may have a claim against me.

A second type of theory of political obligation is the principle of fairness. If we receive benefits from the joint enterprise of state then we should not free ride on the actions and contributions of others (Hart, 1995). Relatedly, it has been suggested that we have a natural duty of fairness to support legitimate states (Rawls, 1999a). If we find ourselves in a legitimate state that benefits us, then we have an obligation to make our contribution.

Other theories with some similarities to fair-play theory have been developed as well. One is that people have obligations out of *gratitude* for the benefits that they have received (Walker, 1988). Another view is that we have *associational* duties. This holds that we should consider our relationship to our fellow citizens as analogous to that with our family. Just as we are born into a family, we are born into a society, and certain rights but also responsibilities come with that (Dworkin, 1986).

[2] See Plato's *Republic* and *Crito* in Cooper, J. M. & Hutchinson, D. S. (1997). *Plato: Complete Works*. Hackett Publishing Company, Incorporated.

I find versions of several of the above theories convincing. However, they are not universally accepted. Others —consequentialists such as Utilitarians— will agree that we can have duties to the state, but out of a more general moral duty to create benefits. This means that the state need not provide the individual personally with benefits, but rather it will be enough that obeying the state will lead to greater overall benefits than disobeying it. Some may prefer to combine two or more of the theories above to create a hybrid or pluralist theory (Wolff, 2000). As mentioned, I find several of the above theories compelling, in which case political obligations are "overdetermined" —several compelling and complementary justifications exist in parallel.

Assuming that everyone is obligated to their state,[3] what are implications for those who have spent time living, growing, learning and working in multiple states? How are Tanuja's duties different from Jay's?

IV. Time and Social Membership

In the previous section I discussed the issue of political obligation. There are several different proposals, and I have not argued for one above the others. What I take for granted is that individuals are under a duty to their state, which flows from the benefits that the state provides. This is straightforward enough if we assume, as Rawls did for simplicity, that society is a closed system with no entry and exit (Rawls, 1999a). However, in the real-world people do not spend their entire lives in a single state. Some people, like Tanuja, move across borders and spend part of their lives in different states. Jay's relationship is entirely with one state. However, Tanuja's relationship is shared with various states.

What does it matter that some people spend time in multiple states, contributing to and receiving benefits from them? I suggest that a tax system that focuses on income and spending occurring only in the present and in one jurisdiction fails to acknowledge the moral duties involved vis-à-vis international individuals. I would also argue that the amount of time that international people have spent in different states is a very important and useful currency to determine the relative strength of those relationships.

Philosophers have in recent years paid increasing attention to the distribution of time within society. Some have emphasized that leisure

[3] Despite all the theories above, some people remain anarchists, or possibly minarchists, who argue that the fact that the state provides us with benefits does not then create duties on us (Nozick, 1974) (Wolff R. P., 1988).

time is not always distributed equally and that it cannot always be linked to money (Goodin *et al.*, 2008; Rose, 2016). Others have investigated the way that societies impose time costs on some people (Cohen, 2018). I agree that time can be a very important factor; the time we spend working is an important contribution to our society.[4] Joseph Carens has considered the issue of time in a very pertinent discussion. He argued forcefully that receiving states have a moral duty to offer citizenship to immigrants who meet certain conditions, even where the person in question was not invited into the country and was perhaps an unwanted illegal migrant. Carens presents a theory of Social membership which "provides the foundation upon which moral claims to citizenship rest" and that "people can be members of a society even when they are not citizens and that their membership gives them moral claims to legal rights" (Carens, 2013).

Carens' theory, then, is intended to show what duties states have with regards to their immigrant populations, regular or irregular. He goes on to argue that residence and length of time spent within the state are keys to social membership (Carens, 2013). Carens argues that once people have spent a certain amount of time within a state they become morally entitled to claim citizenship. Carens admits that his principle has quite limited scope and applicability. He concedes it is not really informative when it comes to many other issues to do with immigration, and also that it is not the only consideration when it comes to the granting of citizenship. He also admits that some will accept some parts of his theory while rejecting others and that it is not a "master concept" when it comes to citizenship (Carens, 2013). Nevertheless, he argues with plausibility that time does work as an important measure of membership.

My argument is that similar considerations of time and moral membership apply when attempting to work out the extent to which people have duties and obligations to their society. This could be because time matters directly, or because it is the best available proxy for one of the theories of obligation presented earlier. I have remained ecumenical on those theories of obligation, but time is linked more directly in the case of associational obligation, and as a proxy for the benefits received in the case of the others.[5] Relative moral membership and obligation is not really an issue when it comes to single-state individuals (like Jay) —there is no question about where their obligations lie. Jay's past state is the same state as his present one.

[4] (Removed for blind review) Bamford (2014b, 2015, 2018).

[5] Consequentialists might support the proposal for other reasons, such as that it would create positive incentives for states to invest in infrastructure and education, and allow some redistribution to poorer states and poorer individuals in wealthier states.

However, I believe that where international individuals (like Tanuja) are concerned, time spent in residence is a relevant consideration when it comes to their duties and obligations to past societies and states. The obligation increases the longer a person has spent in a society and this obligation of association, benefit, fairness or gratitude does not disappear when they move abroad. That connection will stay with the individual. It was part of their personal history and development and that imprint will remain. Some international individuals will be closer to Jay, with a very strong relationship to a single state and a lesser relationship to a second one. Others will be more like Tanuja, with equally split relationships with several states.

V. The Proposal

My proposal is that individuals (everyone on the planet) should be classified for tax purposes as either international or single-national. Single-national individuals (like Jay in the example) should pay taxes as they do now without any need for changes. However, international individuals should have their lifetime tax revenue split between states in accordance with a formula. This "relative relationship" formula would attempt to capture the relative strength of their relationship with their different states and societies. An international organization would be required to administer such a system, perhaps set up under the auspices of the UN.[6] This would act as a clearing house for all the payments. I will, however, largely focus on the factors that I suggest including in the calculation.[7] As I have already indicated, time spent in residence is a major factor in this calculation. Firstly, there should be a threshold above which the relationship between a state and an individual becomes worthy of inclusion in their relative relationship calculation. If Tanuja once spent two weeks on holiday in State E, or regularly makes short train trips across State F, or occasionally visits state G for work meetings then these would not qualify for inclusion in the calculation. Carens' theory of social membership could be used as a guide here. However, the threshold for a duty to contribute some tax revenue would

[6] The claim is that such an institution should be set up to fulfil the duty of international persons to contribute to past states, though such an institution could also be justified as a form of compensation for brain drain, or as a way to stop a race-to-the-bottom in tax rates that would limit tax revenues and undermine progressive taxation, see (reference omitted).

[7] As a clearing house, it would not necessarily require payments from all states. My guess is that a few wealthy states would pay into the system, and poorer states would largely receive some additional revenue. Any payments relating to individuals from those poorer states will be offset against the revenue they would receive for other former residents.

probably be lower than the threshold for citizenship qualification —perhaps one or two years in the former case rather than five to ten for the latter. If someone has spent a qualifying amount of time amount of time in a state, or has ever been a citizen, then this will trigger the relationship. However, brief visits do not generate obligations.

Although time spent in residence is an important component of the calculation, I do not think this should be the only factor in the relative relationship formula. Other factors would be (a) proportion of lifetime spent as a citizen, (b) proportion of income received and (c) time spent in education.[8] These are only suggestions.[9] Perhaps the income factor would only be triggered once someone reaches a certain amount of income, and would gradually phase in and increase from that point with each say $100,000 earned. This suggestion would add a degree of variability into the calculation but in general I would suggest that residence-time should count for more than citizenship-time,[10] and residence time should also count for more than income and education-time.

In this way, Tanuja's relative relationship to state A will grow over time as she spends more time living and working there, and perhaps eventually becomes a citizen of that state. Of course, her total tax revenue will also increase over that time, so it is unlikely that it would require any kind of rebate from states B and C towards state A. However, as time goes on, she would be deepening her relationship with A and diluting her relationship with the others. This seems right to me. If someone leaves a state, they retain some obligation but this obligation will wane the longer they spend elsewhere.

I indicated in the above example that Tanuja has not paid very much tax yet, and so the amount for each state is relatively straightforward to calculate. However, the amount due should be considered on a lifetime basis. After all, we are now looking at the amount of a persons' total lifetime

[8] I am less sure about this one, though it seems important to acknowledge the increase in human capital provided if income is also given a strong weighting in the calculation. The income may only arise due to that earlier educational investment.

[9] I have proposed such calculations in previous works (Bamford, 2013; 2014a). There my suggestion was focused on the proposal that the calculation should additionally be weighted to reward states with higher tax rates. This was designed to counter a "race-to-the-bottom" in tax rates, but I am here emphasizing the moral foundation behind the relative relationship consideration.

[10] As an illustration, let us assume that Tanuja earns $40,000 in a year and pays $15,000 in taxation. If she has not paid much tax in the past which would offset the amounts received, then this would be split fairly evenly between states A and B (say, $5,000 each), with a slightly smaller amount going to state C (something like $4,000) and a much smaller amount going to state D (something like $1,000). Though of course, for most international individuals the two will be correlated.

tax revenue should have been split between different countries. Without an official calculation of lifetime tax payments it is unlikely that states would get an appropriate amount for international individuals (though perhaps in some few cases it would happen to work out that way). Tanuja, remember, will be living and earning in state A, which will be collecting her tax revenue. Without a system of redistributing the revenue, state A will keep all of the tax revenue, while the countries in which Tanuja has previously lived and studied will receive nothing.

I have in earlier work proposed that everyone should be taxed on a lifetime rather than a transactional or annual basis.[11] This would continually recalculate each person's tax rate, ensuring that they have paid the correct amount of tax and received the correct amount of net income at each point. Each calculation would assume that the person is now at the end of their life and their lifetime tax and net income can be calculated accordingly.[12] Then it is a process of ensuring that the amount that the person has paid in tax (and received in net income) over their life matches the amount that they should have done up to that point. This process will then be repeated again at the next payment or calculation point (say, a month later), and so on.

Now, while the relative payment calculation I have proposed makes more sense when using a lifetime tax averaging calculation rather than an annual one, it is not necessary. Even with an annual tax period, the international tax calculation could still operate on a lifetime basis. The calculation would then need to be adjusted accordingly, to take account of past payments and receipts as well.

1. *Ending the Relationship?*

An immediate concern that may arise about my proposal is that it would require some people to have their tax revenues directed towards states to whom they should owe no obligation. Does the proposal create obligations in cases where we might think no obligations should apply? What if Tanuja had fled state B with her parents due to oppression, renouncing their citizenship and history with the state in the process? I agree that this would be unacceptable and so I would add to my proposal that refugees do indeed lose all obligations to have their tax revenue diverted to states that have mistreated them.

[11] (Removed for blind review). See footnote 6.

[12] Proposals for tax averaging can be found in Vickrey, 1939; 1972. Vickrey was writing at a time of manual tax calculations, while tax can now be calculated in real-time, making the process much more straightforward.

What should this mean in practice? One option would be to exclude state B from Tanuja's calculation of relative obligation. This would increase the proportional relationship with her other states. Alternatively, the calculation could be undertaken in the same way as it would be for non-refugees, but the revenue withheld from the offending state. It could instead be provided to a third party, such as the UN refugee agency (UNHCR) or to another international development body. I have a slight preference for the second option here, of redirecting the revenue to another recipient, and will assume this approach when discussing the details later on.

A more practical concern is how such an exemption from duty would be confirmed. State B might claim that they do not mistreat their citizens and the refugees are lying or mistaken; state B did nothing wrong and so their citizens must have left for other reasons. If State C accepts the claim of refugee status and State B denies that this was warranted, then what would an international organization be able to do? This will seemingly force the organization into a political controversy that they would wish to avoid. However, it will be necessary to make decisions, and they will have to be made in as uncontroversial a manner as possible.

This is because there is another concern that would impact on this. This is the possibility that states could abuse a refugee-tax-waiver option given that it might be in their interest to do so. Consider a tax haven which offers to grant refugee status and citizenship to new residents, thus offering them the chance to reduce their taxes and free themselves from any obligation to previous states.[13] An international organization would after all need to adjudicate on such cases for this reason as well, though this could be a significant undertaking.

They might have a listing system which would be used for this case. Where there is a high likelihood that a member of a particular group from a particular state would be a genuine refugee and that the receiving state would investigate thoroughly, then the exclusion could be granted automatically. In other cases, some investigation might be required.

Moving on from these practical issues, we can consider whether excluding state B would be morally justified. Thinking back to the justification, might a critic insist that Tanuja still benefitted from her schooling in state B? The provision of these benefits triggered the obligation and there is no difference between a refugee and someone who simply

[13] This is more of a problem under the first of my proposals above, that refugees should have their tax liabilities calculated differently after being granted refugee status. However, note that the above proposed system of redirecting the benefits of excluding a state from a person's tax calculation to an international organization (say, the UNHCR) would remove some of these incentives to game the system.

chose to emigrate. Both the refugee and the migrant received benefits in the past and so have obligations into the future. I strongly disagree. By driving someone out, a state gives up all claim to reciprocal duty on the part of that individual. Furthermore, political refugees will have a good case that they were in fact harmed by their state, or at least placed at an unacceptable risk of harm which led them to leave. This criticism is undermined because State B failed in its duty to protect (Renzo, 2012).

This leads to a concern that the response on my refugee issue is too blunt a tool. One concern here will be that the refugees may have got benefits from their state before they were forced to leave.[14] How can it be that those benefits are to be ignored once the person has fled? They may still feel some affinities to their past society as well, even if they have had a problem with the government. I have already given my answer to this above, that the failure to protect nullifies such claims, but I would also add that the person in question may have also paid tax to their past state, and I assume that this will not be recovered.[15] A different but related concern regarding refugees is that the situation in their country may change over time. In some cases, a refugee might have had a positive experience in the state before being badly affected as the result of a regime change, causing them to leave. The subsequent removal of that short-lived regime, or the peaceful end to a civil war, may render them safe to return to the state, and nullify the justification for them not to contribute. In this case, I would not advocate that their refugee status would need to be withdrawn, but I do think that there should be scope to reinstate their tax link to that state. Perhaps refugees could be given the option to reinstate this link when they are happy to do so, so that their past state can receive a proportion of their tax funds again.

2. *What About Non-Refugees who Renounce their Past State?*

The proposal that refugees should have future tax revenues diverted away from their past state points to a further criticism, that *everyone* should be able to sever ties entirely with their past state. Why should refugees be able to do this but not other emigrants as well? Should the analogy not be with a divorce, where the two parties come to an agreement

[14] Thanks to Michael Blake for raising this point.

[15] Perhaps there might be scope for an international tax system to withhold and redirect other revenue to states to make up for the past tax revenue paid by refugees. However, this provision might make such a tax system impossible to introduce in the first place, as states might not be willing to sign up to a system which could redirect revenues in this way.

and then go their separate ways from then on with no further duties?[16] A first response to this is that divorce agreements do sometimes include ongoing maintenance commitments (sometimes called alimony). However, maybe that response focuses too much on the analogy. The point is that someone could be unhappy to contribute to a past state, but will be forced to do so by my proposed scheme.

I do not find this a troubling concern myself. The person involved has benefitted from their past state and they have a past relationship with them. If someone does not want to continue that relationship, they should be free to leave. The important point regarding my proposal is that once the person has left, their relationship with their past state will get diluted as their relationship to the new state increases. This dilution occurs because it is a lifetime calculation, and the past tax payments will still count, while the relative relationship is diminishing. For some it may even be the case that they will not need to supplement their past tax payments, since these historic payments will be sufficient to cover their duty. Nevertheless, many would have some proportion of their subsequent tax revenue diverted from their new to their old state under my proposed scheme. However, as mentioned, the relative obligation to the old state will be reducing as long as they are outside it. This is the choice that someone can make —to cease to continue with the relationship, and the relative relationship calculation will take account of this.

Some may challenge my divorce agreement analogy at this point, since marriages were *chosen* and we do not choose where we are born and raised. Instead the relationship to our state is forced upon us, at least if we have not chosen to immigrate.[17] This is particularly a challenge to consent-based theories of political obligation, which requires them to switch to tacit or hypothetical consent. It may impact on those who accept the principle of fairness only where benefits have to be "accepted" rather than received; we may not think that children could accept benefits. However, those who believe that political obligations have to be *actively accepted* in some way may find the argument here lacking. It does not impact upon gratitude or associational duties, so those who accept my argument above on either of these grounds would be unconcerned by this criticism.

One response to those unconvinced by gratitude and associational duties is to invoke tacit consent to the state (or acceptance of benefits). We can be more confident that adults were tacitly consenting to stay

[16] Thanks to Michael Blake for this.

[17] Thanks to an anonymous reviewer for pressing this point.

somewhere up until the point where they left. After all, international individuals are clearly people who have left their original state, so they had an opportunity to leave and took it.[18] The question still remains regarding children, who might be considered incapable of consent. Some may be troubled by this. However, for the single-state individual they will pay tax during their productive years to cover the cost of the education and pension of their fellow citizens. International citizens would be doing the same thing for their historical states as well as their present one, who —after all— did not bear the cost of educating them.

VI. Further Criticisms

There are, no doubt, many possible criticisms of the proposal I make here. There will be concerns about practical and political viability. Philosophical anarchists will criticize the moral foundation that people have obligations to states at all.[19] A Cosmopolitan advocate of a global state might argue that all current states are illegitimate, and I will discuss cosmopolitan concerns later. I will now discuss a series of potential criticisms, in no particular order. Discussing these will hopefully clarify the argument and proposal.

Criticism 1: Is Time a Suitable Currency?

Changing focus now to the factors included in the calculation, one concern is to query whether time is a suitable currency. One version of this is to challenge the moral relevance of time entirely. Does my proposal mean time must have some special moral status, which should be acknowledged and justified?[20] Some may consider such status to be questionable, opaque or incoherent. I have mentioned above that I believe time is an underappreciated and important good, and it is a resource of which people have a limited supply. It is an important resource in its own right and is therefore a suitable currency in general.

Fortunately, I do not think it is necessary to get full agreement on that point. The proposal also builds on the idea that time is also a readily measurable proxy for what generates the obligation to pay tax. It is a reason-

[18] Hume's point that that a "poor artizan [*sic*]" is like a captive because they are unable to leave does not apply to the international citizens to whom my proposal applies (Hume, 1994).

[19] See footnote 12 above.

[20] I thank Alex Sager for this criticism.

able proxy for the benefits received (along with income, which is another factor), for the strength of relationship a person has with various communities, and for the relative costs borne by the state(s) involved. I think that the mix of measures I have proposed generates a sensible proxy, though that does not mean that a better alternative does not exist. Overall, those skeptical of the moral value of time can still count it as a useful proxy.

Criticism 2: What about Differences in what States Offer?

However, this then leads to another criticism, which is that time spent in one state is not equivalent to time spent in another. The net benefits someone received when spending a year in one state (G) will not be identical to the net benefits received by spending a year in another state (H). From the opposite perspective, different residents and citizens will provide them with different benefits and costs while they spend time there.

Thinking about students visiting for education, is there not a contractual relationship here, where students are charged fees?[21] A visiting student spending a year receiving state-funded education in G is not providing as much benefit to that state as a student who is paying large fees to a local education provider in H. It is likely that the student in G is also getting more from the state than they would have received in state H. On the other hand, perhaps the private education in state H is of much higher quality, which is why people are willing to pay a lot for it.[22] Whatever the details, the point is that the costs and benefits involved will certainly vary.

This leads to a worry that time is an inadequate proxy for the educational costs and benefits. This could challenge the need for my proposed education time category. I would not rule this out, as the categories I have proposed are suggestions. However, the main reason for including education separately is to counter the focus on income, since time spent in education will not be represented by present income but rather future income. States that educate people who go on to live elsewhere are providing a service to the world.

Moving away from education specifically, the general issue is that some states provide residents with fewer benefits and greater costs compared to others.[23] State G may also provide its citizens with many high-

[21] Indeed, states attempt to attract students to come because these students bring benefits. I thank Stephen Macedo for this point.

[22] This might not be the case where a wealthy state provides excellent publicly funded education.

[23] I thank Enrique Beltran Camacho for this point.

quality public goods and services, which State H does not. Does this sever the link with time such that another measure should be used? I do not think so. The purpose is to determine the relative relationship for each individual after all. This is the relationship that this person has to a particular state, whether or not they would have got more or less from being in another state. However, if a superior currency for this role can be developed and applied then I would happily support that development.

Criticism 3: Should Citizenship be Included in such a Calculation?

A third criticism is that I have not provided any justification to include citizenship within the calculation. If the core of the claim to a share of tax revenue arises because of the benefits that a person receives, and that time is a good proxy for a lot of those benefits, then why not focus solely on time spent (perhaps above some threshold) and ignore other factors such as citizenship, education provision and income.

In response, I would emphasize that citizenship is indeed a benefit that individuals receive, and it is one that they continue to receive even when they live abroad. A citizen living abroad may rarely make use of their citizenship. However, it could be seen to act like an insurance policy —the person's state stands ready to support and welcome them back should the need arise. People purchase insurance in the hope that they will never need it. However, they nevertheless benefit from the insurance. Similarly, people benefit from their citizenship while they hold it, whether they end up receiving direct benefits or not.

Looking at it the other way around, if citizenship is indeed a benefit then shouldn't states acknowledge that their non-citizen residents receive this benefit from another state rather than them?

Criticism 4: What about Retirees?

A further criticism raised has been that retirees move across countries too, but may no longer be earning income and paying tax. Are they therefore to be excluded from this system? Should the calculation cease once people reach a certain age? My immediate response is that I see no reason why retirees should not be counted as having an ongoing relationship with their new state, one that will grow over time. This should not significantly affect their total tax liability, but it will affect how the revenues are split between countries.

Perhaps this will require an effective transfer of resources from their past to their current state. However, this might be appropriate if the

new state incurs costs from their presence. Migrant pensioners will be using the local infrastructure including healthcare provision after all. One difficulty may be about where to attribute any private pension payments that are received. Should these be attributed to the location of the origin of the funds (the past state) or the place where they are received (their new state)? The response here might depend on other rules about taxing pensions and retirees. Furthermore, if the pension is based on post-tax savings then perhaps there is no need to count this as income within the international tax calculation at all.

Criticism 5: What about the Global Justice Implications?

A final set of criticisms relate to the wider issue of global justice. Some cosmopolitans may find this proposal inadequate in various ways. As mentioned above, some might advocate for a global state, to replace the numerous sovereign states currently in place (Cabrera, 2006). My argument in response would be to point out the downsides and dangers of having a single state, a point noted by Kant and many others (Kant, 1991; Rise, 2015). Furthermore, my proposal could be seen as a more modest one, to have a fairer distribution within the current system, which does not stop people advocating for an alternative global political system. My argument is that within the *current* institutional set-up, people's duties to their past states are going unfulfilled. If there were radically different institutions, our duties would no doubt be different.[24] Some would argue on cosmopolitan grounds for a global tax scheme that would redistribute from the wealthy to the less wealthy in a systematic manner.[25] In one way, my proposal here may be considered to render a formal global redistributive system unnecessary since it will largely redistribute from richer to poorer states. However, it would not have the same redistributive impact as such a global system —states with a large diaspora (perhaps such

[24] One question that could arise is whether our duty to set up my proposed institutions would interfere with a duty (which I don't accept), to create a global state. I'm inclined to think that a cosmopolitan (which in a moral sense I am) should find my proposal preferable to the status quo, even if they might prefer some further scheme that includes all individuals and not just international ones.

[25] Though most cosmopolitans I have come across seem to propose slightly less redistributive schemes than this, with a focus on individuals who fall below a threshold rather than on reducing global inequality *per se*, such as Caney, S. (2006); Pogge, T. (2002). Other cosmopolitans may propose a world-state, such as Cabrera, L. (2006). Such a global state would, of course, generate a global tax scheme (or the potential for one), and while a redistributive proposal such as this would be a possibility within a global federal system, other options might become available for a global state.

as the Philippines) will benefit much more from my international tax proposal compared to a global redistributive system. My proposal may not be as effective at solving global poverty.

In response, I would emphasize that while the scheme I propose here would be an alternative to a global redistributive tax scheme, it need not remove all other commitments of aid and support. Nor would it remove existing duties to support states through aid.[26] It should therefore be considered complementary to these commitments.

A related concern is whether the remittances that people voluntarily make to relatives in their home countries are already doing the job I set out here, or perhaps complicates the picture.[27] The world bank has recorded annual global remittance figures in the region of $540bn in recent years, comparable to the total GNI of Sweden. My initial response is that these remittances are economically important, and they might make the world a less unjust place. There are also various charitable payments which occur across borders. However, they are usually private transfers, not payments to states, albeit they may improve living standards and increase the tax revenue of the receiving states. I would therefore treat such remittance transfers, along with private and governmental aid, and trade, as outside the scope of the calculation I have proposed.

What if some remittances are currently undertaken by people to discharge the a duty of the kind I have invoked here? In that case, I think that my proposal would improve the situation. Such international taxpayers would no longer have to discharge their duty from their net income (their disposable income), it would be done from their gross income, reducing the revenue received by their state of residence (in most cases at least). As a reminder, the aim of the proposal is primarily to *redirect* tax revenues from states in which income is earned and spent towards states which raise and educate workers. The impact on the lives of international citizens should be minimal.[28] It is possible that some migrants may reduce

[26] Even liberals who oppose a global redistributive scheme would accept that there are duties of aid to burdened societies, such as Rawls (1999b). The proposal I make in this paper generates duties that should be accepted by nationalists and others who reject global duties of redistributive justice. I find pluralist internationalism an appealing way of thinking about the issues of global justice, as opposed to a purely cosmopolitan or statist position, see Risse (2015).

[27] I thank an anonymous reviewer for pressing clarification on this point.

[28] An exception to this is that my full proposal also proposes to adjust the total tax payments of people who have moved from high to low-tax states, and to take account of tax rates in the distribution of the resources. The primary aim of this adjustment is to respond to tax havens which abuse the global tax commons, acting as a form of compensation for —but also disincentive to engage in— tax revenue poaching, Avi-Yonah, R. S. (2000), Dietsch, P. (2015).

the value of remittances, or private aid, that they provide if the system I propose were in place.[29] As I have mentioned, any other duties regarding global justice would remain in place, even if the system I propose were enacted. My main argument here is that it is unfair that the single-state individual (Jay) has his duties discharged through his tax revenue, while the international individual (Tanuja) does not. If Tanuja does decide to provide resources to her past state, and perhaps her family as well, she is thereby much worse off than Jay. In addition to this equity argument, there is also the practical argument that a compulsory and organized scheme will be more coordinated than the disaggregated acts of private charity. My overall argument, then, is that it is better to discharge duties through an official scheme than rely on individuals to do this themselves at the cost of their own disposable income. Migrants may or may not provide remittances or donations at the same level as they would without my proposed scheme, but that would be their choice.

Finally, building on the points made in this section, I will admit that the proposal here provides little detail about the types of regimes and states involved. The world is not so simple that there are just two types of regime in the world; good and bad. The picture painted above might imply that there are outlaw regimes that mistreat their citizens, produce refugees, and fail to honor international standards, and that all other regimes are legitimate, just, and supportive of fair and effective global institutions. The "good" states should band together to allow the "bad" states to become good ones, and the scheme here would simply provide transfers between the "good" states. In reality, most states are limited or compromised in one way or another, and there are significant variations between them.

I have assumed that there could be a global bureaucracy, perhaps related to the United Nations, to administer the international tax collection and transfers that I propose. I imagine that the majority of states should be able to participate in this scheme. For the most part it would involve exchanges of information and money, and most of the resources would

[29] I am not confident about predicting the full impacts of the proposal I have made. The impact on remittances might be minimal, for instance if people are seeking to benefit their families rather than their past state and citizens generally. This desire to benefit family members would continue, wherever an individual's tax revenues are directed. Social scientists have been investigating the motivation for remittances, for instance see Azizi, S. (2017). Perhaps it would result in fewer remittances, thus reducing the expected overall redistributive impact. Again, this is a question for social scientists, and some have been considering this: Abbas, S. A., Selvanathan, E. A., Selvanathan, S. & Bandaralage, J. S. (2021).

come from wealthier nations, who would also therefore primarily support the bureaucracy involved. Outlaw regimes might be excluded entirely from the benefits, though the revenues within this calculation should still be collected and then spent to support the victims of those regimes rather than the perpetrators. Many states will be in more of a grey area in this regard. They might well qualify for inclusion my proposed redistributive system despite not treating their citizens entirely justly. One hope will be that the revenues provided to the government will help strengthen demands within those states that revenues be well spent (Collier, 2007; Moss, Pettersson & Van de Walle, 2006, pp. 8-18).

VII. Conclusion

In this paper I have argued that international individuals have duties to their past states and societies as well as present ones. The relative relationship that international individuals have with multiple states should be calculated with consideration for residence-time, citizenship-time, education-time and income. These duties should be discharged by present states on behalf of their international residents. This would effectively provide a form of compensation for states that lose out as a result of "brain drain". However, the argument is not directly based on a requirement of compensation from state to state, but rather the requirement that states discharge the moral duties of individual international residents within their borders.

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Citizen Responsibility for Structural Corruption

Responsabilidad ciudadana frente a la corrupción estructural

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Abstract: The purpose of this essay is to explain what kind of responsibility citizens should assume for structural corruption. To delve into this topic, we analyze the components of a concept of structure as applied to the features of corruption, as well as the notions of guilt, responsibility and political responsibility. Thus, we argue that citizens who do not participate directly in acts of bribery are politically responsible for systemic corruption. Assuming political responsibility implies taking actions in the public sphere to combat the structure of corruption in conjunction with other citizens.
Keywords: Structural Corruption, Citizen Responsibility, Political Responsibility.

Resumen: El propósito de este ensayo es explicar qué tipo de responsabilidad deben asumir los ciudadanos frente a la corrupción estructural. Para profundizar en este tema, analizamos los componentes de un concepto de estructura aplicados a las características de la corrupción, así como las nociones de culpa, responsabilidad y responsabilidad política. De este modo, argumentamos que los ciudadanos que no participan de forma directa en actos de cohecho son políticamente responsables de la corrupción sistémica. Asumir la responsabilidad política implica realizar acciones en el ámbito público para combatir la estructura de la corrupción en conjunto con otros ciudadanos.
Palabras clave: Corrupción estructural, responsabilidad ciudadana, responsabilidad política.

I. Introduction

The analysis of structural corruption presented here is based on a conceptual approach for which corruption is a practice of domination. Corruption is conceived as

> …a wide difference in power between the State and society —a way of accumulation of privileges through illegal or illegitimate means…—, which corresponds to institutional and social inertia, rather than to "personal volition of the actors involved". In the dynamics of this difference in power, coming from a domination bond, the dominant agent is able to interfere immediately, and intentionally, "to worsen the situation of the dominated". This interference is arbitrary since it depends on the will and personal desires of the dominant agent, who does not consider citizens' objectives or goals. (Fragoso, 2019, pp. 6 and 7)

Based on the idea of freedom as non-domination, neo-republicanism argues that political power interference in citizen affairs is licit as long as it remains within legal framework and can be challenged; under these conditions, coercion cease to be arbitrary. The core of corruption, therefore, is a domination system that "prevents citizens from analyzing the reasons supporting norms and policies and, thus, define their interests and achieve their goals with allocated public resources" (Fragoso, 2019, pp. 11, 30).

The purpose of this essay is to provide an explanation of the kind of responsibility citizens have for structural corruption, identified as repeated practices of domination. From a neo-republican perspective, fighting against corruption is not only a civic virtue, but a useful tool to preserve political freedom, that is, freedom that allows citizens to act and decide independently of arbitrary power will, whims or opinions (Lovett, 2018).

The premise supporting our argument is that in repeated practices of domination, such as structural corruption, citizens who are not involved in corrupt transactions do have a political responsibility that their role as beneficiaries of their society impels them to assume. Political responsibility implies necessarily taking substantive actions against corruption and a public stance about the issue; it also entails coordination with others aimed at dismantling the very structure of corruption, that is, a process of self-inclusion of individuals in common life.

In the first section, we identify the components of a concept of structure to be applied to the features of corruption. In the second, we analyze the notion of guilt, the degrees of simple responsibility for an act of corruption, and why structural corruption involves political responsibility for those who have not committed any fault. Lastly, in a third section,

we outline some ideas to undermine, from citizenship, the structure of corruption: identifying the agents with better capacities to combat the problem, activating the mechanism of receptive trust (a person's desire for the good opinion of the others about him or her) and challenge the ideology sustaining the social system of corruption through institutional changes.

II. A Structural Problem

The literature about the causes of corruption points out two major trends. First, those considering corruption as an individual decision in which the social or political environment matters only to calculate the cost-benefit of such determination (Laporta, 1997, pp. 28-32; Nye, 1967 & Rose-Ackerman, 1978). Secondly, those arguing that corruption is the product of imperfect/insufficient laws or instruments to punish bribery and promote a sense of ethics (Klitgaard, 1988; Johnston, 2005; Rose-Ackerman, 1999; Gong & Ma, 2009).

What we intend to demonstrate throughout this chapter, however, is the operation of a general background structure which is closely related to the link between the State and citizens, and to the practices, meanings, and appreciations that this link detonates. According to this vision, an ethical adjustment of individual attitudes and legal or administrative reforms make sense if they are aimed at transforming the structure allowing corruption and, in a second phase, if they outcome of the aforementioned structural change. At the same time, some aspects of the government-society relationship, at first glance, do not fit in corruption —such as mistrust and inequality—, but they trigger a political coexistence favoring ideologies and behaviors that exalt bribery and cheating; they are implicit factors in social interaction that have acquired solidity and become institutionalized, even informally —however contradictory it may seem (Giddens, 1984, pp. 23 and 24). Considering from this broader perspective, corruption is a structural phenomenon not restricted to individual behavior and actions, which includes laws and institutions but goes beyond them —which does not imply that institutions do not have a preponderant role redefining structures.

Every social system[1] —corruption is one of them— is made up of activities that "human agents" reproduce in a certain time and place, and contains a structure, in a tacit way (Giddens, p. 25). Corruption is a social system with its own structure. In this analysis, we use the concept of struc-

[1] Giddens points out that a social system refers to "reproduced relations between actors or collectivities, organized as regular social practices" (1984, p. 25).

ture proposed by Sally Haslanger. For her, the structures are "networks of social relations" that assume different forms according to the cultural and historical context; social relations, in turn, are shaped by practices and are not always intentional or conscious. Practices, in their simplest conception, are "interaction patterns" or behavior regularities; but only explanatory patterns of interaction, which Haslanger calls "robust", can form a structure. In addition to the "robust" interaction patterns, there are two other types of regular practices: the "thin" ones and the "thick" ones. The "thin" regularities encompass a set of simultaneous and coordinated behaviors towards some end, such as obeying traffic signals. In the "thick" practices, in a subset of them, the participants know the "normative responsibility" of their behavior. The "robust" regularities are halfway between the "thin" and the "thick": here, participants do not always not completely or not all of them, know or control the quality of their actions and their results. These kinds of regularities have in themselves material to be explained; as people build them collectively and unconsciously, some aspects of them that are not revealed *a priori* deserve to be discovered (Haslanger, 2014, pp. 21-23, 25). However, "thick" practices of people in places of power support, encourage and justify "robust" practices of structural corruption. For this reason, the "thick" side, related to those who are fully aware of their corrupt behavior and act voluntarily, is also useful to understand the structure of this phenomenon.

Thus, a social structure consists of a set of relationships, in turn made up of repeated and rooted practices, understanding "practice" as a behavior depending on certain "cultural schemes in response to resources". A structure, then, is made up of schemes and resources (Haslanger, 2015, pp. 3-4).

Schemes refer to blocks of "culturally shared" concepts and norms through which "information is organized and interpreted, and action, thought and affection are coordinated". A central feature of cultural schemes is that they take on the social meanings of a given context, that is, 'the semiotic content of various actions, inactions, or status'. The meanings embedded in cultural schemes impact on the way individuals interact with each other, and on how aspects such as power, authority or opportunities are valued and awarded. Schemes can evolve over time and in accordance with contexts but are, in general, highly resistant to change (Haslanger, 2015, pp. 4-6).

A case illustrating the function of cultural schemes in society —whose influence can be even stronger than that of the legal system in the behavior of citizens and state authorities— is the political scandal in Guatemala at the beginning of 2015. Media and judicial officials denounced

a network of corruption in customs, in which businessmen bribed public servants in exchange of paying a much lower tax rate than the officially established. This case was called *La Línea* (The Line) because public servants communicated with businessmen through a special telephone line, by which an alternative payment of taxes was administered. These events became enormously relevant because the International Commission against Impunity in Guatemala (CICIG, by its acronym in Spanish) —instituted by the UN— made public thousands of telephone recordings that involved Vice President Roxanna Baldeti and President Otto Pérez Morales; both resigned from their posts under public opinion pressure and citizen demonstrations. In interviews for the media, president and vice president frequently pointed out that their actions had not been illegal, since the laws of their country had "loopholes" and were not clear enough about what was allowed or not. According to the statements of these officials, abuse of power stems from a certain ambiguity in the rules that regulate the conduct of public servants, so that, as long as this set of laws is not entirely explicit, those who hold public office will be pushed by an irresistible force to a fraudulent proceeding. In the words of the former president himself:

> Here we could put a monsignor and the poor monsignor would not be able to control all the corruption that exists due to the system itself… The only thing the system is doing is dragging us along and no matter how much we do, for the government that arrives [*sic*] it will not be able to, really, it will not be able to… (Ángel, 2016, pp. 311, 319)

According to these Guatemalan authorities, corruption is neither a violation of the law nor a matter of ethical values. For Baldeti and Pérez Morales, the system itself induces corruption and makes it inevitable, and nothing can change until the system is transformed. Both public servants are right by pointing out a structure beyond personal ethics that works almost "automatically" and seems to be inescapable; however, for them, this structure or "system" is nothing more than the weakened and poorly assembled legal framework. There might be gaps in legislation allowing abuse of power not labelled as a crime, which in any case constitutes an act undermining the legitimacy of political power, which fits the category of corruption; but the normalization of bribery also implies shared social meanings like the idea that politicians or public servants might obtain additional resources to their salary at the expense of the public treasury and, if they do not do so (if they do not take advantage of the legal loopholes), they would be acting stupidly. This belief is not only behind the actions of the president and the vice president, but also behind the movements of lesser or very low rank officials: in the case of "La

Línea", the customs staff who did the "dirty" work, those who benefit from extra income, although in a much smaller amount than their bosses.

Resources, on the other hand, the second component of the structure, are things of any kind —human or non-human, animate or inanimate— with some value also of any kind —positive or negative. Resources are the material portion of structures, how structures are manifested in the world, or rather, their "putting into action" by means properly physical. In short, structures are not only mental constructions or meanings, but they also have a material side —which includes people's skills, knowledge, or physical strength– given by resources. Resources, then, embody and justify schemes' interactions in a social environment (Haslanger, 2012, pp. 415 and 416).

In "La Línea", for example, the "set of tools… material, [and human] goods… to perceive and respond in certain ways" is composed by devices and telephone lines, conversations on the phone, messages alluding to illegal transactions and encrypted communication codes behind them, "alternative" government paperwork endorsing the payment of taxes on certain products and the work of customs officials. In cases of corruption and other social injustices, resources also justify and reproduce the schemes at the level of material inequality. Following our example, the small customs officer of "La Línea" receives a very low wage and needs more money to provide his family with a decent way of life; he is not conscious that the ethical integrity of his political community is more relevant than covering up bribes to obtain financial compensation. Several public servants might have become involved in "La Línea" under threat of dismissal or other types of coercion, without any means or protection to denounce. In addition, these people's professional training may be so basic that they may have little chances to find a job with a similar or higher salary than the one they receive in the customs sector. In this sense, their decision, far from being completely free, is constrained by a series of conditions related to one of the components of the structure, resources, which reinforce certain meanings, ideas, and ways of thinking (schemes).

In this way, collective cultural schemes and the organization of resources are interdependent, in a causal and constitutive sense, and create a structure only when mutually nourished and implicated. A structure, that is, a series of behaviors (practices) subject to schemes (meanings) responding to resources, holds up the social system where corruption has become endemic. In this context, citizens internalize social meanings allowing them to use public resources to fill in their economic or status needs; in this process, they barely question their sense of ethics or moral probity, and their respect for the law.

The structure of the social system of corruption is also based on a practice called particularism. Particularism is defined as "the regular distribution of public goods on a non-universalistic basis that reflects the vicious sharing of power within those societies". In particularism, the State's relationship with individuals depends on their social status. Citizens do not expect to be treated with justice and equality by public authorities: a similar treatment is only expected between people of the same layer of society. When bribery is the norm and not the exception, particularism establishes "the culture of privilege", leaving out universalist principles, namely, equality of treatment and access to resources regardless of the group or class to which people belong. In particularist orders, citizens are better or worse treated, or have more or less access to public goods, depending on how close or how far they are from power. Therefore, individuals fight each other to approach and be welcomed by privileged groups, in what has been called "competitive particularism" (an intermediate phase between patrimonial and universalist political organization). Due to collective internalization of the idea of unequal treatment, participation in "competitive particularism" is more plausible than striving to transform state-citizenship bonds. Alina Mungiu-Pippidi asserts that in developing countries corruption is an eminently political problem related to distribution of power —instead, in developed countries, corruption refers to individual cases of violation of law. In some states regarded as democracies for periodic elections, modernity —a clear border between public and private spheres, and fair distribution of public goods among equal citizens— has not been firmly established, hence public administration is still considered a source of rent extraction (Mungiu-Pippidi, 2006, pp. 86, 87, 91 and 92).

Once explained the practices, schemes, and resources of structural corruption, we shall make some clarifications. First, corrupt behaviors largely guided by shared social meanings (cultural schemes) do not place the causes of corruption in cultural traits of a given society –not in cultural traits as permanent values determining collective destiny.

Although structure affects people coexisting and acting, social practices shape structure and rebuild it in turn (Haslanger, 2011, p. 19). Due to its dual nature, structure is not opposed to human agency, on the contrary, encompasses it. Thus, structure's cultural features do not refer to petrified "ultimate values", but to cognitive patterns, skills, semiotic content to interpret reality; all these aspects can be subverted by institutions and rules that claim different practices for, over time, inducing new value guidelines (Rabotnikof, 2003, p. 54).

Before concluding this section, we would like to mention the concept of corruption of Enrique Camacho Beltrán and Francisco García González,

a rule-based concept through which it is argued that corruption is not a cultural phenomenon. These authors argue that "corruption establishes parallel rules or conventions to the ones dictated by the law… which undermines the law's authority by making them, at least in practice, optional". From this point of view, in countries where rules are clear, pertinent, and acts of corruption effectively punished, people are much less likely to think of bribery as a way of protecting their rights (2019, pp. 1342, 1356 and 1357). Nevertheless, this valuable concept is not completely disconnected from a cultural mechanism, it works instead as a complement in the case of structural corruption. In systemic or pervasive corruption, the set of rules parallel to formal legislation —the schemes—, as well as governmental influence and power pacts allowing impunity —schemes in which resources are also involved—, make corruption a political issue, one of beliefs and rooted behaviors, and not a matter exclusively legal.

III. Responsibility, Citizenship, and Structural Corruption

The purpose of this section focuses on a possible answer to the question of citizens' responsibility for structural corruption, whether they are direct participants or not. It should be noted that the concept of citizenship is limited here to the individual who belongs to a political community associated with a national state, holder of rights and subject to a legal framework; this notion includes citizens residing outside the national territory, since their actions or omissions could also affect simple or structural corruption. It is also important to stress that, in its most classical political meaning, citizenship aims at individuals' participation in public life through deliberation (Cortina, pp, 30, 39), nevertheless, meddling in political affairs is typically not allowed for non-citizens. According to neo-republican notion of corruption, freedom as non-domination, the basis for combatting structural corruption, entails citizen's definition of the reasons behind the laws and the questioning of the content and quality of norms. Therefore, embroidering on the responsibility of migrant or non-national population exceeds the scope of this research.

Schemes, an essential part of structure, are deep, difficult to identify and extirpate; people could find themselves trapped in a network of meanings, not being able to modify contents, even if they do not share the beliefs sustaining an ideology and a set of practices. We have pointed out that structures shape individual practices —that structures are social practices themselves—, however, people's practices also make up structures, reproduce them and could even modify them. Structures are both:

the vehicle of the practices that builds social systems, and their effect. Therefore, agents and structures are interdependent, however, their link does not imply dualism (two separated principles), but rather a duality (two characters in the same entity) —what Giddens calls "duality of structure" (1979, p. 69; Haslanger, 2012, p. 404). According to this notion, in contexts of strong social constraint, in which individuals seem to "have no choice", actions are not completely diluted, namely, individuals continue to be agents, do not stop exercising some kind of power (Giddens, 1984, p. 15). In other words, structure is not an impulse of nature or a mechanical traction that impels people to act in a certain way, as alleged by the heads of the Executive in the Guatemalan case to justify their conduct.

This concept of duality confirms that there is really no dichotomy between personal responsibility and structural causes of a phenomenon, since understanding a social system functioning requires the analysis of both elements: structure configuring practices and citizens who shape the structure with their practices. In her proposal about the kind of responsibility members of a society should assume for issues of social injustice, Iris Marion Young argues that in theoretical debates, personal responsibility is usually linked to work and family. Citizens are considered responsible just for keeping a paid work to support themselves and their dependents, without being helped by other people or by State institutions. This individualistic and self-sufficient approach excludes responsibility for people with whom one shares different social processes. From Young's point of view, individuals should be held responsible not only for the sequels of their decisions and actions, but also for the effects of the social processes in which they take part (2011, pp. 10, 11 and 39). This approach to responsibility was intended for social justice issues: poverty, discrimination, well-being. Young's approach to studying responsibility for structural corruption is useful and relevant because it underlines individual's role for power relations in society, in particular, the significant difference of power between the State and citizens, which is the result of a domination practice such as corruption. Then, the question to be answered is how agents who are not directly involved in corrupt transactions could be responsible for corruption in a structural sense; in this regard, the responsibility for permanent and extended corruption for those not directly involved in a causal and direct way must be explained only in terms of political responsibility.

Before fully addressing political responsibility, we shall make some clarifications about the difference between guilt and responsibility. Young recovers Hannah Arendt's concern for this conceptual distinction in her careful reading and analysis of *Eichmann in Jerusalem: A Report on the Banality of Evil*, a work examining the problem of guilt for massive extermi-

nation of Jews in Nazi Germany. In social and political events, orchestrated by a huge and complex bureaucratic machinery – such as the Jewish holocaust –, causing serious damage to large numbers of people, the blame of specific actors is diluted amidst a mass of individuals who collaborated actively or passively. For this reason, Arendt affirms that the guilt many young Germans claimed to have in the second half of the 20th century for the Third Reich's politics is superfluous —"a «cheap sentimentality» rather than the more difficult and dangerous work of politics". Blame extended to the population in general ends up acquitting the true perpetrators, those who planned and/or executed the offense (Young, 2011, p. 85). Likewise, in an environment of endemic corruption, specific culprits should be identified and judged for each act of bribery, even if all members of society contribute, in their own way, to preserving that situation. Blame, according to Young, must be attributed to personal and individual actions of the agents: they should be condemned for their specific conduct; here, guilt is not linked with any kind of responsibility.

Before outlining the nature of political responsibility, it will be explained the meaning of simple responsibility, and then indicate why, from our perspective, a direct act of corruption —which implies guilt— entails responsibility in a broad sense, but with certain nuances depending on an individual's tasks according to their social position. Philip Pettit was chosen to delineate the different sorts of responsibility because his civic republicanism allows to analyze corruption more as a form of relationship between society and the State, as a way of coexisting in the public sphere, and less as an absolutely personal decision or as unconnected individual acts.

But why do these two theoretical approaches, Pettit's and Young's, work together to explain responsibility for structural corruption? Both, theory of oppression and republicanism, frame citizens' actions in their relationship with political power, with the State. Both emphasize the role of individuals, but always in their nexus with people in the collective and with power. In this sense, structural corruption, from Young and Pettit, is conditionally related to a context shaped by hierarchical relationships to which individuals should respond considering the effect of their actions on other people, beyond their personal and immediate interests. This implies, in the case of Young, assuming responsibility for the system of oppression and, in the case of Pettit, combatting domination.

According to Philip Pettit, ascribing responsibility, "in a relevant sense", means that an agent "is a candidate for blame" if what he did is "something bad" and "a candidate for approval and praise" if what he did is "something good". In this sense, assigning responsibility is not

limited to identifying someone's role as the causal agent of a result (Pettit, 2007, pp. 173 and 174).

Simple responsibility must be ascribed for a specific act —not for a state of affairs— and, rather than pointing out who provoked an effect, it is aimed at developing a brief analysis to resolve whether a citizen had the required conditions to be blamed or praised for such an effect (Pettit, 2007, p. 174). Although simple responsibility in its negative aspect always involves guilt, Pettit insists that responsibility chiefly seeks to set aside blame for a moment and to grasp the underlying motives, circumstances, institutional failures, among other factors, related to the environment (or to the subject in connection with his environment) that led to a certain action and its results. Through such analysis, we can understand how, despite an adverse context, a citizen acted commendably; here, responsibility is assigned in a positive sense, for having avoided damage or circumvented guilt. From this angle, the notion of responsibility fulfills an evaluative function: denoting whether a conduct was good or bad after a study of the context, alluding thus to a "historical" responsibility (Cane, 2002, p. 57). The analysis to determine if an individual is candidate to be responsible must consider the three following factors (Pettit, 2011, p. 155):

1) Normative significance: the agent is faced with a moral or "normatively significant choice" which involves "the possibility of doing something good or bad, right or wrong".
2) Judgmental capacity: from his or her social place, the agent is able to understand a given situation and can access the evidence to make "normative judgments about the options" presented to him or her. At this point and having satisfactorily covered the normative meaning, a citizen who grasped the scenario and evaluated evidence, should decide not to get involved in corruption.
3) Relevant control: the agent's choice is truly the result of his or her will and his or her sphere of control, or rather, the individual "has the control required for choosing between the options" based on normative judgements.

Both guilt and simple responsibility gravitates around the "self"; for this reason, both correspond to moral and legal spheres, and both are assigned by specific acts (Young, 2011, p. 78); we insist, however, while guilt is inclined to causality and punishment, simple responsibility entails an evaluative task of the context which led the individual to a certain action.

On the other hand, political responsibility refers to an individual or a group's (a nation, a corporation) ability to publicly acknowledge or declare before others about their actions or omissions for the world's state of affairs. As opposed to guilt or responsibility *tout court*, to be politically responsible does not require to take part directly in any action, it is only needed that agents actively or passively "support governments, institutions, and practices [that drive] to commit crimes and wrongs" (Young, 2011, pp. 91 and 92).

According to Iris Marion Young, exercising political responsibility means associating, with other individuals, in public actions to intervene and transform a social order as citizens,[22] far from adhering to "the interests or wishes of State officials in their bureaucratic functions" (Young, 2011, p. 89). In ideal terms, political responsibility should be a constant principle from which the members of a society must not abdicate; however, treating political responsibility as a duty implies very high standards of action and normative demands that few individuals can meet. It is frequently argued that in many scenarios, political responsibility simply cannot be assumed, such as cases of structural corruption. Here, people feel trapped by a phenomenon that exceeds them because they alone cannot change the relation between the State and citizenship. Nevertheless, the concept of political responsibility —as Young emphasizes— is not oriented to isolated actions; on the contrary, it specifies that institutional change and power transformation will only take place through the joint and organized action of citizens. Even so, there are those who have greater resources and tools to lead or participate in collective action.

In the box below, the reader will find a synthesis of the concepts of guilt, simple responsibility and political responsibility that may be useful to discuss the role of these three ideas in the study of corruption and structural corruption.

[2] This also includes encouraging, at a collective level, criticism and transformation of apparently harmless daily individual activities that cause the suffering of others (Schiff, 2008, p. 113).

	Definition	*Sphere of ascription*	*Field of operation*
Guilt	Condemnation for a specific reprehensible conduct.	A specific conduct	Moral and legal[3]
Simple responsibility	Analysis evaluating whether an agent meets the conditions to be considered worthy of blame or approval (responsible in a negative or positive sense).	A specific conduct	Moral and legal
Political responsibility	Ability to publicly recognize individual actions or omissions in ordinary injustices and to take part with others to transform a certain social order.	A state of affairs	Political and social

To end this section, based on Young's typology on the forms of relation between individuals and a crime carried out by the State (2011, p. 81), we show how the notions of guilt, simple responsibility and political responsibility of agents are applied to corruption in four areas:

1) Those who are guilty of a corrupt transaction (morally and legally).
2) Those who avoid being guilty (at the legal level) through moral acts.
3) Those who are not guilty but do have political responsibility.
4) Those who take charge of their political responsibility.

1. *Those who are Guilty of a Corrupt Transaction (Morally and Legally)*

Individuals directly involved in an act of bribery and often part of a corruption network. Here, the ethical assessment behind the subject's intentions does not matter —it does not matter an evil intent or the purpose of causing some harm— but rather the "objective consequence of his deeds" (Young, 2011, p. 82). Those committing this crime or contributing directly to this offense must be judged by the corresponding justice instances and sanctioned, if appropriate.

[3] Moral guilt is attributed when acts are not based on citizens or State authorities equal respect and consideration for others. Legal guilt, on the other hand, is attributed to transgressions of principles codified in the law.

While anyone involved in an act of corruption is guilty, not all participants can be held to the same degree of responsibility. Each person's level of responsibility depends on his or her position in society and in the hierarchy of charges; this factor defines to what extent a citizen, when faced with a moral choice (normative meaning), has sufficient information to evaluate the options (judgment capacity) and, finally, can decide without being coerced by any authority or by their own context (relevant control). Once made this analysis, it will be possible to determine an agent's simple responsibility (in this case, in a negative sense). Some people directly involved in corruption may not be held responsible, but even so, they are guilty and deserve a sanction, albeit a significantly reduced sentence due to an adverse context to exercise their capacity for judgment and relevant control. Based on these considerations, we distinguish three types of culpability in structural corruption, linked to the actors' degree of responsibility: 1.1) the grand corruption, 1.2) the average bureaucrat or "family man", and 1.3) the petty corruption.

Grand corruption refers to very high-level officials who devise complex strategies to take advantage of public resources, even if the life or integrity of other people is at stake. Those who hold power and must make a morally significant decision (normative meaning) are in the best position to have access to the elements that allow them to understand and appreciate the scenario (judgment capacity), therefore, they have the control to choose (relevant control) because they are the ones who ultimately define the policies, the rules, and the meaning of their conduct and that of their subordinates.

Powerful individuals are not only fortunate for their wide access to knowledge, but also for a kind of "privileged ignorance" resulting from a set of "cognitive vices" developed by elites to protect themselves. According to José Medina, those who manage to fine-tune an epistemic attitude called "active ignorant subject" have eagerly participated in the creation of defense mechanisms to maintain blocks of ignorance that help them uphold their privileges. The high-ranking officials of corruption cultivate what Medina calls "first-order ignorance", at the object level, that is, the lack of recognition of their relationship with other people (who become irrelevant), except their close circles; subsequently, they develop a "second order ignorance", at a meta-level, by which they fail to register their own insensitivity towards others (Medina, 2013, pp. 33, 39, 127-129, 131, 134 and 149).

The second type of culpability for structural corruption, that of the average bureaucrat or "family man", involves middle or lower middle level officials who are involved in this practice to keep their jobs and maintain

a certain status. The *ethos* that guides this behavior is similar to what Edward C. Banfield called "amoral familism", which reads as follows: "maximize the short-term material advantage of the nuclear family; assume that everyone else will do the same" (1958, pp. 33, 34, 85, 87 and 111).

In the third case, that of guilt for petty corruption, simple responsibility becomes even more blurred since those implicated, officials with precarious and complex life circumstances or citizens who cannot do without a service, do not know or do not have access to the data that allows them to evaluate their action (judgment capacity), and neither do they find alternatives to survive or obtain the necessary public assistance (relevant control). For this reason, although they are guilty, they do not fully meet the requirements to be considered responsible *tout court* or, at least, a large part of their responsibility ends up diluted.

2. *Those who Avoid being Guilty (at the Legal Level) through Moral Acts*

These people recognize their ability to distinguish right from wrong, act accordingly, and are consistent. Consequently, they quit their jobs if asked to be part of a corrupt transaction (even if they will be unemployed for a while and supporting their family will not be easy) or refuse to do so even if they suffer job isolation; in this way, they conjure up guilt and their involvement in a crime. By choosing this alternative to avoid harm and blame, these individuals challenge the prevailing structure and deviate from practices considered normal; in a society devoid of containment and support mechanisms, the costs are usually high. Nevertheless, such praiseworthy acts remain in the moral sphere as their authors do not make them public: their rebellion against structure is passive, silent and private. These reactions do not reach the political sphere because people do not publicly oppose corruption in which they refused to participate and do not formally denounce it, they only —although not a small feat— disapprove of the orders of their superiors and decide to get rid of them.

These individuals confronted a morally significant choice (normative meaning), could access to the required elements to evaluate it (judgment capacity), and were able to apply their evaluation with a certain mastery —some in greater proportion than others—, willing not to get involved in corrupt acts (relevant control). They were simply responsible but deserving of approval and praise for their actions (they avoided blame and negative adjudication of simple responsibility).

3. *Those who are not Guilty but do have Political Responsibility*

These people are not implicated in the direct causal chain of corruption but are politically responsible since they support with others —albeit passively— the performance of institutions acting on their behalf. These citizens dogmatically and indifferently accept popular sayings such as the Mexican saying "*el que no transa, no avanza*" ("one who does not cheat does not advance"), do not feel impelled to think over the functioning of the institutions or on the conduct of their officials, and prefer to ignore acts of corruption or consider them normal and acceptable. These individuals do not report bribery they observe and contribute to a "political vacuum": oriented to private sphere or lacking the means or spaces for collective action, they do not organize themselves to present reasoned judgments about public incidents or develop mechanisms attaining transformations.

In the ideal model described here, people have not faced the dilemma of getting involved or not in situations of bribery or extortion (normative meaning), therefore, they have not been able to appraise such a situation (judgment capacity) or choose how to act accordingly (relevant control). For these reasons, simple responsibility cannot be assigned. Nonetheless, they do have a political responsibility that are not assuming: ensuring that the effects of institutional tasks do not harm citizens; observe, with others, public officials' conduct and their interaction with private actors, and with society in general; to advance control mechanisms against authority abuse; and manifest their opinion publicly.

4. *Those who Take Charge of their Political Responsibility*

This category includes those who did not commit faults (they are not guilty) but wonder about their responsibility for structural corruption. Being public officials, private officials, or citizens in general, people deploy viable actions, in coordination with others —or, in fact, encouraging others to collective action—, aimed at changing schemes behind corrupt practices and using resources fairly. Assuming political responsibility differs from praiseworthy individual moral acts because of its public character and for calling other subjects to mobilization.

Finally, it is worth making a brief mention of the possible conflict between citizens' duty to combat corruption in the public arena and the obligations and expectations that weigh on individuals as members of other groups such as family, workplace, neighborhood (competing social expectations). In the first case, civic republicanism stresses that individual life

is successful if the life of political community is also successful, therefore, the life of those who decide not to be part of an act of bribery is better in a critical sense (what "we should do to get the right kind of life") (Dworkin, 1993, pp. 100, 179). In the second case, it is relevant to point out that, unlike the notion of structure applied to questions of social justice, as Iris Marion Young very rightly does, in the case of corruption one cannot speak, at least not completely, of a background of "involuntary structural disadvantage", because corrupt acts can be detected and punished. Nor can corruption be treated as the lack of coordination of well-intentioned acts of a large number of people —as the concept of oppression does— since many of the actors involved in corruption have the tools to know, and in fact do know, the harmful consequences of their behavior (in addition to being organized in networks). In this sense, we reiterate our adaptation of the idea of structure to the specific features of the phenomenon of corruption. In our approach, as it has been stated, republicanism and the theory of oppression converge on citizens' capability of agency when confronting corruption in the midst of structure and social hierarchy. According to neo-republicanism, analytical decision and individual volition would be constantly challenging structure. According to theory of oppression, citizens recognize themselves as politically responsible and take joint actions to change the state of affairs.

IV. Gnawing the Structure of Corruption

The concept of simple responsibility fulfills an evaluative function since it allows us to classify past conduct as good or bad and understand context's anomalies behind it. The notion of political responsibility, on the other hand, has a normative and future-oriented function, indicating how people should behave to curb structural corruption (Cane, 2002, p. 57). This section outlines ideas that could guide some strategies to attack the structure of corruption. These ideas are grouped into three themes: degrees and types of political responsibility, a mechanism of trust responsiveness, and critique of ideology.

1. *Degrees and Types of Political Responsibility*

Agents have different levels and types of political responsibility for endemic corruption and this understanding is essential to figure actions that truly target the structure of the problem. The different degrees of political responsibility for pervasive corruption depend on the agents' social posi-

tion, which provides them with different tools and capacities —and in different intensity— to collectively attack this problem.[44]

We find, then, four "parameters of reasoning" that allow us to identify the agents' political responsibility of and what they can do to undermine structural corruption. These parameters are the same as those proposed by Iris Marion Young to analyze the different degrees of responsibility for justice and are employed here to examine responsibility for structural corruption (2011, pp. 144-151; 2006, pp. 126-130).

The first parameter is *power*; there are people with a high degree of power, potential or real, to influence social processes. Citizens with the greatest power to cast down corruption are the heads of public institutions, leaders of political parties, very high-level state officials —in any of the three powers: executive, legislative or judicial— and the owners or chief executive officers of large private companies.

The second "parameter of reasoning" is *privilege*, namely, prerogatives of structural corruption for agents in positions of power or relative power who regularly participate, even silently, in bribery —for reasons of tacit agreement between elites, institutional habit or coercion. These actors might not directly participate in corruption but passively condone or accept it. For example, legislators who obtain resources for their party from a powerful lobby in exchange for a few votes in favor of a law, or a traffic police officer who accept bribes as a common feature of his job (in part because this behavior is encouraged and approved by his bosses). But unlike the legislator, the traffic police officer has very little power in his institutional position, so the popular representative —as well as the local police chief— should be given greater political responsibility to go against structural corruption.

A third parameter is *interest*. Those who are visibly affected by corruption have a particular interest in reducing it and, therefore, should assume responsibility and organize collectively. This category includes, for example, residents of a neighborhood with poorly paved streets because part of the money to repair the asphalt was diverted to political campaigns. Other agents may coincide with victims in the fight against structural corruption. In the case of the paving in poor condition, some companies could formally protest for not having won the public bidding to pave when

[4] Other authors confront the model of responsibility based on guilt (blame responsibility), oriented towards punishment for past acts, with a model based on tasks (task responsibility), which focuses on the responsibility of people according to the duties of their charge and how the work assigned to each other contributes to producing or avoiding certain results (Goodin, 1987, pp. 179 and 180).

their services exceeded the cost-quality ratio of the selected company, whose work was spoiled very quickly.

Finally, the fourth parameter is *collective capacity* or the agents' position from which they can employ the resources of instances already organized to promote change and convene others to action. These citizens, who possess or have access to the tools, spaces and capacity for collective organization, must highlight the interests of the agents at the top of power using the structures of corruption for their own ends.

2. *A Mechanism of Trust-Responsiveness*

Trust-responsiveness is based on "the desire for the good opinion of others" or the willingness to appear trustworthy to others; it does not matter if this is a "basic" desire of human nature or a tactic to achieve some objective or material goods, as long as this individual strategic feature is not opposed to general interest. This need for esteem belongs to a class of goods that human beings seek, called "attitude dependent";[55] this type of goods can only be enjoyed if individuals find positive attitudes in others and in themselves, and if they can trust these dispositions in others and in themselves (Pettit, 1995, p. 212).

3. *Critique of Ideology*

Pieces of ideology reinforcing schemes of a corrupt structure appear in public officials signals to citizens that become part of popular thinking and sayings remaining in collective memory —such as, once again, the phrase "*el que no transa, no avanza*" ("one who does not cheat does not advance"). This kind of meanings produces a harmful impact on the construction of trust and feeds cynicism, eroding the desire to be the object of a good opinion of others. Those assuming their political responsibility for structural corruption recognize that the idea "corrupt people progress" has become a social truth —in an epistemic sense—, but they resist invoking this scheme to avoid its reinforcement.

[5] There is also another type of goods, those called "dependent on action", which are achieved through the efforts of the interested persons, or through the efforts of others, without the intervention of attitudes or dispositions based on such efforts.

V. Final Considerations

Structural corruption consists of a series of practices of domination —based on a considerable difference in power between the State and citizens— that are deeply embedded in the behavioral habits of people and institutions. These practices are reproduced on a daily and repeated basis by virtue of the two components that operate in their structure and that sustain each other: schemes and resources.

People directly involved in an act of corruption are guilty in the causal sense and have different degrees of simple responsibility according to their position in the government scale of charges, according to the information available to them to evaluate the context, and their degree of autonomy to make decisions. For structural corruption, political responsibility can only be attributed to individuals who are not involved in corrupt transactions but who passively accept the shared meanings (schemas and ideology) that strengthen the social system of corruption, as well as the materialization of its schemes. Political responsibility lies with citizens making up a society as "conscious moral agents" who should care about unjust actions implemented by state institutions harming their fellow citizens, and themselves tangentially.

Assuming political responsibility for structural corruption requires speaking out publicly against acts of bribery and organizing with others to act for the transformation of institutional practices. Political responsibility points to elicit changes in schemes and in distribution of public goods, promote public trust and the social importance of individual prestige, namely, the good opinion of others for our praiseworthy actions. It is important to note that not everyone is politically responsible in the same way or to the same degree.

And, although all citizens have a duty to combat structural corruption, not everyone can do so in the same way and to the same extent.

Finally, it should be noted that the Guatemalan social movement of 2015 against "*La Línea*", although successful, focused on an isolated case within a system of organic corruption. This social movement, some scholars assert, was supported by the US embassy and by a fraction of the Guatemalan business community tired of opportunism and the excessive ambition of the political class of military origin that made of power a business. Social demonstrations also appealed to citizen interest to battle widespread corruption in society.[66] Notwithstanding that the president's

[6] Cuevas Molina, Rafael. (septiembre-diciembre de 2015). Guatemala: la trama de intereses en torno a la movilización ciudadana del 2015. *Revista Brasileira de Estudios Latinoamericanos, 5*(3),pp. 443 and 444.

and vice-president's crimes were penalized, punishment was consumed more by circumstantial factors than by a strategy to combat the very structure of the problem that included a profound criticism of particularist schemes, based on substantive adjustments to public policies —greater legal, economic and rights equality.

Why then is "La Línea" a normatively powerful example? First, because "La Línea" illustrates arbitrary interference, in accordance with neorepublicanism, of very high-level public officials to the detriment of citizens, affecting their rights and options. Second, because it exemplifies how particularist meanings and codes —proper to the structure, according to our adaptation of Young's term— operate in high spheres of power, and how they are transmitted to public servants of lesser rank and to population. And third, because it shows that it is possible to reduce the difference in power between the State and citizens through agency and joint action —in the case of "La Línea", urban population called for public demonstrations, to which other sectors of society gradually joined, under the motto "#RenunciaYa", based on inquiries made by the CICIG (Torres, 2015, p. 5).

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The Citizenship Rights of Veracruz's Roosters

Los derechos de ciudadanía de los gallos de Veracruz

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Abstract: The aim of this paper is to show that Mexico is leading the current trend of recognizing non-human animals as subjects of rights by acknowledging them citizenship rights. In the paper it is argued that a recent resolution by Mexico's Supreme Court regarding a local legislation must be interpreted as conceding citizenship rights to the non-human animals living in the state where that legislation applies. The paper starts by discussing the context in which the relevant law was discussed and approved, and the judiciary actions taken against it. Then, it discusses the analysis and resolution carried out by the Supreme Court of the rights involved and the dynamics among them, the paper also includes a defense of this resolution. Furthermore, the paper argues that the protections established by this resolution must be interpreted, according to the contemporary academic theories regarding citizenship and animal rights, as rights and that these rights must also be interpreted as citizenship rights. The paper ends by replying to some objections and drawing some general conclusions.
Keywords: Animal Protection, Resolutions, Citizenship Rights, Protection, Objections.

Resumen: *El objetivo de este artículo es mostrar que México está a la vanguardia de la tendencia actual que reconoce a los animales no humanos como sujetos de derecho, al reconocerles derechos de ciudadanía. En el artículo se argumenta que una reciente resolución de la Suprema Corte de Justicia de México, relativa a una legislación local, debe ser interpretada como concediendo derechos de ciudadanía a los animales no humanos que residen en el estado donde la legislación aplica. El artículo comienza discutiendo el contexto en el que la ley en cuestión fue discutida y aprobada, así como las acciones judiciales tomadas en su contra. Posteriormente, se discuten el análisis y la resolución alcanzados por la Suprema Corte de los derechos involucrados y la dinámica entre ellos; el artículo también incluye una defensa de esta resolución. Más aún, el texto argumenta que las protecciones*

establecidas por esta resolución deben ser interpretadas en concordancia con las teorías académicas contemporáneas sobre la ciudadanía y los derechos animales como derechos, y que estos derechos deben ser interpretados como derechos de ciudadanía. El artículo termina respondiendo a algunas objeciones y presentando varias conclusiones generales.
Palabras clave: Protección animal, resoluciones, derechos de ciudadanía, protección, objeciones.

I. Introduction

On October 31st, 2018, the First Chamber of the Supreme Court of Justice of the Nation (SCJN) of Mexico resolved the "amparo 163/2018" (amparo en revisión 163/2018, 2018).[1] This resolution transcended to the media and the public opinion due to its implications for the defense of animal rights and animal welfare.

In this text I will defend that the best interpretation of the SCJN resolution is the establishment of citizenship rights for non-human animals (NHA). To defend this thesis, I will carry out an analysis of the SCJN resolution using the broad and illuminating academic debate on citizenship carried out in recent years in normative political academic philosophy.

The article is structured as follows. The first section discusses the context in which the Animal Protection Law for the State of Veracruz was discussed and approved, as well as the protection claims against it, and the first resolutions to these. It also addresses the rights in question and the reasons presented to defend or question the law. The second section discusses the analysis carried out by Minister Arturo Zaldívar Lelo de Larrea on the rights involved and defends the interpretation that the SCJN resolution implicitly establishes domestic animals as subjects of law and presents a defense of it. The third section argues that this protection must be interpreted as a right and that the rights established by this resolution must also be interpreted as citizenship rights. The fourth section reviews some objections to the argumentation presented. Conclusions are drawn in a final section.

[1] An *amparo* is a figure present in Mexican legislation. It consists, succinctly, in a remedy for the protection of constitutional rights.

II. The Law for the Protection of Animals and the Protection of the Environment

On October 31st, 2016 (H. Congreso del Estado de Veracruz, 2016), the bill to amend the Animal Protection Law for the State of Veracruz (LPAEV) was approved unanimously with 33 votes in favor, zero votes against, and zero abstentions. This bill was then published in the Official State Gazette (Gobierno del Estado de Veracruz, 2016) as decree number 924 on November 10th of the same year. This modification of the law was the result of extensive work by activists and animal advocates who argued the need for the law to recognize and prevent the harm of violence against animals, because of the implication both to animals' and children's welfare.[2] The law establishes new provisions regarding civil associations that offer animals up for adoption. It also establishes the functions of animal health centers, creates a Specialized Prosecutor's Office for Crimes Against Animals, protects the habitat of wild species, establishes the obligation to have bioethics committees for institutions that carry out experimentation with animals, and prohibits circuses, cockfights, and, in general, any activity that threatens animal welfare, except for bullfights.

It is this last provision that primarily interests us in this article. For this reason, it is worth reproducing, in full, the relevant fragments of the legislation:

> Article 2. All animals that are permanently or temporarily within the territory of the State are protected by this Law.
>
> (amended, second paragraph; November 10, 2016)
>
> Excluded from the application of this Law are bullfighting shows, country tasks, horse racing, activities related to the sport of charrería, jaripeos, Game Farms, Environmental Management Units (UMAS), and others permitted by law, which must be subject to the provisions of the Laws, Regulations and other legal ordinances applicable to the matter.
>
> (amended; November 10, 2016)
>
> Article 3. The hunting and capture of any species of wild fauna in the State, animal fights and circuses with animals, as well as the acts referred to in article 28 are prohibited by this Law.
>
> …
>
> Article 28. The following acts are considered acts of cruelty and abuse, which must be sanctioned in accordance with the provisions of this Law and other applicable regulations, carried out to the detriment of any animal, coming from its owners, possessors, managers or third parties that enter into

[2] This information was trusted to me by some involved in the discussion prior to the approbation of the bill. The fact that this argument was used will become important below.

relationship with them, with the exception of the provisions of the second paragraph of article 2 of this Law:

…

(amended, go November 10, 2016)

V. Holding fights between animals;

…

(amended, go November 10, 2016)

VIII. The use of animals in the celebration of clandestine rites and patron saint festivities that may affect animal welfare;

…

(amended, go November 10, 2016)

VIII Bis. The circus shows;

…

XI. Any fact, act or omission that may cause pain, suffering, endanger the life of the animal or affect its welfare; (Veracruz, 2016)

These new legislations that regulate in a stricter way the treatment of NHA are becoming more common around the world: circuses, zoos, bullfights, horse races, and cockfights among other practices are being abolished throughout the world. From this perspective Veracruz's new legislation is part of an international drive to repay an ancestral debt owed to NHA. However, at the international level, resistance by sectors that have benefited from these practices has also been very common.

On December 6th, 2016, the Mexican Commission for Gallistic Promotion, Civil Association, (CMPGAC) through its president, Efraín Rábago, filed an amparo that would later be registered by the Supreme Court of Justice of the Nation (SCJN) with the file number 163/2018 in the Correspondence Office of the District Courts of the Seventh Circuit, with residence in Jalapa, Veracruz (amparo en revisión 163/2018, 2018). The CMPGAC is an association founded in 2009 whose mission is to defend individuals and their families who practice cockfighting. This association arose because the National Section of Breeders of Combat Birds (SNCAC), the organization that was previously in charge of defending the interests of these individuals, is part of the National Union of Aviculturists (UNA), and the latter organization demands, in order to be a member, to be a poultry producer. Many individuals who benefit from cockfighting do not directly produce or raise any birds, due to this, the CMPGAC was founded. This association tries to bring together all those interested in defending "gallistics" (the practices related to cockfighting) in Mexico and works together with the SNCAC and "Traditions United by Mexico AC" (TUMEXAC)[3] to defend gallistics and those who sympathize or benefit from it.

[3] An association which also defends bullfighting, horse racing, and circuses.

In the original amparo presented in Jalapa, the following statements were presented to argue against the new law:

1) No affectation to animal preservation.
2) Violation of the right to culture.
3) Violation of the right to property.
4) Violation of freedom to work.
5) Violation of the guarantees of legality and legal certainty by legislating on something in which there is no jurisdiction.
6) Economic impact on families who depend on on gallistics.
7) Violation of the progressivity of the law.
8) Violation of the right to equality and non-discrimination.
9) Lack of the guarantee of justification and motivation (amparo en revisión 163/2018, 2018)

On December 8th, 2016, the district judge registered the case, while on March 13th, 2017 the hearing was held and on June 5th of that same year he decided to deny the petition. On June 17th, the CMPGAC filed an appeal for review which was admitted for processing by the President of the Second Collegiate Court on Administrative Matters of the Seventh Circuit on June 28th, 2017. Later, this court requested the SCJN to assume its jurisdiction to learn about the review appeal. On February 26th, 2018, the President of the court registered the matter, admitted the appeal for review and turned it over to Minister Arturo Zaldívar Lelo de Larrea, current president of the court.

For the purposes of this article, it is not necessary to discuss all the arguments presented by the CMPGAC; I will focus the analysis on the first four. In what follows I will discuss the initial arguments presented by the *galleros* (the people involved in cockfighting), the reply presented by the district judge, and the objections put forward, again, by the *galleros* in their appeal for review.

1. *No Affectation to Animal Preservation*

The CMPGAC argued that there is no impact on animal preservation. This is because, on the one hand, the reproduction of the species the roosters belong to is of interest to the *galleros*, since these animals represent their work source. It is argued that the *galleros*' job specializes in the reproduction, breeding, and maturation of individuals of this species. Additionally, it was argued "there are studies that indicate that combat birds fight among themselves by instinct, with the strongest surviving,

or sometimes both birds dying. So that the dignity, respect, and consideration of animals is not violated either" (Amparo en revisión 163/2018, 2018, p. 7).

The district judge's reply considers the previous argument to be *unfounded*. The judge begins by drawing a distinction between preserving fighting cocks *as a species* and protecting and ensuring respectful treatment of *individuals*. Although the galleros guarantee, since it is in their interest, the preservation of the species of fighting roosters, what is in dispute is whether they respect the roosters individually. In this second respect, the cockfighting activity, affirms the judge, "incites, forces, and coerces the fighting rooster to harm, injure, mutilate, or cause the death of another rooster" (Amparo en revisión 163/2018, 2018, p. 12), that is, actions that can appropriately be described as mistreatment, and that, therefore, constitute disrespectful treatment of each individual animal. The district judge argued that the disrespectful treatment constitutes a violation of the right to a healthy environment enshrined in the fifth paragraph of the fourth article of the Constitution.

It is relevant to transcribe the text in question: "Every person has the right to a healthy environment for their development and well-being. The State shall guarantee respect for this right. Environmental damage and deterioration will generate responsibility for whoever provokes it in terms of the provisions of the law" (Constitución Política de los Estados Unidos Mexicanos, 2021).

In response, the Commission argued that it is "inaccurate" to state that in cockfighting some roosters are incited, forced, or coerced to cause harm to others, so that there is no mistreatment in cockfighting, and there is no disrespectful treatment towards the roosters by the galleros. Additionally, it was argued that although the object of the imputed norms is animal protection, it is also true that these norms violate the right to culture. This counter-reply leads us to the next argument.

2. *Right to Culture*

The *galleros* also argued a violation of the right to culture because cockfighting is an ancient tradition that is currently celebrated particularly in the patron saint festivities and rooted in all social classes.

In his reply, the district judge considers the argument *unfounded*. To justify this, he begins by pointing out that the right to culture is not an absolute right, and that its enjoyment is limited by the protection of other rights. In this case, it is argued that the legislator considered it necessary to limit the right to culture in order to protect the environment. To sub-

stantiate this, the Universal Declaration of Animal Rights (DUDA) approved by the United Nations Organization is appealed to (United Nations Educational Scientific and Cultural Organization [UNESCO], 1978). Said declaration, although not binding, establishes, in the judgment of the district judge, that "the prohibition of animal fights is directly related to the protection of the environment".

In this sense, and this will be important later, the district judge establishes an *external* limitation to the right to culture, since it is the respect for the right to a healthy environment that limits the right to culture, which in turn leads to the protection of cockfighting under this right.

In their reply, the *galleros* argued that this response does not specify how the prohibition of cockfighting can be justified from the right to the environment.

Additionally, they replied to the appeal to DUDA that this "international instrument is intended to protect the existence of animal species, when in reality with cockfighting in no way this species is put at risk" (amparo en revisión 163/2018, 2018, p. 15). They reaffirmed that it is in the interest of the *galleros* to protect the *species* of roosters.

In this section, it would be pertinent to cite those articles of the DUDA from which the district judge interprets a link between the prohibition of cockfighting, or some other type of harm to individual roosters, and the protection of the environment. In addition, it would be pertinent to cite those articles the *galleros* could use to affirm that this instrument is intended to protect animal species. However, the DUDA does not contain any article that allows this kind of conclusion to be established.

The DUDA establishes individual rights of animals: the right to be respected, the right to freedom, the right to attention, care, and protection from man, as well as the right to a life in accordance with the natural longevity of the individuals of the species to which each animal belongs. It also establishes normative categories to regulate coexistence with animals, such as equality between all animals from birth and the description of certain acts, such as abandonment, as cruel and degrading. Finally, the Declaration establishes the type and object of different crimes involving animals, as well as the obligations that stem from it for governments and people.

At no time is the environment spoken of, other than to speak of the *individual* animals belonging to a wild species to live in their natural environment. Species protection is not mentioned either, since the species concept is only mentioned to categorize animals as belonging to wild species or species that traditionally live with humans, to later specify that depending on which category these animals belong to, they will enjoy different rights.

3. *Right to Work*

The CMPGAC also argued that there is a violation of the freedom to work: the new legislation makes a profession illegal, that of gallistics, which previously was not, which violates human rights and violates the principle of progressivity.

The judge's reply is like the previous one, the argument is considered *unfounded*. Once again, it is observed that the right to work is not absolute and that it can be limited by

> …the protection of animals, which results in the protection of the environment. In this case, the fundamental right to a healthy environment, in its aspect of protecting biodiversity, has a greater weight than the individual freedom to engage in an activity, so a restriction of this nature is justified and therefore, it is clear that the right to freedom of work is not violated. (Amparo en revisión 163/2018, 2018, p. 11)

The counter-reply of the *galleros* reframes the previous answer. If it has already been shown that the district judge in his argumentation has not duly justified the link between the ban on cockfighting and the right to a healthy environment, then the restriction of the freedom to work is not justified in the legislation by the protection of another right. Therefore, there is a violation of both a human right and the principle of progressivity.

4. *Right to Property*

Finally, it is argued that the new law unjustifiably restricts the right to property of the *galleros*:

> ...the contested articles impose on the fighting birds —understood as goods owned by the *galleros*— the limitation consisting of not being able to carry out events with them such as cockfighting, which does not obey any public interest, but adopts a position that seeks to grant animals a "veiled condition" similar to that of human beings. In this sense, animals are not subjects of law but objects regulated by law.

As an objection, the district judge responded that this argument is *ineffective* since it starts from the false premise which affirms that the law deals with the property rights over the birds. The legislation in question has the objective of preventing animal cruelty and for this purpose; the property over the animal is not legislated.

In their reply, the *galleros* argue that "The essence of the argument […] is not the ownership of the fighting birds, but rather the limitation

of the exercise of the right to use and enjoy from these assets" (*Amparo en Revisión 163/2018*, 2018, p. 16). Additionally, they argue that, since the main activity for which roosters are used is fighting, this represents a strong limitation to their ownership of these birds.

III. The Analysis of Zaldívar and the Rights of the Roosters

Minister Zaldívar divides his in-depth study of the grievances into three parts. The only one that interests us for this article is the second one, where the methodology of the proportionality test is used to analyze the violation of the right to property, right to culture, and freedom to work. To follow this methodology, the Minister analyzes whether the contested legislation affects *prima facie* any of these rights. If this is the case, it is subsequently analyzed whether the articles of the legislation have a *legitimate purpose*. If this is also the case, the adequacy, necessity and proportionality of the legislative measure are successively examined.

Before beginning with the detailed analysis of the rights in question, it is worth noting an important argument made by Zaldívar that is not found in the discussion of these rights. Zaldívar agrees with the *galleros* when they object that in the argument of the district judge the link between, on the one hand, the prohibition of cockfighting and the mistreatment that this activity implies and, on the other, the right to a healthy environment is not clear.

> [T]his Supreme Court considers that in constitutional terms the protection of the environment cannot be equated with the protection of animal welfare. Although the constitutional mandate to protect the environment supposes the possibility of establishing general norms that protect animal species that "subsist subject to the processes of natural selection and that develop freely" —known as "wild fauna"—, we must not lose sight that there are many animal species that are born, grow and reproduce in environments controlled by human beings for different purposes: food, experimentation for medical or scientific purposes, companionship or help to people, entertainment, among others. Thus, the protection of all animal life is not an issue that can be redirected to the protection of the environment or natural resources. (Amparo en revisión 163/2018, 2018, p. 22)

Zaldívar's argument seems to start from distinguishing two types of animal species and can be outlined as follows:

1) The constitutional protection of the environment only includes species considered as wild fauna.

2) There are animal species that are not considered wildlife.
3) All animals, regardless of their species, have welfare subject to protection.
4) Therefore, the constitutional protection of the environment does not protect the welfare of all animals.

Premise (2) establishes a distinction between wild fauna and other types of fauna, which, following a usual distinction in the literature, we could call *domestic fauna*.

However, this argument ignores a second difference between the constitutional protection of the environment and the protection of animal welfare, a difference that the *galleros* use in their reply to the district judge's arguments.

The protection offered by the Constitution to the environment is a protection to the species, which implies the obligation to ensure that the populations that make up each species remain healthy: with a healthy number of individuals and with sufficient genetic variability. However, this protection does not include obligations towards the individuals belonging to the species. The protection of the environment is compatible, if no species is threatened or in danger of extinction, with the violation of the welfare of several of the individual members of these species. This last statement is true regardless of whether the species involved are wild or domestic.

Following a common distinction, and without getting into the details of it, we could say that the protection offered by the Constitution is a social right, while the protection offered by Veracruz's reformed law is an individual right. This distinction between the right to a healthy environment and the animal right to welfare will be relevant later.

Right to Culture

The response offered by the SCJN to the argument regarding the right to culture has been the aspect of the sentence that has transcended the most in public opinion. This is easily explained, since the argument based on the right to culture is one of the most popular to defend practices similar to cockfighting, such as bullfighting. Thus, once the SCJN has considered this argument unfounded, this opens the door to penalizing other practices of animal abuse. However, the response to this argument has been widely misunderstood, and, I will argue, is not the most interesting contained in the sentence.

Minister Zaldívar begins by observing that although the right to culture is enshrined in article 4 of the Constitution, the first chamber of the court

had already interpreted the right contained in this article as constituted of three aspects: "1) as a right that protects the access to cultural goods and services; 2) as a right that protects the use and enjoyment of them; and 3) as a right that protects intellectual production" (amparo directo 11/2011, 2011; amparo en revisión 163/2018, 2018). However, the *galleros* challenge a violation of their right to culture because cockfighting is a *cultural expression,* and cultural expressions are not protected by the aforementioned constitutional article.

However, they are protected by subparagraph a) of article 15.1 of the International Covenant on Economic, Social and Cultural Rights, which establishes: "Article 15. 1. The States Parties to this Covenant recognize the right of every person to: a) Participate in cultural life" (ACNUDH, Pacto Internacional de Derechos Económicos, Sociales y Culturales, 1966).

This legislation allows, apparently, to substantiate the argument of the *galleros* because the Committee on Economic, Social and Cultural Rights of the UN has interpreted that this article supposes the obligation that the State party refrain from interfering "in the exercise of *culture practices*" and that "[e]very person has the same right to seek, develop and share with others their knowledge and *cultural expressions*" (Consejo Económico y Social de la ONU, 2010).

Therefore, it only remains to justify that cockfighting is a cultural expression protected (at least) *prima facie* by the right to participate in cultural life established in this legislation, in order to grant the argument to the *galleros*. However, the latter is not trivial. Although it is unquestionable that cockfights are a cultural expression from an *anthropological viewpoint*, because they have historical, cultural, and popular roots, as well as a clear symbolic element, the question is not only whether cockfighting is a cultural expression, but whether this cultural expression deserves constitutional protection. To this last question Zaldívar answers negatively.

The argument begins by pointing out, as we have done previously, that the right to culture is not absolute. As it is not, it is relevant to study its (internal) limits. Regarding these, it is stated: "This First Chamber shares the idea that «culture is not admirable for being traditional, but only when it *bears values* and rights that are compatible, first of all, with human dignity, and secondly, with the mutual respect that we human beings owe each other, and with which we all owe nature»" (amparo en revisión 163/2018, 2018, p. 32).

Consequence of this idea is that any practice that involves unnecessary suffering or mistreatment of NHA cannot be considered a *cultural expression* that deserves to be protected not even *prima facie* by the Constitution.

Subsequently, Zaldívar argues that cockfighting is, precisely, a practice that involves unnecessary suffering of NHA. For this it is shown that the argument put forward by the cockfighters against the mistreatment of roosters due to their instinctive tendency to fight is unfounded, since, as it is evident, regardless of the veracity of the statement "roosters fight instinctively" it is transparent that in cockfights roosters are *encouraged* to injure each other.

In conclusion, Zaldívar establishes that the right to culture enshrined in the Constitution and in international treaties does not protect cockfighting as a cultural expression. In other words, unlike the district judge who bases his argument on an *external limitation* to the right to culture, the Supreme Court sentence is based on an *internal limitation* of this right. This important aspect of the sentence is usually ignored.

In one of the articles that have been published commenting on the court's resolution, Oscar Leonardo Ríos García affirms: "[A]nimal rights were taken into consideration as a guide for a judicial decision. The foregoing is so, since after examining the matter, it was determined that there is no direct impact on people, but on animals... the duty of the Constitutional club prevails to respect and guarantee animal rights" (García, 2018, p. 5).

This is false. On the one hand, the court's resolution never *explicitly* mentions animal rights, it even mentions: "we must remember that our Constitution does not contain any provision from which it can be inferred that the legislator is constitutionally obliged to enact regulations that protect animals of mistreatment" (amparo en revisión 163/2018, 2018, p. 38).

On the other hand, the interpretation that Ríos García makes of the resolution is as an external limitation to the right to culture, since this right is limited by animal rights, while the most natural interpretation of Zaldívar's analysis is as an internal limitation.[4] This is so because Zaldívar does not consider that the right to culture protects cockfighting because these fights violate the rights of roosters, but because cockfights are not bearers of *values* compatible with the respect for nature.

[4] Not to mention that Zaldívar himself clarifies that the correct interpretation is the internal one: "it is important to clarify that the question that is being analyzed now is not the external limits of the law, that is, it is not discussed whether this aspect of the right to culture can be limited by the State when pursuing other legitimate purposes. Instead, the question to be answered has to do with the internal limits of the right to participate in cultural life. Thus, what must be determined is whether the right whose violation is alleged grants at least prima facie protection to any cultural expression —including cockfighting— or whether only some of them deserve constitutional coverage" (amparo en revisión 163/2018, 2018).

Let us illustrate this with an example. Suppose there is a cultural practice that consists of the cutting down and subsequently burning of a dry tree. This practice is motivated by the admiration of the unjustified domination and destruction that humans can exercise over nature. Let us suppose, even more, that this practice is only exercised once a year by small populations so that it does not endanger a healthy environment. Following Zaldívar's argumentation, we can consider that the legislation that prohibits this practice does not violate the right to culture.

However, our argument does not need to start, as Rios García suggests, from the supposed rights of the tree to life, or from the right to a healthy environment, as the district judge suggested. Our argument can simply be based on pointing out that a cultural practice that admires domination and unjustified destruction over nature is not worthy of constitutional protection. Since this practice is not compatible with values of respect for nature, it does not deserve that level of protection.

This argumentative strategy is common in animal ethics; one of the pioneers of this strategy is Immanuel Kant himself, who argued that although we may not have obligations *towards* animals, and therefore they do not have rights, we do have obligations *regarding* animals.[5]

Surprisingly, a sentence by the SCJN from 2022 uses the external limitations arguments in the context of bullfighting. In this sentence, Minister Alberto Pérez Dayán argues that the human right to a healthy environment externally limits the alleged cultural right to bullfighting or cockfighting:

> Culture and the participation in it are only conventional and constitutionally valuable and worthy of protection as long as they are truly compatible with human rights… [therefore] It must be established if bullfighting or cockfighting are compatible o reconcilable with the human right to a healthy environment… the answer is clearly negative. This is so because it is an evident fact that bullfighting and cockfighting constitute, inherently, the agony, suffering, and even death, of sentient animals, just to serve the entertainment, sport or recreation (amparo en revisión 80/2022, 2022).

Even if this argumentative path follows the common strategy of using the human right to a healthy environment to further animal rights, as was famously suggested by Judge Pinto de Albuquerque (*Case of Herrmann v.*

[5] Kant argues that we have no direct obligations to NHA as they cannot make moral judgments, however, we do have indirect obligations to NHA. This means that we do not owe the good treatment of the NHA to them, but we owe it to other humans to treat NHA correctly, since, similarly to what Zaldívar argues, treating an animal incorrectly prompts vicious behavior, and we owe it to other humans not to behave viciously (Kant, 1997, p. 212) [Ak 27: 459].

Germany, 2012), I have already pointed out some flaws with this strategy: 1) it focuses its attention on the social rights of species, 2) it only grants rights to wild species.

To conclude, from my interpretation, the resolution of the SCJN does rule on animal rights, and I will argue for this in the next section. Nonetheless, we can't justify this interpretation based on the analysis of the right to a healthy environment.

IV. Right to Property and Freedom to Work

Regarding the right to property, the amparo ruling affirms that the legislation does *prima facie* affect this right. Minister Zaldívar argues that article 27 of the Constitution establishes three inherent and consubstantial rights to private property: "the right to use the thing, the right to enjoy it, and the right to dispose of it" (amparo en revisión 163/2018, 2018, p. 36) as well as a guarantee that restricts the way the State can limit these rights.

Thus, a *prima facie* intervention of this guarantee occurs "if the measure is provided for in a general rule with a vocation for permanence; and if it affects any of the attributes of private property: use, enjoyment and disposal" (amparo en revisión 163/2018, 2018, p. 40). In the opinion of the First Chamber of the SCJN, both requirements are satisfied.

With regard to freedom to work, the sentence affirms that the legislation also affects *prima facie* the freedom to work. The sentence argues that article 5 of the Constitution establishes a right linked to *personal autonomy,* since it establishes a protection to allow individuals to perform the professional activity that best suits their life plan.

Given that the legislation in question legally prevents cockfighting by establishing a ban that considers this activity illegal, it is concluded that the regulatory portions that are challenged affect the freedom to work.

Once a *prima facie affectation* of the content of both rights has been established, what is appropriate now is to analyze the legitimacy of the purposes sought with the articles of the legislation in question.

As it has already been argued, the aims sought with the legislation cannot be understood from the right to a healthy environment, but must be understood as directly *protecting animal welfare*, which must be interpreted as an individual protection of animals, and not of the species of which they are part of. This interpretation is strengthened in the amparo sentence with evidence from the legislation itself and from the opinions of commissions prior to their voting and the publication of the modifications to the law.

Having established the purpose of the law, the question left is whether it is legitimate. Zaldívar states that there is no constitutional provision regarding animal welfare: there are no provisions that mandate the legislator to protect animal welfare (because it has already been established that animal welfare and a healthy environment are not comparable concepts), but there are also no provisions that prohibit the legislator from advancing measures for this purpose. Additionally, the Constitution does include a democratic principle, which empowers the legislator to make the most important decisions for the political community it represents. This principle "transmits its constitutional status to the objectives that Parliament pursues through its interventions and that are not explicitly or implicitly prohibited by the Constitution" (amparo en revisión 163/2018, 2018, p. 48). Additionally, Zaldívar points out that the protection of animal welfare is clearly a purpose compatible with the values of a liberal democracy. With this, the amparo ruling concludes that the purpose sought is legitimate.

Having established this, Zaldívar proceeds to show that the legislative measure is suitable, necessary, and proportional.

Now, the methodology of proportionality is contentious. Many believe this methodology does not satisfy basic criteria of objectivity or impartiality and they believe there is too much room for the judges to bring in their own prejudices or personal values (Habermas, 1996). Robert Alexy (2007) has replied to this line of thought by presenting an objective test for the proportionality principle. As it is common in social sciences, mathematics is brought into the picture to show the methodology is objective enough.

The proportionality principle is used to solve tensions among other juridical principles or rights. In a concise way it says that: *a restriction or dissatisfaction of a set of principles S is permissible in a context C only if the satisfaction of the set of conflicting principles S' is more important than the restriction or dissatisfaction of S in context C*.

This principle suggests a methodology to justify the restriction of a set of principles or rights:

1) Establish the degree of satisfaction or dissatisfaction of the conflicting rights in the given context.
2) Establish the degree of importance of the conflicting rights in the given context.
3) Establish if the importance of the satisfaction of the rights in question justifies the restriction or dissatisfaction of the other rights in the given context.

Alexy suggests a triadic scale for the intervention of a right: mild (m), average (a), and high (h). The three conflicting principles are: right to property, freedom to work, and animal welfare.

Regarding the *right to property,* the new law restricts this right *mildly*, because the owners of the roosters can still use them in any way unrelated to cockfights. The *restrictions to freedom* to work should also be considered as *mild*, since the realm of activities that are deemed as illegal by this law is very small: only those related to fights involving animals (and this does not even include bullfights). Citizens of the state of Veracruz are still allowed to interact in many ways with NHA, including roosters, and to have a job related to it. While, obviously, they are also permitted to have jobs that do not directly involve NHA.

Meanwhile, the interventions to *animal welfare* are *very high*. Cockfights significantly reduce the welfare of roosters: they are injured, mutilated, and killed as an intended result of these practices. Also, contrary to what the *galleros* argue, this intervention on animal welfare could be significantly reduced by outlawing this practice.

Regarding the importance of the conflicting principles, it is not hard to see why the *right to property* and the *freedom to work* are *highly* important principles. In liberal democracies, the right to pursue the life plan that best suits the desires and values of the citizen is one of the most important rights to be protected. It is clear this right would not be possible without an extended freedom to work and without an important protection on personal belongings and other properties.

Establishing the importance of *animal welfare* is harder. Contemporary debates on bioethics have shown there are principled and pragmatic reasons to regard animal welfare's importance at least as *average;* and I will argue it should be regarded as *high*. As we will briefly discuss in the following sections, the same ethical principles that protect human welfare can be shown to also protect NHA welfare, that is why we have strong principles that show the importance of it. On the other hand, the climate crisis, as well as the outrageous actions committed by the food industry, have shown us why there are pragmatic reasons to care more about animal welfare. Lastly, it is also important to mention that even the *galleros*, and the people who dispute the new law, agree with this, as they have argued that it is part of their job to care for the welfare of the roosters.

To complete the last step Alexy suggests the following equation:

$$G_{1,2-3} = \frac{I_1 G_1}{I_2 G_2 + I_3 G_3}$$

Where the variables represent:

- $G_{1,2-3}$ The concrete importance of the satisfaction principle 1 (if its satisfaction restricts principles 2 and 3). This is because the importance of the principle in the relevant context is directly proportional to the general proportion of the principle and the degree of its satisfaction, and inversely proportional to the importance and the dissatisfactions of the principles that will be restricted.
- I_1 The general or abstract importance of principle 1 (respectively for I_2 and I_3)
- G_1 The satisfaction of principle 1 (respectively for G_2 and G_3)

If we assign the values 1 for mild, 2 for average, and 3 for high and we regard the abstract importance of animal welfare as *average* we get:

$$G_{1,2-3} = \frac{2 * 3}{3 * 1 + 3 * 1} = 1$$

And if we regard it as *high*:

$$G_{1,2-3} = \frac{3 * 3}{3 * 1 + 3 * 1} = \frac{3}{2}$$

Following Alexy, the concrete importance of the satisfaction of a principle justifies the restriction of the other conflicting principles if the value of it is greater than 1, and in the case of it being equal to 1 we have a tie and need further analysis to resolve the issue. This shows that, according to the proportionality test, the legislation limits the right to property and freedom to work in a permissible way only if the abstract importance of animal welfare is similar to the abstract importance of freedom to work and the right to property. The following sections will argue why it should be like this, but it is important to stress that this analysis shows that the resolution of the court is unique in its kind by implicitly acknowledging the aforementioned similarity of the importance of these principles.

I hope this analysis also eases the worries of those who criticize the methodology of proportionality. Not only has this analysis shown

why there are objective reasons to assign the degrees of importance and satisfaction that have been assigned, and so replied to the objection that this methodology allows personal prejudice to guide the decision, but this analysis has also used an objective mechanism to ponder those degrees, and, therefore, it has proved why this methodology should not be criticized for being too subjective.

V. The Right to Animal Welfare

Once the argument presented by the SCJN has been exposed, it is necessary to normatively interpret the type of protection for animal welfare that is established. In philosophy of law, it is argued that the reasons for limiting a right must meet extremely demanding criteria.

This has given rise to the interpretation of rights as trumps developed by Ronald Dworkin (Dworkin, 1978), where rights allow their holders to act in certain ways even when the social interest could be promoted if they acted in the opposite way. Although Dworkin's perspective has been widely discussed, it is not necessary to adhere to it to accept that every right has among its motivations the protection of certain benefits or interests of its owner, and that allowing any motivation to constitute a limitation of that right renders the right in question useless.

This reflection implies that, from the perspective of the SCJN, the protection of animal welfare meets high demands, since it limits rights such as the right to property or freedom of work. This suggests the interpretation that the protection of animal welfare should be conceived as a right, for the position that only one right can limit another seems, at first sight, reasonable.

However, even in a theory such as Dworkin's, which starts from the idea that rights are an individual protection against social interest, there are limitations to rights that do not constitute other rights such as: a clear and enormous social interest, the continuation of the democratic order, national security, social tolerance, feelings (of dignity or not humiliation) and constitutional principles (Barak, 2012, pp. 265-277).

Therefore, we cannot immediately conclude from the fact that animal welfare limits other rights that it constitutes a right. Despite this, understanding the protection of animal welfare as a right is the most natural interpretation of the cited articles of Veracruz's legislation and the SCJN ruling.

It is not only the case that the protection of animal welfare *externally* limits other rights, but animal welfare cannot be properly classified as any

of the usual motivations for limiting a right previously mentioned. Perhaps the only classification in which it could be assigned is that of social interest.

However, it seems clear to me that animal welfare is not socially recognized as a clear and capital interest, because otherwise institutions such as zoos, slaughterhouses, and intensive farms would be considered illegal. Even so, it is possible that *legislators* have identified this interest as clear and legitimate based on a detailed analysis of the social benefits that its protection entails.

Now it is difficult to explain how the recognition of this social interest differs from the recognition of a right. Especially if we remember the established protection of welfare is considered as an individual protection of individual animals, which motivates sanctions to their perpetrators, as well as the normatively loaded description of their acts as cruel and mistreatment. Remember, the protection of animal welfare is distinct from the social right the species have due to the right to a healthy environment all citizens have.

It seems to me that all of this shows why the most plausible normative interpretation of the resolution of the SCJN is as a recognition of the individual right NHA have to their own welfare.

1. *Animal Welfare as a Citizenship Right*

The last decades have seen a wide debate on the rights of citizenship. Schematically, it has been observed that there are different aspects of citizenship. Citizenship as a legal status, citizenship as an aspect of identity, citizenship as the source of solidarity, and citizenship as a civic virtue. It is the first aspect that interests us in this text. From the legal status of citizenship, four types of citizenship rights are recognized: civil rights, political rights, social rights, and cultural rights (Wayne & Kymlicka, 2007).

Some examples of civil rights are the right to freedom of expression or religious freedom. The protection of animal welfare is, evidently, this type of right, as I will argue.

However, it is important to note how citizenship rights differ from other types of rights. The contemporary theory of law, particularly in its liberal tradition, is composed of two theories. A theory on universal rights, which are usually included in Human Rights, and a second theory about citizenship rights.

Citizenship rights arise to recognize that subjects of law are not only holders of certain claims because of the type of subject they are (in the case of Human Rights, for the simple fact of being human), but they also have other claims as a consequence of being members of certain political com-

munities. Some of the rights that are usually associated with citizenship in this sense are rights of sovereignty, rights of residence, and rights over a territory.

An important part of the debate on the rights of citizenship has been regarding the way in which these rights are acquired. Following theorists such as Joseph Carens, we can affirm that these rights are acquired by actively participating in a political community (Carens, 2013). According to this analysis, the legal status of citizens, and several of the rights that accompany it, have as their source the belonging to a community, and its motivation is to protect this community and its members; social membership ought to imply legal membership.

Parallel to the development of these debates, various authors such as Peter Singer and Tom Regan have argued (Regan, 1983; Singer, 1975), from the developments of animal ethics, that the normative obligations we have towards other humans do not differ significantly from the obligations we have towards NHA. A good part of the premises of this debate have arisen from studies in biology or ethology that have shown close analogies between the mental abilities of humans and NHA. Additionally, this debate has shown that the only reason for refusing to recognize domestic animals as members of our political community is a discriminatory attitude, or a speciesist prejudice.[6] For these reasons, some theorists have proposed recognizing the citizenship rights of NHA (Donaldson & Kymlicka, 2011). While these theorists have argued that NHA should be accorded civil, political, and social rights, for the purposes of this article it is only necessary to defend the existence of one civil right of citizenship of NHA: the right to welfare.

So far, in this section, I have only laid the ground, arguing that there is conceptual space in modern legal theories for a right to animal welfare. And that, from a normative perspective, there are reasons that draw from the theories of citizenship rights and animal ethics to recognize this right. However, it still remains to be argued that both the LPAEV and the SCJN ruling establish this as a right of citizenship and not as a universal right.

On the one hand, we have already clarified that the amparo sentence, in its argumentation on the non-identification of the right to a healthy environment and the right to animal welfare, establishes the distinction between wild fauna and domestic fauna. The domestic fauna being composed of NHA that have been raised, socialized and sometimes even edu-

[6] A big portion of the debate on speciesism (the discrimination of NHA), has taken the the concept of discrimination as unproblematic. Elsewhere I have discussed this problem as well as the arguments that that show why many of our practices regarding NHA are discriminatory (Reyes, forthcoming).

cated to coexist in human society, that is, in political communities where humans play a transcendent role.

In this way, the ruling already establishes in its arguments a normatively relevant distinction between those animals that are part of communities where human presence is essential and wild animals. Distinction that is already present in DUDA.

The LPAEV also establishes this distinction:

> Article 4. For the purposes of this Law, it shall be understood as:
>
> …
>
> IV. Domestic animal: One that does not naturally exist in the wild habitat, that has been reproduced and raised under human control, that lives with it and depends on it for its subsistence;
>
> …
>
> IX. Wild animal: One that reproduces and breeds without human control, that does not require it for its subsistence and that lives in its natural wild habitat.

Furthermore, this legislation explicitly establishes that the obligations regarding animal welfare depend on the classification under which it falls:

> Article 6. The State authorities, in the formulation and conduct of their policies for the protection of animals, shall observe the following Principles:
>
> I. Animals must be treated with respect and dignity throughout their lives;
>
> …
>
> III. Every domestic animal must receive attention, care and protection from humans;
>
> IV. Wild animals will live and reproduce freely in their own natural environment;
>
> V. Domestic animals will live and grow at the pace and in conditions of life and freedom that are typical of their species (Veracruz, 2016).

That is, the right to animal welfare includes a universal negative right (expressed in section I) that requires respectful and dignified treatment. However, the right to well-being also includes a positive right (expressed in section III) to attention, care, and protection from humans, and this right is exclusive to domesticated NHA. In other words, the right to well-being is recognized as a positive civil right of citizenship.

It is worth mentioning that the decision of the legislative power to conceive the positive part of the right to animal welfare (attention and care) can be justified beyond political or conjunctural considerations, and so it can be defended in a way that the decision to exclude the protection of animal welfare established by the law to bulls in bullfights cannot.

The debate on predation, discussed by authors such as Jeff McMahan and Óscar Horta (Horta, 2017; McMahan, 2015), has made it clear how controversial it is to extend this positive right to welfare to wild animals as well. The supposed obligation to attend and care for wild animals implies the obligation to end predation in nature, the implementation of which would have consequences that would change life on the planet as we know it.

This being the case, not only can it be interpreted that part of the right to well-being established in the LPAEV is a citizenship right, but there are compelling normative reasons to consider it this way.

2. *Objections*

The central argument of this text can be divided into two parts. The first concludes that the amparo ruling recognizes the right to animal welfare, the second concludes that this right is a right of citizenship. Therefore, my argument is open to objections at both steps.

Let us first consider objections to the first step. It could be objected that the obligation to respect animal welfare is not a *direct* duty to NHA, but an indirect duty, and, therefore, NHA do not have a right to their individual welfare. Along these lines, it could be argued that the obligation to protect their well-being can only be owed to subjects of the law and not to objects regulated by the law. So we have a duty to protect the animal welfare that we owe to other humans, but not to NHA.

However, this makes little sense. Although the discussion before the vote of the bill emphasized that obligations towards children could indirectly justify the protection of animal rights, the discussions also emphasized the importance of avoiding cruel treatment and mistreatment of animals due to the damage this causes to the animals themselves.

Additionally, the sentence of the SCJN mentions that animal welfare is a legitimate end in itself, and not that it is justifiable because it extends the rights of some other subject of human rights. Furthermore, as we reviewed in the discussion on the right to culture, the sentence *explicitly* recognizes the value of nature as a *final value*[7], and not only as an *instru-*

[7] I use "final value" in the sense that many use "intrinsic value", to contrast it to instrumental value. I do so because the opposite of intrinsic value is extrinsic value, and not instrumental value; intrinsic value is the kind of value something has due to its intrinsic properties, the same is true for extrinsic value and extrinsic properties. Contemporary discussions have shown that some things have final value due to their extrinsic properties, so they have non-instrumental non-intrinsic value, making the semantic distinction I am issuing important (Rønnow-Rasmussen, 2015).

ment to advance human interests. And so, it is far from the view that only humans have final value or rights.

A second objection could be motivated by the texts of Gary Francione. From this perspective, it could be argued that welfare protection cannot be conceptualized as a right, or if it is done so it is an empty right, since the fact that NHA continue to be considered as property trivializes this protection.[8]

The proportionality analysis is an excellent reply. In this analysis it was argued that the protection of animal welfare is so important and its limitation to the right to property of the *galleros* is so insignificant in relation to all the other rights that the *galleros* have as owners, that the measure of prohibiting cockfighting is a necessary, suitable, and proportional measure. This shows that the right to animal welfare 'has claws' and can generate significant protection for NHA.

A third objection could be motivated by a certain interpretation of the right to a healthy environment as, partially, a right of future generations. This interpretation has also been used by the SCJN, so it is important to discuss it here (Suprema Corte de Justicia de la Nación, 2009). It has already been argued that the protection of animal welfare cannot be derived from the right to a healthy environment, and so, we do need to propose a new normative principle to protect animal welfare. On top of that, I have already argued that the motivation of the legislators from Veracruz was not just to protect animal welfare to further human interests, the motivation was to protect animal welfare as a final value. So, this normative principle is owed to NHA. Because I have already argued that this protection must be interpreted as a right, we can conclude that the right to animal welfare is a right *of* NHA, and cannot be derived from any right owed to humans, neither present nor future.

Let us now consider objections on the second step. It may be objected that it is not possible to grant citizenship rights to non-citizens. Article 24 of the Constitution makes it clear that only humans can be citizens.[9] While article 25 establishes what the rights of Mexican citizens are, among which the right to animal welfare is not found, this objection is prey to confusion. The thesis of this article is not that the Political Constitution

[8] "The property status of animals renders completely meaningless any balancing that is supposedly required under the humane treatment principle or animal welfare laws, because what we really balance are the interests of property owners against the interests of their animal property" (Francione, 2000, p. xxiv).

[9] Article 34. Citizens of the Republic are men and women who, having the status of mexicans, also meet the following requirements: I. Have reached the age of 18, and II. Have an honest way of living

of the United Mexican States or that the laws emanating from it recognize NHA as citizens. The thesis is that the LPAEV and the amparo ruling 163/2018 recognize animal welfare as a right, part of which must be interpreted as a citizenship right (following contemporary theories on citizenship rights). This second thesis is independent of whether the legislation *explicitly* recognizes this right as a right of citizenship. What is in question is whether the correct interpretation of this protection, as found in the mentioned texts, should be through the theory of citizenship rights.

The theories about citizenship rights have made extensive developments since the last decade of the last century. It is expected that the legislation cannot always keep up with the latest academic developments, but this fact does not invalidate an argument that, based on these developments, conceptualizes a legal protection using the theoretical tools of recent developments.

VI. Conclusions

The Supreme Court judgment 163/2018 of the SCJN has given much to talk about, both in specialized areas and in public debate. I have argued that this sentence establishes the protection of animal rights as a right of non-human animals, and that part of this right is a positive civil right of citizenship of domestic animals. This was done based on a detailed analysis of the amparo ruling and the LPAEV. I argued, on the one hand, that the protection established in the local legislation articles, which were challenged in the amparo lawsuit, is an individual protection for non-human animals that is conceptually different from the right to a healthy environment enjoyed by all Mexican citizens. Protection that, by limiting other rights such as the right to property and freedom to work, must be understood as an individual right.

Later, I argued that this individual protection establishes different obligations towards wild animals and domestic animals. Additionally, I argued that domestic animals should be considered as members of political communities to which we humans belong, taking up the discussion in animal ethics about the capacities of non-human animals, their contributions to the human community, and the problems of speciesist prejudice. Finally, I argued that the legal status of citizens is precisely a consequence of belonging to a political community, this leads to the conclusion that a part of the right to animal welfare is a citizenship right.

If my argument is correct, the sentence of the SCJN has enormous implications. Although there are international precedents where legal per-

son status is granted to NHA and even the precedent of the Constitution of Mexico City where NHA are conceived as sentient beings, this would be one of the first cases of recognition of a citizenship right to NHA. I have presented several virtues of recognizing the citizenship rights of NHA. It both offers strong protections to their welfare in the practical realm and solves complex deontological problems in the theoretical realm. On top of this, there are other citizenship rights that could be recognized to NHA, both civic and political, which could lead to finally conceiving domestic animals as legitimate members of our society, a recognition we have owed to them for a while.

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Artículos

Jürgen Habermas. Baedeker de su propuesta jurídica

Jürgen Habermas. Baedeker of his legal proposal

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Resumen: Habermas ha elaborado una teoría jurídica a partir de su filosofía de acción comunicativa. Sin alejarse de los fundamentos tradicionales que sustentan al Estado democrático de derecho, ha innovado una posición de legitimación al derecho y a su ejercicio, incluso ofrece nuevas herramientas conceptuales para la función judicial, como es el caso de lo que podría llamarse la adecuación que sustituye a la conocida propuesta de la ponderación de los derechos. El presente artículo pretende servir de guía para adentrase en el territorio de su propuesta.
Palabras claves: teoría discursiva, legitimación, argumentación jurídica, derechos fundamentales, función judicial.

Abstract: Habermas has developed a legal Theory based on his communicative action philosophy. Without moving away from the traditional foundations that sustain the Rule of Law, he has innovated a position of legitimation of the law and its exercise, even offering new conceptual tools for the judicial function as it's the case with what could be called the adequacy that replaces to the well-known proposal for the weighing of rights. This article aims to serve as a guide to get inside the territory of his discursive proposal.
Palabras clave: Discursive Theory, Legitimation, Legal Argumentation, Fundamental Rights, Judicial Function.

[1] Agradezco al profesor Juan Carlos Velasco Arroyo sus solidarias orientaciones. De igual manera, a las dos personas revisoras anónimas, quienes señalaron imprecisiones. Al final decidí darle la estructura que aquí se presenta, por lo cual los errores subsistentes me señalan a mí como único responsable.

I. Preliminares

En 1986 un grupo selecto de científicos sociales alemanes se reunieron en la calle de Mylius con un solo objetivo: replantear el papel del derecho en la sociedad actual. Pero 12 años más tarde, a tan sólo un kilómetro y medio de distancia, se instalaría el Banco Central Europeo. Si unimos lo anterior con lo variado de la ciudad de Fráncfort, como son su torre Eschenheimer Turm o el edificio IG-Farbenhaus, se dibuja ante nuestros ojos una historia surrealista, o quizá una novela de intriga y suspenso. Sin embargo, la realidad es que dicha reunión tuvo importancia para el mundo, pero no precisamente en lectura conspiratoria. Se trataba de la reunión convocada por Habermas para construir uno de los más ambiciosos proyectos de investigación en torno a la teoría del derecho.

Estaban convocados Rainer Forst, Günter Frankenberg, Klaus Günther, Ingeborg Maus, Berhar Peter y Luzt Wingert, y en algunas ocasiones Helmut Dubiel y Axel Honneth. La causa fue que Jürgen Habermas obtuvo el prestigioso premio alemán Gottfried Wilhelm Leibniz, y con ello la benevolente cantidad de dos millones de marcos. Explica Müller-Doohm (2020) que dicha cantidad tenía que invertirse "en el plazo de cinco años en un proyecto que el premiado" era libre de seleccionar y por lo cual "Habermas crea un grupo de investigación de filosofía del derecho en la Universidad de Fráncfort, al que pertenecen filósofos, sociólogos y juristas" (pp. 267-283).

Son muchos los resultados de este grupo, pero quizá uno de los más representativos fue la monumental obra *Facticidad y validez*, escrita por Habermas, pues en ella el filósofo alemán plasma su concepción del derecho.

Su propuesta, en esencia, es una aspiración normativa, ya que dice cómo debe ser el derecho. Otra cosa distinta es que —en esa construcción— él tenga muy claro que es necesario navegar entre teorías normativas y descriptivas del derecho. Cuida de señalar que no pasa por alto que el derecho es un fenómeno complejo que vive en una tensión permanente entre facticidad y validez; tensión que se divide en externa e interna. En el ámbito externo, el derecho (validez) surge como un concepto normativo que se enfrenta a la complejidad de la sociedad (facticidad). En el ámbito interno, el derecho tiene que resistir la pugna que surge del concepto *validez*, entendida como una imposición coactiva (facticidad), o bien, como un concepto normativo que va más allá de la literalidad del enunciado o de dicha fuerza (validez).

A pesar de la tensión externa e interna, él, a diferencia de otras propuestas, no ve una desventaja; al contrario, ve una ventaja. Por usar

una metáfora: el derecho sirve como una especie de resortes de tensión para sostener la plataforma de un trampolín. Si en lugar de resortes hubiera un mecanismo fijo, no permitiría el movimiento. Por el contrario, si hubiera un mecanismo blando, caería al suelo el objeto de peso.

Por ello tiene razón Vallespín, cuando escribe que la propuesta habermasiana "es un hechizo por el cual las asimetrías que observamos en la realidad se pliegan a una reconciliación conceptual nítida y sin fisuras", o para decirlo más claro: "detrás de este asombroso paseo por todas las avenidas del pensamiento contemporáneo, el lector escéptico se encuentra ante una situación similar a la de quien asiste a un número de magia: intuye que en algún lugar hay truco, pero es incapaz de señalar cómo ni donde se ha introducido" (Rawls & Habermas, 1998, pp. 9-41).

No ha tardado quien ya ha buscado descubrir el truco. Por ejemplo, en el mundo hispano, Juan Antonio García Amado (1993) dice que "como era de esperar, lo que Habermas hace es una aplicación de los postulados, generales y ya conocidos de su teoría de la acción comunicativa a la problemática iusfilosófica" (p. 236). Por su parte, Jiménez Redondo (2005) explica que la parte central de la propuesta jurídica está en el "sistema de los derechos y los principios del Estado de derecho" (p. 9); mientras que Juan Carlos Velasco Arroyo (2000) considera que la teoría jurídica habermasiana es una teoría de cierre, y por ello explica que " esta obra cubre una necesidad de orden intrasistématico: la articulación de una teoría discursiva del derecho… que cierre finalmente el triángulo de la racionalidad práctica configurada por la ética, el derecho y la política" (p. 79).

Así, este artículo parte de la tesis de Juan Carlos Arroyo: la propuesta discursiva es una teoría de cierre. Y para darle esa lectura es necesario revisar dicha propuesta jurídica desde una óptica de la preocupación especial de Habermas: "Ofrecer un nuevo fundamento normativo para la teoría social desde la reelaboración de la racionalidad en términos de la acción comunicativa" (Arroyo, 2000, p. 6).

En tal sentido, el objetivo del texto es el de servir de guía para adentrarse en el territorio de la propuesta jurídica habermasiana, desde el enfoque de la teoría social y la necesidad de encontrar un fundamento normativo (Arroyo, 2000, p. 6). Una vez concluida esta parte de preliminares, la ruta a seguir será la siguiente: lo primero que hay que anotar es cómo este enfoque parte del reto que significan las sociedades plurales. Enseguida, descubrir, en perspectiva constructivista, al derecho como solución a ese reto de las sociedades plurales. En esta última dirección merece especial atención tanto la legitimación de los procesos de producción del derecho como la legitimación de un orden de dominación. Porque una cosa es legitimar la construcción de la idea del derecho y otra

diferente es la de producir y aplicar las leyes que surgen de esa idea. Por utilizar un ejemplo: supongamos que una empresa desea adquirir un vehículo, entonces lo primero que se tendrá que hacer es justificar la adquisición del mismo. Pero una vez adquirido, lo segundo que hay que hacer —y cada vez que se use— es justificar su empleo. Aportar razones del porqué se usará en unos viajes y en otros no; justificar por qué lo manejará determinada persona y otra no.

Finalmente, no puede pasar desapercibido que la propuesta habermasiana ha recibido críticas. Aunque no será posible hacer un catálogo de ellas, al menos sí se deben nombrar tres de las principales críticas que han venido insistiendo en los fallos de esta alternativa. Y por último y a manera de conclusión, resulta importante señalar los retos que deja la teoría jurídica habermasiana.

II. Babel. El reto de las sociedades plurales

La pluralidad de las sociedades es una realidad. Hay diferencias ideológicas, culturales y sociales. Las diferencias no son superficiales, lo que defiende una religión es, precisamente, lo que combate otra. Lo que valora una cultura es lo que rechaza otra, y así las diferencias podrían continuar. Las diferencias antes eran silenciadas por mandato de la divinidad, de la historia, e incluso por orden de un dictador. Pero en estos tiempos es inaceptable que las diferencias sean silenciadas en nombre de la unidad, puesto que la unidad se debe formar a partir de la heterogeneidad. Y el único camino posible es a través del Estado democrático de derecho (Brudner, 2007).

Con base en lo anterior, el Estado democrático de derecho, como dice Prieto Sanchís (2004), debe hablar "con muchas voces" (p. 54). O como explica Rosenfeld, el modelo unitario de una sociedad homogénea, compacta y sometida a una sola expresión, ha quedado eliminado con la actual propuesta. Ante el declive de la homogeneidad surge la necesidad de reconocer la heterogeneidad, y ello ocasiona que la visión plural predomine en la formación de las instituciones políticas (Rosenfeld, 2004, pp. 119 y 120).

Sin embargo, esta tarea no es fácil. El Estado democrático de derecho debe hacer uso de múltiples herramientas que articulen los diversos discursos legitimantes y logren satisfacer las demandas de las personas. Para Habermas, una de estas herramientas —quizá la principal— es el derecho. Ciertamente, para él la función propia del derecho es la de estabilizar expectativas (Habermas, 2005, p. 200). Y estabilizar expectativas no es otra

cosa que asegurar y operar la integración social en una sociedad plural y compleja (Habermas, 2005, p. 99).

El papel central asignado al derecho por Habermas en esta tarea no es espontáneo; dio unas primeras pistas cuando construyó su teoría de la acción comunicativa. Y aunque en aquella ocasión, influenciado por la idea marxista de que el derecho sólo podía ser visto en términos de instrumento de dominación, titubeaba e incluso mostraba cierta desconfianza al derecho; en años posteriores cambió esta visión.

Para Habermas, la acción comunicativa se concibe como la forma en que "los actores coordinan sus planes de acción a través del entendimiento lingüístico; es decir se coordinan mutuamente de manera que utilizan para ello las fuerzas elocutivas vinculantes propias de los actos de habla" (Habermas, 2002, p. 117), y cuya finalidad última se desdobla en dos planos: en la teoría de la sociedad y en el ámbito filosófico-crítico. Así, como teoría de la sociedad buscará responder la pregunta "¿cómo es posible el orden social?" (Habermas, 1997, p. 479); mientras que como disciplina filosófica se encargará del análisis de la teoría del significado, la reconstrucción de la razón, la clarificación de la diversidad de los discursos y el estudio pragmático-formal de los procesos de entendimiento (Habermas, 1997, pp. 506 y 507).

Particularmente, la acción comunicativa, en su plano de la teoría de la sociedad, descubre que el derecho es una herramienta de integración. Aunque esta herramienta como tal no se identificaba en el derecho premoderno, pues había una fusión de política, moral y derecho en un solo discurso. Entonces, el derecho premoderno era legítimo en su producción y en su aplicación por una sencilla razón: nadie ponía en duda que el derecho venía de Dios (legitimación en el proceso de producción) y que las autoridades hablaban en nombre de él para resolver los conflictos (legitimación de un orden de dominación). Dicha tensión permanecía dormida mientras no se objetaban los fundamentos sacros del derecho. Pero la positividad —como indica su nombre— logró la emancipación, para expresarlo con claridad, de la mano de Dios. Ahora el poder del príncipe tiene validez por la fuerza material que posee, pero no es suficiente. La ausencia de la mano de Dios quita una validez que ahora se extraña; no basta con la mano del hombre para convencer sobre la validez del derecho, pues pelean por un espacio principal el discurso moral, el político y el derecho.

A partir de ese momento surge una variedad de teorías que buscarán explicar cómo lograr y justificar la legitimidad del derecho, en su proceso de producción y de dominación. Antes, la unidad entre derecho, moral y política no lo exigía.

III. Legitimación de los procesos de producción del derecho

Como ya se había adelantado, Habermas distingue dos planos de la legitimación del derecho: por un lado, la legitimación que debe buscarse al construir un sistema que vendrá a cumplir la función de estabilizar expectativas, y por otro lado, la legitimación que deberá respaldar a la función permanente que —una vez construido— tendrá que desarrollar el derecho a través de leyes concretas. Esto no quiere decir que sean temas separados, si acaso podría compararse con las caras de una misma moneda. Recuérdese el ejemplo que se mencionó líneas antes, sobre la adquisición de un vehículo: un tema es su adquisición y otra su uso.

Por lo que se refiere a los procesos de producción del derecho, Habermas afirma que éste se logra cuando aquel se convierte en el único discurso neutral, que permita la integración social y, al mismo tiempo, respete las iguales libertades de acción para las personas. Dicho de otra manera, dentro de la pluralidad, lo que asegura que yo sea escuchado en la colectividad de manera imparcial y, a la vez, permita la integración, es el derecho. Pero para entender los alcances de esta afirmación es necesario precisar qué entiende Habermas por formas de integración social y después justificar cómo el derecho se presenta como discurso neutral que respeta las iguales libertades de acción para las personas.

1. *Formas de integración en términos de la acción comunicativa*

Habermas explica que las personas en sociedad se pueden integrar de dos maneras: en uso de la conciencia de ellas, o bien, a sus espaldas. Pensemos, por caso, lo siguiente: cuando un grupo de personas decide realizar un viaje y definen en conjunto la ruta, el destino y las modalidades de viaje. Ahí hay una integración consciente. Pero cuando una persona utiliza un tipo de moneda y se integra con otras personas por motivos monetarios, no sabe (ni ella, ni con los que se relaciona) si esa moneda perderá valor o lo acrecentará. Hace uso de las monedas, pero los sucesos relativos a su valor se producen, por así decirlo, a espaldas de los participantes. Desde luego que Habermas no utiliza estos ejemplos; lo dice más o menos de esta manera: los papeles de las personas en ambos escenarios son distintos: en el mundo de la vida la persona mantiene su calidad de sujeto racional conforme a valores, normas y fines; por el contrario, en el sistema no importa su dirección, sino sólo el éxito logrado por la utilidad, la efectividad y la adhesión. Lo primero lo mantiene en calidad de sujeto agente; lo segundo lo relega a simple unidad a la "que se imputan las decisiones" (Arroyo, 2000, p. 23).

Por otro lado, y aunque es aventurado tratar de dar una definición precisa de estos conceptos, sí se pueden delimitar de la siguiente manera: el mundo de la vida es el entono social de las personas; el sistema es el entorno del dinero (economía) y del poder (administrativo y político).

El mundo de la vida tiene tres componentes: cultura, sociedad y personalidad. Cada uno de ellos, a su manera, genera la integración de las personas. La cultura lo hace a través de patrones generados por las tradiciones, y con ello permite el consenso; la sociedad, por su parte, lo hace a través de la idea de la solidaridad surgida por la pertenencia a grupos, y la personalidad dota de lenguaje y acción al sujeto para expresar su propia identidad y permitir su participación en procesos de comunicación (Habermas, 1989, p. 405). Un ejemplo narrado por Habermas podría aclarar lo anterior:

> El albañil veterano que manda a un colega más joven, recién contratado, a buscar cerveza y le pide que se dé prisa y esté de vuelta en un par de minutos, parte de que los implicados, aquí el destinatario y los que le escuchan, tienen cierta la situación: la proximidad de la hora del almuerzo es el *tema*; el ir a buscar la bebida un *fin* relacionado con ese tema; uno de los colegas más viejos concibe el *plan* de mandar por la bebida al "nuevo", que dado su *status*, difícilmente puede sustraerse a esa exigencia. La jerarquía informal del grupo de trabajadores ocupados en la obra es el *marco normativo* en que uno puede exigir a otro que haga algo. La situación de acción viene definida por la pausa para el almuerzo en lo que toca al *tiempo* y por la distancia entre la obra y el puesto de bebidas más próximo en lo que se refiere al *espacio*. Pero si ocurre que al puesto de bebidas más próximo no se puede llegar en un par de minutos, es decir, que el plan que ha concebido uno de los trabajadores veteranos, a lo menos dada esa condición, sólo se puede poner en práctica *contando* con un coche (u otro vehículo), el interpelado tal vez responda, pero si yo no tengo coche. El trasfondo de una emisión comunicativa lo constituyen, pues, definiciones de la situación que han de solaparse suficientemente para cubrir la necesidad actual de entendimiento. (Habermas, 2003, pp. 172 y 173)

En el anterior ejemplo, la cultura se presenta por el plan diseñado por el veterano en razón a la proximidad del almuerzo (tema); el mandar por las bebidas del almuerzo hace suponer que es para compartirlo (solidaridad generada por lo colectivo), y la réplica que hace la persona que no tiene coche no es por negarse a ir, sino por expresar la imposibilidad de cubrir la orden en los términos indicados (personalidad que dota de lenguaje).

Habermas dice que el mundo de la vida tiene éxito cuando se logra la acción comunicativa, y, en consecuencia, una integración social que ge-

nera el consenso sin coacciones y a través de convicciones racionalmente motivadas. Los tres elementos del mundo de la vida funcionan plenamente. La reproducción cultural posibilita esquemas de interpretación susceptibles de consenso; la integración social viabiliza relaciones interpersonales legítimamente reguladas, y el desarrollo de la personalidad libera las capacidades de interacción. Pero el mundo de la vida también puede fracasar, y esto puede suceder si los elementos del mundo de la vida no funcionan adecuadamente. Esto es resultado de lo que él llama *perturbaciones* y *absorciones*. Las primeras se presentan al interior del mundo de la vida; las segundas son invasiones externas.

Las perturbaciones se presentan cuando hay pérdida de sentido en la reproducción cultural; la integración social se transforma en anomia, y la personalidad, en lugar de liberar capacidades de interacción, desarrolla psicopatologías que las impide (Habermas, 2003, p. 203).

Hay absorción, al exterior, cuando los sistemas invaden el mundo de la vida. En esto tenemos que recordar que la idea de sistemas en Habermas es deudora de Luhmann, para quien los sistemas "se definen por aquellos modos de operación mediante los cuales se produce y se reproduce a sí mismo" (Luhmann, 1997, pp. 115 y 116). Un sistema no requiere de la intervención de las personas, pues se regula por sí mismo con la finalidad de conservar su propia existencia o integridad. En los sistemas sólo se busca el cumplimiento de sus respectivos códigos para asegurar su propia supervivencia. "Cada sistema posee un código binario que lo distingue de los demás sistemas. Así, por ejemplo, el código del sistema político es gobierno/oposición; del sistema económico, dinero/no dinero; del sistema educativo, capaz/incapaz; del sistema moral, bueno/malo" (Castro, 2011).

En caso de que el sistema absorba (invada) al mundo de la vida se presenta el fenómeno de la colonización, que no es otra cosa que la pérdida de valores, normas y fines que permiten al agente ser sujeto de acción, y esta pérdida, consecuentemente, origina en el sujeto su transformación en unidad sujeta a procesos de las reglas de la economía y del sistema. Esto funciona de la siguiente manera: supongamos que, culturalmente (mundo de la vida), está desaprobado que el dinero (sistema) sustituya los sentimientos. Pero para la economía (sistema), los sentimientos (mundo de la vida) no importan, sino la generación del propio código, que es el dinero, por lo cual en este sistema es válido el desplazamiento de los sentimientos, aunque no lo sea en el mundo de la vida. Es decir, la balanza se tendrá que declinar a favor de uno u otro. Cuando la balanza se inclina a favor de los sistemas, estamos ante el fenómeno que Habermas llama *colonización*.

Por ello, Habermas asegura que el conflicto de nuestro tiempo ya no es la lucha de clases, sino el problema de la invasión del sistema en el mundo de la vida.

Ante ello, su propuesta se ofrece no sólo como una medida en contra de las perturbaciones al mundo de la vida, sino también como una alternativa en contra de esta colonización del mundo de la vida por parte del sistema, y se dirigirá a la búsqueda permanente de la humanización del mundo de la vida (Habermas, 2003, p. 562).

La acción comunicativa como muro de contención cumple una función al exterior, pero entonces ¿qué nos asegura que al interior del propio mundo de la vida las diversas concepciones y modos de vida se pongan de acuerdo? Esto guarda una relación con los diversos discursos que surgen en la integración social y, particularmente, en la interacción entre mundo de la vida y sistema.

2. *Discursos legitimadores y derecho*

Dentro de la exposición habermasiana se puede identificar una clasificación de discursos que son usados para la interacción entre las personas: los discursos legitimadores y los artificiales. Habermas, en ningún pasaje, lo señala de esta manera, pero una lectura integral de sus principales exposiciones autoriza hacer esa clasificación.

Los discursos legitimadores son usados dentro del mundo de la vida o de los sistemas, o en la relación entre ambos para generar la integración social. A manera de metáfora, el mundo de la vida y los sistemas son plataformas, y los discursos son las categorizaciones de la información. Piénsese, por ejemplo, en el caso de Facebook (plataforma) y los grupos que se crean de amigos, seguidores, etcétera (discurso). Por eso es necesario identificar cada uno de estos discursos, para poder navegar adecuadamente en la plataforma.

Habermas hace una clasificación entre razones pragmáticas, éticas y morales. La base de esta clasificación permite también referirse a discursos legitimantes, por lo que las razones pragmáticas constituyen al discurso pragmático; las éticas, al discurso ético, y las razones morales, al discurso moral. Situación especial merecerían las razones jurídicas (discurso jurídico) y las políticas (discurso político). Más adelante se volverá sobre este punto.

Reanudando el tema de la clasificación en los tipos de razones, hay que ver el objeto que persigue cada una de ellas. En las razones pragmáticas, si yo deseo un fin, entonces busco los medios racionales, entendidos éstos como conductores de eficiencia. Deseo trasladarme con rapidez

de un lugar de la ciudad a otro, la razón —pragmática— eficaz me indica que es mejor hacerlo en un automóvil que a pie. Ahora bien, deseo llegar rápido, pero soy un ecologista en contra del uso de automóviles. Es decir, tengo una razón ética, por lo que la razón pragmática no puede guiar mi conducta. Tendré que buscar una convincente para mi persona; podría, por ejemplo, seleccionar el irme a pie o utilizar una bicicleta, pero desecho la alternativa del automóvil. Aquí estaremos ante la presencia de razones éticas, y lo que buscan es alcanzar la vida buena.

Finalmente, quizá no busco ni un fin ni la vida buena (ambos deseados sólo por mí), sino la vida compatible con la de otros; o sea, una razón moral. Aquí, explica Habermas, la pregunta tradicional "¿qué debo hacer yo?" se sustituye por "¿qué se debe hacer?". Entonces, las razones son razones para actuar en un colectivo en el cual se tengan presentes los intereses de todos los involucrados. Estaremos, en este último caso, ante las razones de carácter moral.

La formación común deberá obtenerse en coordinación con el discurso apropiado para el tipo de cuestión que haya que resolver: si se trata de una cuestión moralmente relevante (aborto, distribución de la riqueza social, etcétera) habrá necesidad de acudir a los discursos morales (someter el tema al *test* de universalización). Ahora bien, si se trata de un asunto ético (migración, cuestiones étnicas, cultura política, etcétera), entonces la alternativa a seguir son los discursos éticos, pues "son discursos que penetran a través de los intereses y orientaciones valorativas, en los que se generó el desacuerdo y, que por vía, de procesos de autoentendimiento, nos hagan reflexivamente conscientes de concordancias profundas, radicadas en la propia forma de vida común" (Habermas, 2005, p. 233).

Si los discursos ordinarios no se mezclaran, no habría problemas. Pero en la realidad las personas tienen que enfrentar problemas complejos que afectan varios intereses, y de manera diversa, por lo cual los discursos se mezclan y eso genera la necesidad de crear discursos artificiales (diferentes a los ordinarios), de nivel superior, que busquen la armonía entre aquellos. Y de esta manera surgen la negociación y el derecho.

Un primer discurso artificial es la negociación. La negociación se ofrece como alternativa siempre y cuando los actores ganen más de lo que ganarían si no hubiera acuerdo. Pero este discurso artificial puede tener algunos riesgos. Uno de ellos es que, si la negociación no tuviera límites, se permitiría el negociar incluso con la eliminación de la diferencia, y esto no sería posible. Para evitar lo anterior surge el derecho como un segundo discurso artificial, que cuidará que no se violente el único derecho innato e innegociable: iguales libertades de acción.

3. *El único derecho innato: iguales libertades de acción*

Si en el mundo sólo existiera una persona, ese ser tendría libertad absoluta. Pero en el mundo no hay una sola persona; hay muchas que compiten por hacer valer su libertad absoluta. Aquí hay necesidad de buscar coordinación, pero esta coordinación, lejos de ser un asunto fácil, es bastante complicado. Esto es así, principalmente, porque de lo que se trata es de tener en cuenta, al mismo tiempo, tanto al individuo en su singularidad (y por lo tanto, satisfacer sus deseos personales, es decir, sus razones pragmáticas o éticas) como al individuo incrustado en la sociedad (y por ende, limitar algunos de sus deseos personales). Las y los teóricos de estas ideas han optado por relacionar la primera libertad con autonomía privada; la segunda con autonomía pública.

En otras palabras, se puede utilizar un ejemplo (ilustrativo, pero no exacto en cuanto al contenido de la propuesta habermasiana): X quiere hacer valer su deseo por silenciar a personas que hagan ruido, pues su religión impone tranquilidad (eticidad); por su parte, aquellas desean hacer eficaces sus pretensiones de validez por hacer ruido, ya que su forma de divertirse es, precisamente, haciendo ruido. Ante la ruptura del derecho sacro que tenía una autoridad ambivalente y podía imponerse, ahora X y los demás sólo aceptarán coordinarse si se les asegura que serán tomados en cuenta en el acuerdo de coordinación (autolegislación).

La gran fractura del fenómeno moral básico en dos "unilateralidades simétricas", que se comentó en líneas anteriores, muestra el complejo carácter individuo-comunidad que se refleja entre la tensión, por un lado, de la idea de "hacer valer la inviolabilidad de los individuos exigiendo igual respeto por la dignidad de cada uno de ellos" (Habermas, 2000, p. 20), y por el otro, de la idea de protección a "las relaciones intersubjetivas de reconocimiento recíproco en virtud de los cuales los individuos se mantienen como pertenecientes a una comunidad" (Habermas, 2000, p. 20). Esto es, en realidad, concluye Habermas, una tensión entre autonomía pública y privada.

Para enfrentar la tensión y respetar las dos autonomías hay que buscar cuál o cuáles son los derechos innatos. Y Habermas (2005) responde que sólo hay un derecho innato: el derecho a iguales libertades de acción (p. 158). Asimismo, Habermas explica que lograr las iguales libertades de acción significa que todas las normas que regulen la conducta de una persona deben hacer coincidir tanto al autor de la norma como al destinatario. Una norma me puede obligar si al mismo tiempo yo la hice o la autoricé. Esto, continúa Habermas, no es más que producir el derecho a partir de la autonomía privada y la pública.

Jean-Jacques Rousseau intenta resolver esta tensión entre individuo y colectividad. Cuando se pregunta sobre la forma de armonizar los intereses individuales con los colectivos, responde que la mejor manera es entender los intereses individuales (libertad o arbitrio) como una idea estrechamente vinculada con la idea de razón. Esta idea de razón no es otra cosa que el seguir las pautas de una comunidad ética cuyos miembros se orientan hacia el bien común o voluntad general. Es decir, la razón le pertenece al colectivo: los intereses individuales valen en la medida que buscan esa voluntad general. Por el contrario, los intereses que se separan de ese bien carecen de valor alguno.

Pero Rousseau es consciente de que una mayoría podría afectar a una minoría utilizando como herramienta una falsa idea de la voluntad general. Como defensa, Rousseau ofrece el carácter general y abstracto de las leyes: una mayoría no podría abusar de una minoría, pues las leyes generales y abstractas no diferencian entre ciudadanos. Las leyes benefician o perjudican parejo. Por eso una mayoría no puede abusar de la minoría, ya que en ese abuso la persona estaría creando las leyes para su propio daño. De todo ello, concluye Rousseau, cuando se logra la voluntad general y ésta produce leyes (abstractas y generales) dichas leyes son de carácter obligatorio, e incluso impuestas bajo amenaza de coacción.

Habermas critica está solución; se muestra insatisfecho porque no encuentra cómo hacer que los individuos inconformes con la voluntad general puedan respetar dicha voluntad general por su propio arbitrio y no por la imposición de una coacción. En Rousseau, la lectura ética de la autolegislación ocasiona que la autonomía privada (derechos humanos) se vea sacrificada en nombre de la autonomía pública (soberanía popular) o, mejor dicho, la idea de autolegislación fracasa porque los destinatarios de las normas no siempre resultan ser los mismos que los autores.

Un siguiente intento es el de Immanuel Kant. Para Kant también la tensión tiene como punto de arranque la idea de autonomía bajo el binomio libertad-razón. Pero a diferencia de Rousseau, Kant considera que la razón no le pertenece al colectivo, sino al individuo: éste obtiene sus derechos pre políticos de la administración de recursos propios y "cognitivos que son independientes de las tradiciones religiosas y metafísicas". Ahora bien, dicho individuo logra su incrustación en el colectivo porque su razón "individual", al estar guiada por un objetivo común, o bien, supremo, llega al mismo punto que las otras voluntades: ese *mío* o *tuyos* internos, al aplicarlos al *mío* o *tuyo* externo, produce la conciliación entre individuo y colectividad (Habermas, 2005, p. 166).

Para Kant, visto de esta manera, no puede haber tensión entre la autonomía privada y la pública, puesto que "partió de que nadie puede

asentir en el ejercicio de su autonomía ciudadana a leyes que vulneren la autonomía privada asegurada por el derecho natural". Esto es, el derecho natural pre político (léase autonomía privada) no se contrapone a los derechos políticos (léase autonomía pública) porque Kant nunca imaginó que alguien podría poner en duda el contenido del derecho natural pre político (Habermas, 2005, pp. 196 y 197). En todo caso, la autonomía en Kant se obtiene de una lectura moral, por lo que la supremacía es de la autonomía privada. Aquí, subraya Habermas, el propósito de la autolegislación falla, pues de nueva cuenta los destinatarios de la norma no son los mismos que sus autores.

Habermas observa que ambos autores equivocan el camino por no tener en cuenta dos puntos principales: primero, tanto la propuesta de Rousseau como la de Kant son omisas al identificar los diversos discursos legitimatorios que existen para la formación de acuerdos. Rousseau le apuesta al discurso ético; Kant al discurso moral. Y ambos olvidan el discurso pragmático. Segundo, ambos autores están influidos por la filosofía del sujeto.

En cuanto al tema de los discursos legitimatorios, Habermas dice haber superado ese punto, pues él sí tiene una tipología de discursos que, como ya se dijo, son éticos, pragmáticos y morales. Junto a ellos estarán los artificiales, como son el de la negociación y el derecho.

Por lo que se refiere a la filosofía del sujeto, explica Habermas que cuando se abandona la filosofía del sujeto y se hace uso de una propuesta como la suya (la comunicativa), el discurso racional ya no tiene que gestarse ni en el sujeto individual (Kant) ni en el sujeto colectivo (Rousseau). Esto es:

> La legitimidad del derecho se basa en última instancia en un mecanismo comunicativo: como participantes de discursos racionales los miembros de una comunidad jurídica han de poder examinar si la norma de que se trate encuentra, o podría encontrar, el asentimiento de todos los posibles afectados. Por lo tanto la conexión interna que buscamos entre soberanía popular y derechos del hombre consiste en que en el sistema de los derechos se recogen exactamente las condiciones bajo las que pueden a su vez institucionalizarse jurídicamente las formas de comunicación necesarias para una producción de normas políticamente autónomas (Habermas, 2005, p. 169).

En otras palabras, el mecanismo comunicativo sirve como mediador entre la individualidad y la colectividad sin sacrificar a ninguna de las dos autonomías. Dicho mediador "reciclará" la tensión (negativa) en una positiva: las fuentes de legitimación no pueden disponer a voluntad (Habermas, 2005, pp. 184 y 185). Imagínese, por ejemplo, el caso de dos su-

jetos tirando de una cuerda. Uno tirará de su lado y lo mismo hará el otro. Lo que hacían las filosofías del sujeto era representar la autonomía con uno de los dos sujetos. Cuando el individuo se fortalece por criterios morales nomológicos (Kant) el "en medio de la cuerda" pasa del lugar central y se va del lado del individuo. Cuando el colectivo se fortalece por criterios éticos, el "en medio de la cuerda" se va para su lado.

En oposición, Habermas sigue dejando intacta tanto la autonomía privada como la pública (Habermas, 2005, pp. 184 y 185), pero le resta el poder de sobreponerse uno sobre otro. La propuesta comunicativa vendría a ser una especie de intermediario mecánico o artificial (es decir, sin ser un sujeto) que asumirá la tensión y la canalizará hacia un objetivo común: la formación de una voluntad común. Nótese que el intermediario no resta fuerza a los dos sujetos; al contrario, les deja su fuerza, pero lo que hace es conectar el "en medio de la cuerda" a otro objetivo. Así, tanto autonomía privada como pública tiraran hacia un solo objetivo.

Salvados estos dos temas —el de la eliminación de la filosofía del sujeto y la inclusión de los diversos discursos legitimatorios— ofrece un modelo de derechos que cumple con la promesa de la autolegislación y, al mismo tiempo, garantiza una voluntad racional (McCarthy, 1987, p. 222).

Con esto en mente, Habermas inicia planteando el principio universal (derivado de la máxima kantiana), que sirva como postulado universal, de todos aquellos que buscan —en una lógica del discurso práctico— llegar a un acuerdo. Y su principio es el siguiente: "(D) Válidas son aquellas normas (y solo aquellas normas) a los que todos los que puedan verse afectados por ella pudiesen prestar su asentamiento como participantes en discursos racionales" (Habermas, 2005, p. 172).

Este principio D se convierte en una herramienta neutral ante los demás discursos legitimadores, e incluso el artificial, que es la negociación, y permitirá que las diversas personas se pongan de acuerdo, aunque no coincidan con el tipo de discurso que cada quien emplea. Pensemos, por ejemplo, lo siguiente: un grupo de personas discute la obligatoriedad de inyectarse una vacuna en contra de una pandemia. Habrá personas que acepten colocársela por motivos morales (solidaridad con la sociedad); otras por motivos éticos (conservar la vida de acuerdo con su religión), y otras más por fines únicamente pragmáticos (conservar la vida para seguir bebiendo alcohol). Sea como fuere, se ha logrado que los tres tipos de personas den su aquiescencia.

Habermas no encuentra justificación para rechazar su principio D en una comunidad de personas razonables, pues, siguiendo la teoría del desarrollo de la conciencia moral de Kohlberg (Almagiá, 1987), considera que el consenso fundado en el entendimiento es posible (Martínez, 2011, p. 29).

Sin embargo, para que tanto autonomía privada como pública apunten hacia un solo objetivo, precisa Habermas, la clave está en una nueva propuesta de derechos humanos acorde con su alternativa comunicativa. Esta nueva propuesta deberá sustituir a la "tradicional" teoría de los derechos humanos.

4. *El sistema de derechos que asegura las iguales libertades de acción*

Con el principio D se ha establecido una regla base para empezar a jugar, pero quedan muchas más precisiones, pues el principio D es tan abstracto, que necesita materializarse, primero, a través de un sistema de derechos, y después, en la aplicación de esos derechos. Es como decir que la finalidad del ajedrez consiste en que uno de los bandos dé jaque mate al rey. Eso sería el principio D. No obstante, faltan las reglas específicas de los movimientos, que serían las reglas generales del juego. Y estas reglas generales del juego es el sistema de derecho. Después de esas reglas generales habría que revisar los casos concretos de aplicación.

Ahora bien, por lo que se refiere a las reglas generares del juego, o, por decirlo en términos habermasianos, el sistema de derechos, debe destacarse que éstos cumplen, según Habermas, con la aspiración de autolegislación: los destinatarios de la norma son, al mismo tiempo, sus autores. Por un lado, respeta la autonomía privada de los individuos, pues cada persona actuará conforme a sus valores, normas y fines (Habermas, 2005, p. 186), pero también se verán obligados a respetar la autonomía pública, pues desde el momento mismo en que aceptan entrar al proceso comunicativo (jugar pues), tienen que aceptar que hay derechos (el sistema de derechos) indispensables para la formación del acuerdo. Es decir, autonomía privada y pública —que en el ámbito moral sólo forman una (Habermas, 2004, p. 160)— permiten que el agente intervenga en la responsabilidad de contraer obligaciones ilocucionarias (auto) y, al mismo tiempo, que si llegan a entrar establezcan el contenido de dichas obligaciones y sus respectivos derechos (legislación).

Habermas, para fundamentar el sistema de los derechos, tiene que elaborar una fórmula (categoría) de derechos a través de la cual puedan derivarse las otras, pero que, a su vez, mantenga una génesis lógica con el principio del discurso. Influido por la tesis kantiana, la propuesta de Rawls, y sobre todo de la clasificación de Thomas Marshall, diseña una propuesta que no enumera derechos, sino que establece las reglas para generarlos.

Ahora bien, el autor en estudio reconoce cinco categorías de derechos. Y el primer derecho que todas las personas deben aceptar para

poder "jugar" dentro del Estado democrático de derecho es el de reconocerse el mayor grado posible de libertad e igualdad.

La segunda categoría la componen aquellos derechos que permiten la inclusión de las personas en la vida política. Este es un agregado eminentemente habermasiano. La política —vía pertenencia— es el escenario donde el principio del discurso se materializa; sin ella las iguales libertades "no aterrizan". Importante: Habermas no limita la participación a los no ciudadanos, sino que, precisamente, señala que es un derecho ser ciudadano y participar en los asuntos políticos. Por ello, cuando se declara partidario de una ciudadanía cosmopolita, lo que hace es expandir su idea de este derecho correlativo. Habermas lo ha expresado enfáticamente: "Los derechos humanos y civiles reconocidos a los individuos deben atravesar ahora todas las relaciones internacionales" (Habermas, 2005, p. 122).

La tercera categoría de derechos se integra por todos aquellos que permiten accionar. O sea, los que ponen en movimiento la maquinaria judicial y estatal, pues de nada serviría contar con derechos sin tener medio de acceso a aquellos.

La cuarta categoría está compuesta por los derechos que permiten participar en la opinión pública.

Por último, la quinta categoría la conforma el derecho a condiciones de vida social, técnica y ecológicamente para lograr la igualdad de oportunidades. Es decir, aquí ubica Habermas los derechos sociales, los derechos a las nuevas tecnologías y el derecho humano a disfrutar de condiciones ambientales de calidad aceptable.

Este sistema de derechos, en suma, es lo que dota de legitimidad al proceso de producción del derecho. Pero todavía falta que el modelo explique la legitimación de un orden de dominación.

IV. Legitimación de un orden de dominación

La creación, o, mejor dicho, la justificación del derecho en términos de un sistema de derechos que aseguren las iguales libertades de acción, da razones suficientes para aceptar que existe un derecho legítimo en cuanto a su producción. Pero el derecho una vez creado es una especie de "árbol vivo" (Waluchow, 2009) que tiene que legitimar de momento a momento su poder de dominación. Dicho de otra manera, y aquí se repetirá el ejemplo que se colocó líneas atrás: supongamos que está justificado comprar un vehículo, pero una cosa es justificar su compra y otra es justificar su uso diario.

La legitimación del orden de dominación tiene que vigilar dos subprocesos. El subproceso de creación de las leyes, o como él le llama, la géne-

sis de las normas (Habermas, 2005, p. 338), y que atañe particularmente a la relación entre política y derecho, y el subproceso de aplicación del derecho, y que atañe a la relación entre derecho y los operadores institucionales de justicia (jueces).

La primera idea descansa en su propuesta de producción legislativa; la segunda en su proceso de aplicación. En el proceso de producción legislativa la teoría discursiva tendrá que resolver cómo deben aprobarse las normas específicas de un Estado democrático de derecho; por su parte, en el proceso de aplicación deberá justificar la resolución de los casos concretos jurídicos.

1. *La creación de leyes*

La sociedad necesita de leyes y de instituciones que vigilen su cumplimiento. Éstas no pueden surgir únicamente por el reconocimiento del sistema de derechos. Se requiere de algo que ayude a materializar los acuerdos y a vigilar su cumplimiento. Esto, afirma Habermas, lo hace el poder político.

Habermas entiende por *poder político* la estructura de acción y con capacidad de materialización que tienen los poderes públicos. Bajo la anterior idea, reitera que el derecho tiene como finalidad la estabilización de expectativas de comportamiento. Por su parte, explica, la función propia de la política es la realización de fines colectivos. Tal distinción de funciones propias no es impedimento para que se presten auxilio recíprocamente. Así señala que la política auxilia al derecho, al dotar de seguridad jurídica a los destinatarios de las normas. Un poder político institucionalizado, subraya, "responde a una codificación que presta a las reglas jurídicas un mayor grado de consistencia y de explicitación conceptual".

Por otro lado, el derecho también presta auxilio al poder político, y este auxilio es en virtud de que el derecho "no se agota en normas rectoras del comportamiento", sino que también "genera instituciones estatales, procedimientos y competencias" (Habermas, 2005, p. 212). Dicho de otra manera, el derecho pone las reglas y el poder político la materialización. Imagínese, por caso, la meta de llegar a un rumbo determinado: el derecho pone la gasolina y el poder político, el vehículo.

Tener clara la idea de separación entre derecho y política significa también clarificar que puede haber Estados políticos sin derecho, pero no debe haber derecho sin Estado. Esto se entenderá mejor si se subraya que para Habermas la relación posconvencional entre el derecho y la política surge, precisamente —más allá de la forma legal—, "por un procedimiento legislativo que engendra legitimidad en la medida en que

garantiza discusivamente las perspectivas públicas de la sociedad en general" (Quintana, 1996, p. 39).

Para decirlo pronto, el poder político institucionaliza el principio de neutralidad porque él, como poder institucionalizado, se convierte en el centro, a manera de regulador central, de los diversos discursos presentes en las sociedades contemporáneas (pragmáticos, ético-políticos, negociaciones y discursos morales). Y aunque todo el poder político institucionalizado tiene el deber de regular los discursos, el Poder Legislativo es el que tiene la mayor importancia en este modelo, pues en él se genera el

> Recurso ilimitado a razones normativas y pragmáticas, incluyendo las constituidas por los resultados de negociaciones *fair,* lo tiene solamente el legislador político, más ello solamente en el marco de un procedimiento democrático atenido a la perspectiva de fundamentación de normas (Habermas, 2005, p. 261).

El Poder Legislativo deberá captar las demandas ciudadanas y transformarlas en leyes. El proceso será simple: deberá escuchar y rendir cuentas a la sociedad civil y la opinión pública. Estos últimos son poderes informales de legitimación, y su función consiste, justamente, en trasladar e impulsar los conflictos que se producen en la periferia hacia el sistema político. Para ello, sociedad civil y espacio de la opinión pública deben mantener una separación tajante con el Estado y su correlativo (el espacio de la política pública). El espacio de la opinión pública, explica, "es como una red para la comunicación de contenidos y tomas de postura, es decir, de opiniones, y en él los flujos de comunicación quedan filtrados y sintetizados de tal suerte que se condensan en opiniones públicas gavilladas en torno a temas específicos" (Habermas, 2005, p. 440).

Por su parte, el núcleo de la sociedad civil "la constituye una trama asociativa que institucionaliza los discursos solucionadores de problemas, concernientes a cuestiones de interés general, en el marco de espacios públicos más o menos organizados" (Habermas, 2005, p. 447). Consciente Habermas de la diversidad de significados adjudicados a la sociedad civil, él, siguiendo a Arato y Cohen (Cohen, 2012), señala las características de la sociedad civil en términos del discurso: 1) pluralidad: se abarca la más amplia gama de sectores, como son las familias, grupos informales o asociaciones voluntarias; 2) publicidad: instituciones culturales y de comunicación abiertos y conocidos por todos; 3) privacidad: ámbito libre para el autodesarrollo personal y la elección moral, y 4) legalidad: leyes que permitan y promuevan el desarrollo de las anteriores características

y también garanticen que ellas mismas se desarrollen dentro del marco legal.

Siguiendo a los mismos autores, Habermas enumera las condiciones en las que debe desarrollarse dicha sociedad civil. Primero, esta sociedad civil está pensada para contextos de una cultura política desarrollada, y entiende por una cultura política desarrollada aquella en donde se respeta "el ejercicio de las libertades, y de los correspondientes patrones de socialización, así como sobre la base de una esfera de la vida privada, que mantenga su integridad, es decir, sólo pueda formarse en un mundo de la vida ya racionalizado" (Habermas, 2005, p. 452). Segundo, la opinión pública sirve para ejercer influencia y no para tener poder político. Tercero, la sociedad civil no debe aspirar a la organización en conjunto de sí misma.

La vigorosidad de la que dota Habermas a la sociedad civil genera efectos importantes en su propuesta y marca la diferencia con las teorías que le anteceden. De esta manera él, en primer lugar, le confiere al discurso político la característica de ser un centro operativo de diversos discursos generados en la sociedad civil y la opinión pública para la formación de leyes; en segundo lugar, replantea el concepto de soberanía, y en tercer lugar, reconfigura la tradicional división de poderes.

Acerca del discurso político como centro operativo de diferentes discursos, explica Habermas que aquel tendrá que justificar que ha logrado enfrentar la diversidad de discursos en un solo discurso político. La democracia, desde luego, no sustituye las reglas de los otros discursos, pues no es su finalidad desaparecerlas, sino, precisamente, respetarlas. La función, en este caso, del principio del discurso, es la institucionalización de dicho proceso formativo y regulado por el sistema de derechos que garantiza a todos los actores una participación comunicativa en plano de iguales libertades (Oquendo, 2002, p. 191).

Con respecto al concepto de soberanía, para Habermas, ésta debe adquirir un nuevo rostro, y este nuevo rostro ya no encarna en un sujeto, sino se dispersa en el espacio público. El poder soberano aquí no será otra cosa que el poder comunicativo de los ciudadanos. Siguiendo a Arendt, explica Habermas que el poder comunicativo "surge ahí donde se produce una formación de la opinión y la voluntad comunes, que con la desencadenada libertad comunicativa de cada uno «para hacer uso público de su razón en todos los aspectos», hace valer la fuerza productiva que representa una «forma ampliada de pensar»" (Habermas, 2005, p. 215). Por ello, el poder se presenta en forma más pura cuando

> …los revolucionarios toman el poder que está en las calles, cuando una población decidida a la resistencia pasiva hace frente a los tanques extranjeros con sólo sus manos; cuando minorías convencidas cuestionan la legitimidad de leyes vigentes y ejercitan la desobediencia civil; cuando en los movimientos de protesta irrumpe el puro placer de la acción. (Habermas, 2005, p. 216)

El otro punto importante es el relativo al tema del principio de división de poderes. La tradición liberal distribuye funciones, pero para él la división de poderes no se agota únicamente en dicha distribución, sino además en dotarlo de poder comunicativo. La diferencia entre una y otra tarea se puede ver en el caso de un estado institucionalizado que distribuye el poder político sin importarle el poder comunicativo.

Colocar al poder comunicativo como centro de la nueva distribución de poderes tiene consecuencias al momento de distribuir funciones entre cada uno de ellos. En primer lugar, las funciones se definen con base en discursos argumentativos. El discurso argumentativo del Poder Legislativo, por ejemplo, es el de la fundamentación de las normas y consiste en "institucionalizar formas de comunicación necesarias para la formación racional de la voluntad política" (Habermas, 2005, p. 248), y por ello deberá dar apertura a los distintos tipos de discurso (ético-políticos, morales y pragmáticos). El discurso argumentativo del Poder Judicial, por otro lado, es el de aplicación de las normas, y éste consiste en tomar "una decisión acerca de cuál de las normas presupuestas como válidas es la que se ajusta a una situación descrita de la forma más posible en todos sus rasgos relevantes" (Habermas, 2005, p. 240). El discurso argumentativo del poder administrativo, por su parte, consiste en resolver cuestiones de eficiencia. La administración, detalla Habermas, puede "seleccionar tecnologías y estrategias de acción, pero con la reserva de que —a diferencia de los sujetos jurídicos privados— esas autoridades no persigan sus propios intereses y preferencias" (Habermas, 2005, p. 261). La misma separación —en estos términos— asegura que el Poder Ejecutivo sólo quede limitado a las funciones de aplicación que se le han ordenado, pues "la administración no tiene ninguna capacidad de intervenir en las premisas a las que ha de atenerse en sus decisiones" (Habermas, 2005, p. 241).

La finalidad de esta nueva perspectiva de división tiene como objetivo proteger, institucionalmente, los derechos individuales, ya que a través de dicha división queda "garantizada tanto la seguridad jurídica como la aceptabilidad racional de las decisiones judiciales".

2. *La aplicación de las leyes*

Ronald Dworkin narra la siguiente anécdota:

> Siendo Oliver Wendell Holmes *Jr.* magistrado del Tribunal Supremo, en una ocasión de camino al Tribunal llevó a un joven Learned Hand en su carruaje. Al llegar a su destino, Hand se bajó, saludó en dirección al carruaje que se alejaba y dijo alegremente: "¡Haga justicia, magistrado!". Holmes paró el carruaje, hizo que el conductor girara, se dirigió hacia el asombrado Hand y, sacando la cabeza por la ventana, le dijo: "¡Ese no es mi trabajo!". A continuación el carruaje dio la vuelta y se marchó, llevándose a Holmes a su trabajo, supuestamente consistente en no hacer justicia. (Dworkin, 2007, p. 11)

El dilema entre hacer justicia o aplicar el derecho es un debate permanente en la teoría jurídica. Y es justamente este dilema el que Habermas presenta como el tema de la aplicación del derecho. Explica que la legitimación de un orden de dominación puede ser explicada por la fuerza que surge de las sanciones de un derecho vigente, o bien, por invocar normas racionalmente aceptables. Y, en concreto, se presenta cuando el juzgador tiene que emitir sentencias, pues por un lado debe conservar la seguridad jurídica para los destinatarios de la norma y, por otro, dictar sentencias razonablemente aceptables. Piénsese, por ejemplo, en el caso de una norma que haya sido elaborada hace 200 años y que margina los derechos de la mujer. ¿Se aplica la norma en nombre de la seguridad jurídica o se evade en nombre de la corrección normativa?

Ahora bien, explica que hay tres principales posturas que han intentado responder a dicha cuestión: la hermenéutica, el realismo y el positivismo.

La propuesta hermenéutica considera que el problema puede ser enfrentado exitosamente si consideramos que la norma, aunque tenga un texto expreso (regla), debe interpretarse conforme a "principios históricamente acreditados", y con ello desaparece el problema. Sin embargo, Habermas le reprocha a esta propuesta que invocar esos principios históricamente acreditados tiene dos defectos: el primero consiste en que sólo habría justicia con base en una concepción del pasado y poco se podría definir en relación con el futuro; el segundo estriba en que invocar los "principios históricamente acreditados" es, en realidad, la imposición de un "*ethos* dominante" que no da cabida a la pluralidad de concepciones surgidas en una sociedad.

La propuesta realista del derecho resuelve el problema al señalar que los jueces deciden de momento a momento qué es el derecho, y en esta decisión cuidan proteger tanto la seguridad jurídica como la correc-

ción normativa. Habermas considera que no es así; señala que las sentencias, vistas de esta manera, están cargadas con decisiones políticas, lo que impide proteger la seguridad jurídica, pues las normas titubean en el mar de las incertidumbres ocasionadas por la política o por un fuerte decisionismo judicial.

Finalmente, el positivismo considera que el derecho es un sistema cerrado que puede solucionar por sí solo sus problemas sin acudir a la moral o a la política. La base de todo el sistema jurídico son las reglas cuya fortaleza radica, justo, en que no pueden ser cambiadas ni alteradas; pero esto, dice, es como confundir forma con fondo. La seguridad jurídica triunfa, pero desaparecen los rastros de una fundamentación normativa.

Entonces, al no convencerle ninguna de las tres propuestas anteriores, acude a Ronald Dworkin. Para Dworkin, la tensión entre seguridad jurídica y corrección normativa no es otra cosa que buscar una respuesta correcta a la solución de los casos difíciles. En la solución de los casos difíciles, el juez deberá tener presentes los tipos y funciones de las pautas normativas: reglas[2] y principios, así como las directrices políticas. Las reglas obedecen a una estructura formal y se sujetan a la teoría hartiana de la distinción entre reglas primarias y secundarias. Ordenan las primeras; reglamentan a las primeras las segundas. Pero además de las reglas formales, también existirán a su lado ciertas disposiciones (principios) que tendrán como referente la idea de justicia, equidad o cualquier otra disposición de la moralidad. Por último, las directrices políticas son propuestas que deberán ser alcanzadas en beneficio de la comunidad (Dworkin, 2002, pp. 72-76).

Dworkin amplia la caja de herramientas en las que podrá apoyarse un juez para encontrar la respuesta correcta. En esa caja, el juez dworkiano encontrará principios, directrices políticas y reglas; es decir, hay espacio para las ideas de los hermenéuticos, los realistas y los positivistas. Y con estas herramientas deberá acercarse, lo más humanamente posible, a dicha respuesta, pues si no se le puede exigir que la alcance, al menos sí se le puede demandar que se esfuerce por alcanzarla.

Su modelo de un juez es capaz de poner en marcha los procesos de legitimación e integración de la sociedad en sus resoluciones; es un personaje ideal para la conciliación de la tensión entre la seguridad jurídica y la corrección normativa, ya que, como observa Habermas

[2] Coloco la expresión *reglas*, y no *normas*, considerando dos distinciones convencionales: 1) las reglas forman parte del conjunto de normas, y 2) las reglas en su uso prescriptivo, que caracteriza a las leyes del Estado. Sobre este tema véanse (Rodríguez, 2021, pp. 40-49), (Schauer, 2004).

> ...dispone de dos ingredientes de un saber ideal: conoce todos los principios válidos y todos los fines y objetivos que son menester para la justificación; al mismo tiempo tiene una perfecta visión de conjunto de la densa red de elementos enlazados por hilos argumentativos, de que consta el derecho vigente con el que se encuentra (Habermas, 2005, p. 282).

Pero Habermas, a pesar de la atracción al modelo dworkiano, le formulará dos principales objeciones: una, que sobre ésta "se extiende la sombra de fuertes idealizaciones", y estas idealizaciones descansan, en buena medida, en la ficción del juez Hércules; dos, que este juez invade funciones de constructor de derecho cuando el único constructor autorizado es el legislador.

Sobre la primera objeción Habermas observa que la figura idealista del juez Hércules es producto de una posición monológica, y apoyado en Michelman, señala que el juez Hércules es un juez solitario.

Con base en lo anterior, Habermas explica que al aplicar el derecho el juez deberá "dialogar" con las partes involucradas, y que lo hará a través de un proceso de argumentación. De tal manera que la ley que se aplique resultará legítima desde el momento en que tiene como guía al propio texto de la ley, pero que también explica por qué esa ley debe ser aplicada en ese caso concreto.[3] Ante todo esto, Habermas, al decir de Alexy, genera "muchas aportaciones importantes para una teoría de la argumentación racional" (Alexy, 1989, p. 142). En todo caso, lo que Habermas propone con la teoría del discurso es una visión renovada del constructivismo dworkiano sobre la base de una teoría de la argumentación. La teoría del discurso, expone Habermas, permitirá enfrentar —sin disolver— la tensión entre seguridad jurídica y pretensión de corrección.

La propuesta habermasiana ha sido detonante de investigaciones posteriores en el área jurídica. Quizá el caso más paradigmático es el de su discípulo Robert Alexy, con su teoría de la argumentación jurídica. Pero hay una línea temática que no se ha evidenciado y que merece la pena mencionar aquí: la oposición no declarada de Habermas en contra del neoconstitucionalismo. Así, hay dos maneras de ver esta oposición: una de ellas desde el ámbito de la práctica forense del derecho, y otra desde la ética del discurso.

Por lo que se refiere a una primera manera de ver esta diferencia, debemos tener en cuenta que "para las personas neo, los enunciados nor-

[3] Es importante tener en cuenta que en la comunidad jurídica se suele distinguir entre *fundar* y *motivar*: el primero es citar la regla que sirve de guía; el segundo es aportar las razones que conectan el caso concreto con la regla (Aliste, 2018). Habermas, bajo la expresión *fundamentación*, agrupa ambos aspectos.

mativos tienen tensiones y la ponderación es una (entre otras) herramienta idónea para enfrentar esas tensiones. Por su parte, para las personas ius, la ponderación resulta subjetiva y a veces irracional" (Moreno, 2014, p. 54).

Por cuestiones de espacio no es posible atender la crítica habermasiana a detalle, pero al menos podemos señalar su base. Para ello recordemos que la propuesta de la ponderación es una fórmula que se ofrece como solución para el conflicto entre principios. Tal solución ofrece tres evaluaciones (*tests*): la idoneidad, la necesidad y la ponderación en sentido estricto.

La idoneidad parte del fundamento de que toda norma tiene una conexión racional entre su finalidad y los medios para hacerla cumplir. Si no hay esta conexión racional, entonces no es una norma idónea. Por ello, diferenciar entre la idoneidad o no de la norma permite resolver el conflicto entre principios; por ejemplo,

> …tanto la legislación de Canadá como la legislación de Sudáfrica establecían que cuando un individuo se encontrase en posesión de droga ilegal se debía presumir que su posesión tenía fines de tráfico… el juez Dikson señaló que debía existir una conexión racional entre la posesión de la droga ilegal y la presunción de que dicha posesión tuviera lugar con la intención de venderla. Tal conexión racional no existe cuando la cantidad en cuestión es o bien muy pequeña o bien insignificante. (Barak, 2017, pp. 337 y 338)

Es decir, la norma no es proporcional, pues no es idónea para la finalidad perseguida. Por su parte, la necesidad establece que "se debe escoger —de todos los medios que puedan promover el propósito de la medida restrictiva— aquél que menos restringe el derecho humano protegido" (Barak, 2017, p. 351). Téngase por caso la siguiente situación:

> En Sudráfica, en la decisión del caso Manamela, la Corte examinó… *que* la ley establecía que una persona acusada de adquirir bienes robados tenía la carga de probar que tales bienes no lo eran. La Corte sostuvo que el fin de la ley… era adecuado… *pero* que no se había cumplido el test de necesidad ya que los fines de la ley hubiesen podido alcanzarse a través de una medida menos restrictiva, como, por ejemplo, limitar el alcance de la medida a una categoría particular de bienes de alto valor (Barak, 2017, p. 353) (cursivas agregadas).

Al final, la ponderación en sentido estricto se sustenta en la idea de que los derechos tienen un peso, y comparar ese peso puede solucionar cuál de los dos derechos debe prevalecer, atendiendo, precisamente, su peso. Robert Alexy explica que "La fórmula del peso es un intento de representar la estructura de la ponderación con la ayuda de un mo-

delo matemático", y agrega: "La fórmula del peso no intenta reemplazar la ponderación como forma de argumentar, por el cálculo. Solo es un instrumento formal que expresa la estructura inferencial de la ponderación por principios" (Alexy, 2011, pp. 125-127).

Habermas no se pronuncia respecto a la idoneidad y la necesidad. Su crítica más visible es en contra de la ponderación en sentido estricto, pues asignar valor a los derechos puede ser subjetivo. Por decir, ¿qué vale más?, ¿reconocer el derecho a la vida o permitir la eutanasia?, ¿proteger la salud o permitir el libre uso de las drogas?, ¿las manifestaciones de odio o la libertad de expresión? En cada uno de estos casos, asignar un peso tiene la influencia ideológica de un sector determinado. Ante esta situación, Habermas ofrece una alternativa distinta a la ponderación por asignación del peso.

> Quizás el primer tratamiento teórico de la adecuación como alternativa (excluyente) a la ponderación se halla en la propuesta de Klaus Günther. Seguidores de esta opción, como Habermas, han visto una solución (que sustituye eficazmente a la ponderación) para el caso de algunos conflictos normativos. (Moreno, 2014, p. 54)

El desarrollo de este tema se llevaría varios párrafos, pero, corriendo el riesgo de caer en la simplicidad, el ejemplo de Günter se puede explicar de la siguiente manera: pensemos en dos enunciados: a) se deben cumplir las promesas; b) se debe auxiliar a los amigos en caso de enfermedad. Ahora bien, una persona le promete a un amigo ir a su fiesta, pero ese mismo día otro amigo se enferma. Entonces él tiene que decidir. Un partidario de la ponderación diría que hay que pesar qué vale más, o para decirlo más frío: ¿a qué amigo se le tiene más aprecio?

Por el contrario, Habermas, siguiendo a Günter, diría que aquí no se trata de asignar peso, sino de reflexionar sobre los alcances de la decisión para futuros acontecimientos. Es decir, imaginemos que podemos anticiparnos al acontecimiento y entonces puedo, válidamente, decidir que iré a la fiesta siempre y cuando una persona (amigo o no) requiera de mi presencia. No porque una situación pese más que otra, sino porque, razonablemente, se ha llegado a una situación previsible. Desde luego, los conflictos entre principios casi nunca son previsibles, pero la mejor decisión debe tomarse con base en sus consecuencias para el futuro.

Pensemos en otro caso: en Oaxaca existe un pueblo indígena (zapoteco) que consume una bebida ancestral que se llama téjate. El téjate lleva ingredientes de cacao y maíz, y para el caso de compartir con niños o niñas se endulza con azúcar. El artículo 20 Bis de la Ley de los Derechos de Niñas, Niños y Adolescentes del Estado de Oaxaca establece lo si-

guiente: "Artículo 20 Bis. Para la eliminación de formas de malnutrición de niñas, niños y adolescentes, se prohíben las siguientes actividades: I. La distribución, venta, regalo y suministro a menores de edad, de bebidas azucaradas…". Esta regla tiene como fundamento la protección de la salud del menor, pero esa obligación ¿incluye también la negación a darles téjate a los niños? Debe tenerse en cuenta que el artículo 4o. de la Ley de Derechos de los Pueblos y Comunidades Indígenas del Estado de Oaxaca establece como principio el de "identidad social y cultural". Ante este conflicto normativo entre la protección a salud y a la identidad social y cultural, los partidarios del neoconstitucionalismo dirían que hay que ponderar; Habermas lo negaría, pues asignar cualquier tipo de peso es influir ideológicamente. Lo que él propondría seria revisar el caso concreto y asumir una decisión pensando en el futuro. Aquí, en ese sentido, no está asignado el peso; está adecuando la normatividad al caso concreto.

La anterior afirmación se entenderá mejor si nos enfocamos en una segunda manera de ver una objeción no declarada de Habermas en contra del neoconstitucionalismo. Aunque hay una variedad de formas de entender el neoconstitucionalismo (Comanducci, 2005), un punto central es que identifica los principios de derechos humanos como valores, y por ello es posible una ponderación. Pero Habermas considera que "las normas entablan interrelaciones de coherencia dentro de un sistema, en contraste con la flexibilidad y las configuraciones variables de las jerarquías valorativas" (Vega & Gil, 2008, p. 25). Así, el propio Habermas explica que, "al igual que los juicios empíricos o matemáticos, a los juicios morales también les caracteriza una pretensión universal de validez que les distingue de los juicios de valor no morales" (Putnam & Habermas, 2008, p. 100); por el contrario, los valores no tienen dicha pretensión, pues se limitan a ser aprobados por una cultura y una forma particular de vida.

V. A manera de conclusión. Algunas críticas

Habermas es un científico apasionado por el debate; abre frentes contra muchas corrientes e ideas. Juan Carlos Velasco Arroyo propone una guía útil sobre sus debates e intervenciones en controversias públicas (Arroyo, 2003, pp. 149-160). Asimismo, autoras y autores han criticado, ajustado o polemizado con Habermas, y la lista es amplia. Sólo por mencionar algunos nombres, se puede identificar a Niklas Luhmann, Jean-François Lyotard, Richard McKay Rorty, Charles Margrave Taylor, Iris Marion Young, Nancy Fraser, Seyla Benhabib, y la lista continúa. No es posible aquí enumerar las diversas posiciones que tienen algo que señalar a la propuesta

discursiva. Sin embargo, y sólo con la finalidad de subrayar algunas ideas de las más conocidas, se colocarán algunas de ellas.

La primera crítica que se hace a la propuesta habermasiana es la de su nivel de abstracción. Por ejemplo, Jason Brennan dice que un autor como Habermas "es muy influyente alrededor de todo el mundo, pero es un filósofo y hace lo que todos los filósofos: sentarse en un sillón y teorizar sobre cómo debieran ser las cosas. No se levanta de su silla para ver cómo el mundo funciona en realidad" (Brennan, s. f.). Bajo esta misma idea es conocida la crítica del enemigo más visible de Habermas, el neoconservador Hermann Lübbe, para quien la propuesta habermasiana es tan ilusoria que, de ponerse en marcha, sólo tendría como fin el perecer por sí misma (Lübbe, 1990).

Una segunda crítica puede ser ejemplificada con la posición de la filósofa Seyla Benhabib. Ella considera que la base de la teoría de la acción comunicativa fracasa en reconocer derechos a quienes no tienen posibilidad de comunicarse, y que son, precisamente, quienes deben quedar protegidos por una propuesta teórica del derecho. Ella lo dice de esta manera:

> …según la fuerza con la que se defina "capacidad de habla y de acción", muchos seres, tales como niños muy pequeños, las personas de capacidad diferentes y los enfermos mentales, parecerían quedar excluidos de la concepción moral. Lo que es más, puede haber seres con los que estamos en deuda por obligaciones morales y que pueden convertirse en víctimas morales en virtud de ser impactados por nuestras acciones pero que no pueden representarse a sí mismos: seres sensibles capaces de sentir dolor, tales como animales con sistemas nerviosos desarrollados y, según algunos, incluso los árboles y los ecosistemas, pues estos están vivos y pueden verse afectados por nuestras acciones. ¿La ética discursiva puede hacer justicia a sus demandas morales y su condición moral? (Behabib, 2004, p. 21)

Una tercera crítica es la voz de las feministas, quienes han señalado, con mucha precisión, que la teoría discursiva invisibiliza a las mujeres. Le han reprochado a Habermas desde diversos frentes, pero quizá una opinión que lo resume es la que considera que su principio universal no escapa a los valores culturales (Krause, 2008, p. 42). Krebs, ha escrito que

> La ética discursiva no sólo no es idónea desde una perspectiva feminista, sino que tiene —y con esto quiero pasar a una directa ofensiva feminista contra ella— un inequívoco sello masculino. En la definición que la ética discursiva da de la moral como dispositivo protector de la integridad personal, se hace

patente una visión masculinamente distorsionada del fenómeno moral (Krebs, 1994, p. 267).

Además, agregan a esta crítica el señalamiento a la propuesta que hace Habermas entre los espacios público y privado.

Sin embargo, todas estas críticas, incluso al ser acertadas, no destruyen la propuesta habermasiana; la fortalecen y abren nuevos campos de investigación. Por ejemplo, si Seyla Benhabib le dio el toque feminista que le faltaba a la propuesta discursiva, y Robert Alexy desarrolló una teoría de la argumentación jurídica a partir de la misma, hay también espacio para una teoría del derecho parlamentario o una teoría comunicativa del Poder Ejecutivo. Es más, una teoría de los órganos autónomos a la vista de su ausencia en facticidad y validez. O quizá una teoría de la función judicial desde la perspectiva comunicativa. Hay, como se puede apreciar, tierra fértil en la que será necesario sembrar.

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Ficciones constitucionales. Elementos introductorios para el estudio de las ficciones jurídicas en las constituciones del nuevo constitucionalismo latinoamericano[1]

Constitutional Fictions. Introductory Elements for the Study of Legal Fictions in the Constitutions of the New Latin American Constitutionalism

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Resumen: El derecho, como lenguaje, cumple diferentes funciones comunicacionales que logra, en buena medida, a través del uso de herramientas y dispositivos narrativos. Entre ellos se destacan las ficciones jurídicas, las cuales, lejos de retratar la realidad, buscan crear una verdad jurídica. En el caso de las ficciones constitucionales, éstas son, con frecuencia, malinterpretadas, lo que lleva a su degeneración. En este texto, más allá de ofrecer un acercamiento conceptual a la figura de las ficciones constitucionales, se ofrece un análisis introductorio en cuanto a la forma en la que ha ocurrido esto en el contexto del nuevo constitucionalismo latinoamericano.
Palabras claves: Constitución, derecho constitucional, constitucionalismo, nue-

[1] *Artículo de investigación que expone resultados vinculados a los proyectos de investigación posdoctoral y doctoral de los autores, respetivamente, en su calidad de becarios en la Universidad de los Andes, Chile. Asimismo, los autores agradecen los comentarios y observaciones realizados por el investigador Daniel Rivas-Ramírez, los cuales enriquecieron el desarrollo del texto.

vo constitucionalismo latinoamericano, ficciones jurídicas, ficciones constitucionales.

Abstract: *Law, as a language, fulfills different communicational functions that it achieves, largely, through the use of narrative tools and devices. Among them, legal fictions stand out, which, far from portraying reality, seek to create a legal truth. In the case of constitutional fictions, these are often misinterpreted, leading to their degeneration. In this text, beyond offering a conceptual approach to the figure of constitutional fictions, an introductory analysis is offered as to how this has occurred in the context of the new Latin American constitutionalism.*
Palabras clave: *constitution, constitutional law, constitutionalism, new latin american constitutionalism, legal fictions, constitutional fictions.*

I. Introducción

Cuando se suele pensar en la narrativa jurídica, una idea recurrente sobre ella está mediada por la intención de "generalización y estabilización de expectativas de conducta" (Luhmann, 2018, p. 35). En efecto, dicha idea se edifica en el dogma que determina que las normas jurídicas conforman un sistema y que, por demás, ellas pueden ser objeto de procesos cognitivos desde diferentes metodologías o enfoques (mono o multidisciplinares) (Fuentes & Cárdenas, 2018, pp. 163-188).

Pese a que esta visión del derecho ostenta elementos restrictivos —y que no es capaz, por voluntad u olvido, de dar cuenta de los aspectos prejurídicos—, sí permite hacerse el cuestionamiento sobre el papel comunicacional de la regulación jurídica.

Justamente, si la regulación condiciona las acciones u omisiones para obligar, facultar, permitir o prohibir, su formulación requiere de la inclusión de diferentes tipos de recursos literarios que satisfagan las funciones perseguidas (Ferrari, 2015). De allí que no sea extraño que se valga de enunciados descriptivos, presunciones, analogías y ficciones, entre otras, que faciliten la comprensión, el acatamiento y la aplicación por parte de los receptores.

Pues bien, estos recursos comunicacionales no son particulares de un único precepto, sino que, por el contrario, recorren la totalidad de los es-

calonamientos del sistema, existiéndose desde las normas constitucionales hasta los actos entre y de particulares. Sólo que cuando su uso se ubica en las normas de rango superior, su expansión y efecto se hace mayor debido a la gradualidad, a la exigencia de coherencia, al principio de jerarquía y a la autorreferencialidad del sistema jurídico.

En ese sentido, el actual texto, partiendo de una metodología exploratoria, muestra una reflexión sucinta sobre las ficciones constitucionales, en general, y su uso en el nuevo constitucionalismo latinoamericano.

Con tal fin, y siendo éste un resultado preliminar de investigación, se dará énfasis al marco conceptual que brinde elementos para, posteriormente, profundizar sobre cuáles son los limitantes prácticos de la asimilación de las ficciones constitucionales, en el contexto del nuevo constitucionalismo latinoamericano. Para ello, el texto cuenta con tres acápites, previos a las conclusiones, que exponen la función comunicacional del derecho desde la percepción *derecho-literatura*, para después abordar la noción de ficción aplicable a los sistemas jurídicos y finalizar con los elementos relacionados con el constitucionalismo señalado y las respectivas ficciones que lo sustentan y lo presentan como promesa.

II. Función comunicacional del derecho: un referente conceptual desde el derecho y la literatura

Hasta la noción simple del lenguaje —como facultad para comunicar—,[2] o inclusive aquellas más complejas que parten de la diferencia entre internalismo (lenguaje como una competencia cognitiva) y externalismo (lenguaje como un sistema de signos estructurados desde la convencionalidad [Ricoeur, 2008]), terminan observándolo como un fenómeno que no responde a un carácter estático (Ríos, 2010, p. 25). Antes bien, las realidades fragmentadas, eventuales trasplantes y adaptaciones que se construyen tanto en lo coloquial como en el lenguaje técnico, dan cuenta de los procesos de transformación del lenguaje.

En este último campo del lenguaje; es decir, el técnico, sobresale aquello que se denomina, genéricamente, *derecho*. Si bien carece de univocidad, se indica que éste, en una perspectiva jurídica, cuenta con un mínimo de tres sentidos: *a)* como norma; *b)* como sistema, y *c)* como ciencia (Fuentes, 2015, 109-128).

[2] "El lenguaje es a facultad que permite la comunicación entre las personas y constituye una base fundamental. Se manifiesta en diversas lenguas que presentan gran variedad y riqueza y que caracterizan la naturaleza humana, pues hacen posible la vida mental, social y cultural, la historia y el conocimiento" (Cucatto, 2010, p. 17).

Dichos sentidos comparten, trasversalmente, el efecto de que el derecho, ante todo, comunica algo, y, en consecuencia, como lenguaje, es abierto, cambiante y no neutral (Acosta & Betancur, 2020):

> a) *Como disposición, un deber*.[3] De ahí que la norma jurídica se funde, con regularidad, en un lenguaje prescriptivo; es decir, que busca direccionar la conducta humana del interlocutor.[4] Por tanto, cuenta con un emisor (establecido por el dictamen de la competencia o capacidad), un receptor o receptores (según la generalidad de la norma), un mensaje (el deber mismo) que cuenta con un código (signos y reglas que originan el lenguaje jurídico) que se transmite por un canal (publicidad de la norma), se limita por el ruido (aspectos que distorsionan la finalidad original con la que fue prevista la disposición) y se vincula con un contexto (elementos crono-topológicos en los que se produce la disposición).
> b) *Como sistema autorreferencial y autopoiético*, la dicotomía entre derecho/no derecho propia de la dualidad entre sistema/entorno[5] y las reglas y principios de interacción entre las diferentes normas jurídicas que yacen al interior del sistema.
> c) *Como ciencia, un metalenguaje*[6] que parte de los juicios de realidad o descripciones que pueden generarse a partir del lenguaje objeto o norma jurídica que serán abordados para su asimilación a través de las competencias derivadas de las actividades de entender, comprender e interpretar. (Fuentes, 2020, 9-29)

3 "Toda la Ética, en la que el derecho se funda, consiste en deberes o servicios debidos; pero los que atañen al derecho son tan sólo aquellos deberes o servicios socialmente exigibles —es decir, por la intervención de un juicio socialmente establecido— porque se consideran necesarios para la conveniente convivencia" (D'Ors, 1999, p. 12).

4 "Un enunciado descriptivo es aquel que formula y transmite informaciones sobre el mundo («La nieve es blanca», «La nieve es azul»). Un enunciado prescriptivo es un enunciado dirigido a modificar el comportamiento de los hombres («No matar», «Prohibido fumar», etcétera). Es descriptivo el lenguaje de la ciencia; es prescriptivo aquel del derecho (y de la moral). Entre enunciados descriptivos y prescriptivos existe una diferencia realmente importante: los enunciados descriptivos tienen valores de verdad, es decir, pueden ser verdaderos o falsos; por su parte, los enunciados prescriptivos carecen de valores de verdad, es decir, no pueden ser ni verdaderos ni falsos" (Guastini, 2016, p. 23).

5 "La teoría de sistemas debe mucho de sus éxitos y cualidad dinámica al hecho de que veía los sistemas como abiertos al entorno y adaptativos" (Teubner, 2017, p. 27; Luhmann, 1996a; 1996b).

6 Haciendo una sinonimia con el derecho como ciencia, el metalenguaje se enmarca en un lenguaje que "no tiene como objeto cosas extralingüísticas sino otro lenguaje: *a)* Se suele llamar «metalenguaje» al lenguaje mediante el que nos expresamos… *b)* Se suele llamar «lenguaje-objeto» al lenguaje del que hablamos… Se suele decir también que un metalenguaje y su lenguaje-objeto se colocan en dos niveles diferentes del lenguaje: el metalenguaje está «por encima» del lenguaje-objeto, en el sentido de que versa sobre aquel" (Guastini, 2016, p. 23).

Este carácter comunicacional que se puede reconocer en el derecho dio pie para la expansión de aquello que se conoció como *derecho y literatura*. Y si bien como movimiento encuentra espacio durante el siglo XX[7] —y como percepción con bastante anterioridad a dicho siglo (Jiménez & Caballero, 2015)—, su manifestación reciente se atribuye a la publicación, en 1973, del texto *The Legal Imagination: Studies in the Nature of the Legal Thought and Expression* (White, 1973). Una obra que muestra un vínculo necesario entre estas dos expresiones culturales y atribuye un papel vital a la literatura y sus herramientas para facilitar la comprensión y aplicación del derecho.[8] Bajo los anteriores fundamentos y su diversificación, este movimiento se abrió paso en los planes de estudio de diferentes centros universitarios de Estados Unidos, viéndose favorecidos por características propias de su modelo jurídico.[9] Sólo que el movimiento no se limitó a los Estados Unidos; también llegó al contexto de Europa y América Latina, en las propuestas de países como, por ejemplo, Argentina, Brasil, Chile, Colombia, México y Perú,[10] Dándose origen a seminarios, congre-

[7] Con todo, "El Derecho y Literatura puede ser considerado un movimiento cuyo desarrollo acompaña, prácticamente, la evolución de la historia del siglo XX. Resulta útil dividirlo en tres periodos bastante distintos, según sugiere Sansone (2001, p. 2), a fin de facilitar la comprensión: el primer momento es el punto de partida, en el comienzo del siglo y hasta el fin de la década del 30, cuando surgen los primeros escritos propiamente sobre Derecho y Literatura, tanto en el escenario jurídico europeo cuanto en el estadounidense; el segundo momento es un período intermedio, en que se advierte la continuidad en la producción de las investigaciones, con la profundización y la difusión de sus estudios en especial en Europa, en las décadas del 40 y 50, y con el renacimiento estadounidense del movimiento *Law and Literature*, en la década del 70 (18 a 43); y, por fin, el tercer momento, cuando ocurre el arraigo curricular del estudio del Derecho y Literatura en el interior de los departamentos universitarios y de los centros de investigación, a partir de la década de 80" (Trindade & Magalhaes, 2009, pp. 175 y 176).

[8] "I began this Introduction by asking this question, meant to capture the essence of many such questions I have heard: «How can literature have anything to say to lawyers when literature is inherently about the expression of individual feelings and perceptions, to be tested by the criteria of authenticity and aesthetics, while law is about the exercise of political power, to be tested by the criteria of rationality and justice?» I hope the reader can now see something of what I mean when I say that this question misstates everything it touches. Literature and law are both about reason and emotion, politics and aesthetics; they both promise to integrate what that question falsely separates, and to do so by drawing attention to what is at stake whenever one person writes or talks to another" (White, 1988, p. 751).

[9] En efecto, entre esas características se cuentan, verbigracia: *a)* existe una visión histórica del derecho derivada de la influencia del *common law* (Pereira, 2010); *b)* se otorga mayor relevancia a la producción normativa como efecto de la repetición, por encima de la creación del derecho por decisión; *c)* no tuvo cabida un modelo de educación del derecho basado en el *mos italicus tardío* (Contreras & Cárdenas, 2017); *d)* yace una tendencia dirigida hacia el pragmatismo y al realismo epistemológico, y *e)* la existencia, desde la década de los veinte del siglo XX, del realismo jurídico estadounidense (Cairns *et al.*, 2018; Marzocco, 2018).

[10] Una recopilación sobre los países puede verse en, entre otros, Arango, 2019. Igualmente, para Latinoamérica, en Douglas, 2017, pp. 181-192.

sos, asignaturas, cátedras, publicaciones, revistas y diferentes manifestaciones (Zolezzi, 2013) que compartían los referentes (Magris, 2008) sobre el derecho *de la* literatura, el derecho *como* literatura y el derecho *en la* literatura.[11]

Estas nociones reconocen, por ende, por lo menos tres conexiones entre derecho y literatura:[12] una *pragmática*, dada por el hecho de que tanto las soluciones jurídicas como las narraciones de la literatura surgen, normalmente, de la observación del entorno social (Zolezzi, 2013, p. 384); otra *comunicacional*, debido a que ambas se materializan en la palabra, sea mediante modalidades orales y/o textos (Pérez, 2006, 143-144), y, al final, la conexión *creativa*, basada en que ambos son productos de índole cultural (Marí, 1998, p. 251; Sáenz, 2018, p. 143; Calvo, 2018, p. 1268) que suelen tener su sustento en las ficciones.

Tales conexiones han tenido momentos diferentes donde se favorece, en mayor o menor medida, su estudio. De ahí que, dependiendo, en mucho, del enfoque de aplicación, la relación entre las disciplinas y el interés explicativo, la profesora Sáenz planteó una clasificación bastante acertada de momentos del movimiento, la cual se complementa sugiriendo una quinta etapa, tal y como se aprecia en la siguiente tabla:

[11] "Primero, nos encontramos con el derecho de la literatura, una perspectiva que normalmente ha sido reservada para los abogados. Bajo esta perspectiva se pueden analizar la libertad de expresión que gozan los autores, la historia jurídica de la censura, las demandas que surgieron a propósito de obras que, en su tiempo, fueron consideradas como escandalosas… Una segunda perspectiva puede ser el estudio del Derecho como literatura. En este caso, se puede considerar la retórica judicial y parlamentaria; se puede estudiar el estilo particular de los abogados, un estilo que es a la vez dogmático, tautológico y performativo. Se pueden comparar métodos de interpretación entre textos literarios y textos jurídicos. Esta clase de perspectiva ha sido desarrollada ampliamente en los Estados Unidos… Por último, la perspectiva por la que yo me decanto estudia el Derecho en la literatura. Desde luego no se estudia el Derecho técnico, aquel que encontramos en los diarios oficiales, en los tratados y en las doctrinas… No, el Derecho que busco en la literatura es el que asume las cuestiones más fundamentales a propósito de la justicia, del Derecho y del poder" (Ost, 2006, pp. 334 y 335).

[12] Una extensión de estas conexiones las presenta el profesor Andrés Botero Bernal a través de la clasificación de modelos de abordaje: retórico, expositivo, metodológico, analítico, jurídico y estético (2007, pp. 46-54).

Tabla 1. Tendencias del movimiento *derecho y literatura*[13]

No.	*Momentos*	*Periodo*	*Mirada*		*Tipo y vocabulario de la relación*		*Material*	
			Hacia arriba	*Hacia abajo*	*Asimilación*	*Diálogo*	*Teoría*	*Novela*
1	Humanista	70s		X		X		X
2	Hermenéutico	80s	X		X		X	
3	Narrativo	90s		X		X		X
4	Estudios culturales de Derecho	2000s	X		X		X	
5	Interpretativa	Post 2010s		X		X	X	

Ahora bien, centrando el interés en el quinto momento, se debe decir que éste se fundamenta en la distinción básica entre hermenéutica e interpretación. Y aunque dichos vocablos se toman como sinónimos, lo cierto es que

> …la hermenéutica es la teoría científica del arte de interpretar textos, y en derecho, sin ser el único objeto sujeto de interpretación, especialmente se hace referencia a la interpretación de la norma jurídica en cuanto a su manifestación textual… [Mientras] La interpretación jurídica puede entenderse desde dos vertientes: como proceso (actividad) y como producto (Hernández, 2019, p. 47).

De tal modo, la interpretación no tiene necesariamente un objeto textual, aun cuando no lo descarte, sino que se basa en aquello que comunica un mensaje. En esa orientación, aportes significativos han efectuado

[13] Como se anticipa, el cuadro toma como fuente principal y referencia el trabajo realizado por la profesora María Jimena Sáenz. Sin embargo, se integra la quinta etapa y se modifica el periodo de la cuarta. Señala la autora sobre sus etapas: "La periodización más atractiva del movimiento segmenta: una primera etapa «humanista» desarrollada entre 1970 y 1980; una segunda etapa «hermenéutica» dominante entre 1980-1990 que aglutina trabajos centrados en la problemática común de la «interpretación», con fuerte impronta teórica que deja atrás a las obras literarias; un tercer momento «narrativo» durante los noventas, que vuelve hacia la literatura en su aspecto «narrativo» y reacciona frente a los excesos de hermetismo de la teoría; y una cuarta etapa de «estudios culturales» que vuelve a aplanar la diferencia literaria para situarla en el terreno más general de la cultura (Baron, 1999 y Peters, 2005). El esquema general que siguen las etapas de la producción del movimiento puede leerse como un movimiento pendular entre el énfasis en la diferencia literaria (etapas 1 y 3) y la asimilación (etapas 2 y 4); así como una oscilación entre dos tipos de miradas, dos tipos de materiales literarios a los que se recurre y dos vocabularios para pensar la relación" (Sáenz, 2019, p. 276).

lo que se conoce como la teoría comunicacional del derecho (Robles, 1996; 2010, 2015a; 2015b; Sterling & Osma, 2018, p. 243; Hermida, Roca & Medina, 2020; Santos, 2017, p. 157), que, basada en tres niveles de estudio conectados en sus metodologías y formas, propone que en cada uno de estos niveles hay homólogos en el universo jurídico y en el literario. Esto se puede apreciar a continuación:

Tabla 2. Niveles en la teoría comunicacional del derecho

Teoría comunicacional		
Área jurídica	*Área lingüística*	*Función (general) compartida*
Teoría general del derecho	Sintáctica	Estudiar las reglas y principios que direccionan la interacción de elementos que conforman un sistema.
Dogmática jurídica	Semántica	Asimilar contenidos y estructuras del sistema, su modificación y el significado que se les otorga.
Teoría de las decisiones jurídicas	Pragmática	Valorar la afectación que produce el contexto en procesos interpretativos y de señalización de significados.

Este modelo de lo comunicacional expone la influencia proclive y en doble vía que existe entre las dos disciplinas, mientras explora los diversos fines para profundizar dicha reciprocidad.[14] Un ejemplo de esta influencia se advierte en los recursos compartidos tanto en el derecho como en la literatura para expresar sus mensajes, y entre ellos tiene un lugar relevante, por la naturaleza prescriptiva del derecho, la *ficción.*

III. El concepto de ficciones y su aplicación en el derecho

Del latín *fictio,* laficción se define, etimológicamente, como la acción y efecto de pretender que algo es cierto, cuando no lo es. No obstante, no se debe llegar a la equivocación de asemejar la ficción con una mentira, un error o una falsedad (Saer, 2016). En primera instancia, debe recordarse que la ficción es un medio empleado en la lógica con el fin de alcanzar y estructurar un conocimiento. Aunque la esencia de la ficción

[14] "La literatura, al igual que el Derecho, tampoco puede concebirse como un único sistema discursivo o semiótico susceptible de una sola teoría de la interpretación" (Carreras, 1996, p. 61).

es presentarse como una contradicción de la realidad, "En un sentido extendido, con el término «ficción» se alude a cierto tipo de enunciado en el que se hace uso, explícito o implícito, de la expresión «como si» o expresión equivalente traducible al «como si» sin pérdida de significado" (Mendoça, 2016, p. 7). En consecuencia:

> a) Lo contrario a la ficción no es, necesariamente, la verdad, debido a que, como recurso de la gnoseología, puede permitir llegar a ésta.[15] b) Con todo, se debe reconocer que existe una diferencia jerárquica y, al mismo tiempo, una dependencia entre verdad y ficción (donde la verdad debería supeditar a la ficción para alcanzar el conocimiento de la realidad).
> c) Más allá de la distancia entre lo subjetivo y lo objetivo, la verdad y la ficción pueden estar mediadas por la eficacia y la verificabilidad, de allí que la ficción se valore como una metáfora de la realidad (Bautista, 2011).
> d) Así, la ficción no evade siempre los rigores propios de la verdad, sino que favorece y se encuentra mediada por aquello que se alude como el parámetro de lo complejo, necesitando de coherencia y suficiencia para su correcto planteamiento (Pavel, 1995; Garrido, 1997).

Estos presupuestos avalan, entonces, que una narrativa ficcional, o sea, un texto con constituyentes ficticios (Reisz, 1979, p. 99), pueda ser objeto de valoración como verdadero o falso, inclusive dentro de la realidad en la que se suscriben e, igualmente, respecto a su cercanía con la realidad empírica. Por estas razones, la idea de ficcionalidad se muestra como una figura que resulta atractiva en los fenómenos comunicacionales. En efecto,

> …el término [es] utilizado en teoría de la literatura para designar uno de los rasgos específicos de la literariedad: la posibilidad de crear, mediante la imaginación artística, mundos de ficción, diferentes del mundo natu-

[15] "Está claro que para Platón la ficción es algo muy cercano a la mentira. Lo mismo declara Solón (cit. por Aristóteles, *Metafísica* I. ii, 983 a). Para Gorgias, la ficción (poesía) es una forma de mentira en la cual el engañado es más sabio que el que no se deja engañar. La tradición crítica posterior, comenzando por Aristóteles, pugnará por diferenciar los conceptos de ficción y mentira: hay una correspondencia subyacente entre la realidad y la ficción que no se da en el caso de la mentira. Aristóteles opone la poesía a la historia, pero no se trata de la oposición entre mentira y verdad. Para Aristóteles la ficción es fiel a la verdad en un sentido que va más allá de la mera literalidad de la historia: resulta claro no ser oficio del poeta el contar las cosas como sucedieron sino cual desearíamos hubieran sucedido, y tratar lo posible según verosimilitud o necesidad. Que, en efecto, no está la diferencia entre poeta e historiador en que el uno escriba con métrica y el otro sin ella… empero diferéncianse en que el uno dice las cosas tal como pasaron y el otro cual ójala hubieran pasado (*sic.*). Y por este motivo *la poesía es más filosófica y esforzada empresa que la historia*, ya que la poesía trata sobre todo de lo universal, y la historia, por el contrario, de lo singular (*Poética* IX, 1451 b)" (García Landa, 1994, p. 266).

> ral, que se configuran a través del lenguaje literario. El término ficcionalidad se utiliza también en Pragmática y en Semántica textual para aludir al sistema de reglas con las que el receptor de una obra literaria puede poner en relación el mundo posible que en ella aparece con el mundo exterior al texto (Estébanez, 1999, p. 412).

Luego, la ficcionalidad,[16] a través de sus modalidades (Álamo, 2012), ejerce la posibilidad de crear mundos alternativos en donde se utiliza un conjunto, o sistema de reglas, propio o adoptado, que permite la configuración de interconexiones con la realidad, con el mundo empírico-natural; es decir, la presentación y representación de seres, acontecimientos y modos que se desarrollan en mundos posibles —y de cierta forma, aspiracionales—.[17]Por supuesto, el derecho, como la literatura, puede no sólo emplear los recursos metafóricos (Stolleis, 2010; Kucharska, 2016) o mitológicos (García Pelayo, 1981; Grossi, 2003; Misari, 2021), sino edificar un mundo posible, en pro de una coherencia narrativa,[18] desde lo ficcional; en específico, desde lo que se conoce como "ficciones jurídicas",[19] que congregan las "disposiciones jurídicas que con frecuencia tiene la for-

[16] "La «ficcionalidad» es el nombre para un sistema especial de reglas pragmáticas, que prescribe cómo los lectores deben tratar las relaciones posibles de los Wiq hacia EW, comprendiendo a los textos literarios, como también, cómo a tratarlos *adecuadamente* respecto a las normas desarrolladas históricamente en el sistema de la comunicación *literaria*. La ficcionalidad no es, por lo tanto, una *propiedad* de un texto literario en sí mismo…" (Schmidt, 2004). Cfr. (Pozuelo, 1994).

[17] "En otras palabras, un mundo posible consiste en un conjunto de individuos dotados de propiedades que pueden ser acciones (Eco, 2000a, p. 181). Así, un mundo posible puede equivaler a un texto sin que esto signifique que todo texto tenga que hablar de un mundo posible. En la semiótica de la cooperación textual, los individuos son un conjunto de combinaciones de propiedades, explícitas o no, con nombres comunes o propios (Eco, 2000a, p. 184). En el fondo, lo que Eco trata de mostrar es que los mundos posibles o alternativos son construcciones culturales, sean realistas o fantásticas. Esto es así porque ningún mundo complementario podría ser totalmente autónomo respecto del mundo real" (Mandujano, 2013, p. 472). Cfr. (Dolezel, 1999; 1998).

[18] Sobre el tema, ver, por ejemplo Dworkin, 1985, 1986; MacCormick, 1984, 2005; Lenoble, 1988; Nerhot, 1990; Schiavello, 2001, y Taranilla, 2012.

[19] "En el estado actual de la doctrina jurídica no se ha conseguido un concepto unánime y pacífico de lo que la ficción sea ni de cuáles pueden considerarse sus caracteres distintivos y sus límites de aplicación. La tesis más difundida es la que considera la ficción como un medio técnico-jurídico mediante el que se expresa la equivalencia jurídica de dos supuestos de hecho. Esta noción dista mucho de ser precisa y delimitadora, pues existen otros medios técnico-jurídicos, que se basan en semejanzas y con los que se pretenden equivalencias de hechos, como son la analogía y la interpretación extensiva, considerados distintos de la ficción… [E]n la ficción no se busca una situación de apariencia ni se persigue ningún efecto indirecto, sino que se logra el resultado directo de remover imperativamente un obstáculo o impedimento que se opone a la aplicación de una norma" (García Garrido, 1957-1958, p. 305).

ma «los F se considerarán como G (o no G)»" (Hernández Marín, 1986, p. 141). De allí que se consideren por ser cualificatorias, o sea, disposiciones que atribuyen la cualificación, y que tengan cierta similitud con las definiciones jurídicas.

Empero, a diferencia de las definiciones, la ficción no formaliza enunciados con fines descriptivos ni busca igualar dos supuestos de hechos; ciertamente, "en la ficción no se busca una situación de apariencia ni se persigue ningún efecto indirecto, sino que se logra el resultado directo de remover imperativamente un obstáculo o impedimento que se opone a la aplicación de una norma" (García Garrido, 1957-1958, p. 308). Por ende, "La ficción ni falsea ni oculta la verdad real, lo que hace es crear una verdad jurídica distinta a la real" (Venegas, 2007, p. 44), y, en contraste, por su parte, de las presunciones como recurso jurídico, las ficciones no parten necesariamente de una realidad objetiva o natural.

De cualquier forma, las ficciones pueden responder a diferentes clasificaciones si para ello se siguen los fines que pretenden frente al receptor, el sujeto que las produce, las finalidades dentro del sistema y el objeto de la ficción, como se aprecia en la siguiente figura:

Figura 1. Clasificación de las ficciones jurídicas[20]

[20] Resulta de interés hacer alusión a la clasificación que toma en cuenta la finalidad frente al sistema. Dicha clasificación tiene como referente la propuesta del profesor Alf Ross (2006, p. 105), y se conforma de ficciones creativas, dogmáticas y teóricas. Las creativas buscan ampliar la aplicación del derecho con la idea de regular con completitud, sin necesidad del detalle o la repetición; en esa medida podrá establecer equivalencia en estatus, condiciones, derechos, entre otras cualificaciones. Ahora, las dogmáticas se emplean, por parte de la doctrina, para explicar la disposición en vigor con casos similares o con regulaciones análogas. Finalmente, las teóricas se encargan de sustentar el funcionamiento del ordenamiento, reduciendo el papel creativo de los órganos que aplican el derecho, suponiendo. Por ende, vinculándose con la capacidad y lo competencial. *Cfr.* (Kelsen, Fuller & Ross, 2013).

En definitiva, la variedad de las modalidades da una idea de que el uso de las ficciones en el derecho (Luna, 2015) no es casual ni se observa como innecesario; al contrario, funcionan de modo semejante a las reglas operacionales de las ciencias ideales.[21] Por ese motivo, más que "mentiras blancas", en términos de Ihering (2011), son, como lo presenta Blackstone (2001), "beneficiosas y serviciales" para la organización y el funcionamiento del ordenamiento jurídico.

De ese modo, aunque los usos de las ficciones en el universo normativo se consideran como válidas y oportunas, pueden generar disparidades más ligadas a su percepción, llevando a que el error esté en:

a) Confundir la "ficción" con la "realidad" empírica en todo momento.
b) Esperar demasiado de las "ficciones", en términos de eficacia.
c) Asumir un poder (casi) mágico de la "ficción" para trasformar la realidad —a lo sumo puede hacerlo frente a su realidad o contexto lógico—.
d) Pensar en la "ficción" como ajena al contexto social.

La presencia de estos prejuicios o confusiones logra llevar a materializaciones ideológicas que conllevan la aplicación irreflexiva y autómata del derecho, tal como sucedió con el legalismo decimonónico, y puede estar pasando con el constitucionalismo actual en el contexto latinoamericano, como se expondrá.

IV. Constitución, constitucionalismos y ficciones constitucionales

Un punto de referencia inicial para este acápite —de los varios que se podrían encontrar— sería aceptar las afirmaciones realizadas por el profesor José Calvo González (2016, p. 51), quien señala que:

> La Constitución es, en consecuencia, una *máquina de ficción*… Como ficción es un artificio —*ars fictio*— cuyo *telos* ontológico es la hacedora artificialidad (*inventio*) de una arquitectura jurídico-política cimentada en instituciones y estructuras para el control del poder y erigida mediante mecanismos de producción de normas del sistema jurídico e instauración de derechos.

[21] "Así, es posible afirmar que, en su contextualidad narratológica, el derecho está atravesado por un plano profundamente ficcional que se traduce en enunciados potencialmente inverificables, muchas veces alejados también de la experiencia y de cualquier procedimiento formal demostrativo, pero que pese a ello poseen una potencialidad performativa, modificativa de la realidad y comúnmente son aceptados sin cuestionamientos por quienes operan en la *praxis* jurídica (Meliante Garcé, 2014b)" (Meliante & Sosa, 2018, p. 78).

La Constitución como artificio hacedor corona con una *gran ficción* en la que descansa de su validez normativa.

Por tanto, la Constitución, de cierto modo, funciona como un contenedor de las ficciones jurídicas que reposan en sus disposiciones o preceptos, al mismo tiempo que es objeto de las ficciones dogmáticas que se introducen para su comprensión y aplicación, y para entender su origen como obra del Poder Constituyente. Así las cosas, la Constitución es ficcional en su origen, en su contenido y en su asimilación.

Pese a que cada una de estas proposiciones implican un abordaje extenso que se imposibilita por el número de páginas a cumplir, una muestra fehaciente de este fenómeno, en términos generales, puede iniciarse respecto a las propias definiciones dogmáticas que se han empleado para el texto constitucional. Habitualmente se ficciona a la Constitución con una

a) *Casa común* "en que deben hallar soluciones de habitabilidad todos los participantes del proceso político de un Estado" (Calvo, 2019, p. 337).[22]
b) *Carta de navegación*,encargada de direccionar los poderes públicos hacia el cumplimiento de los fines estatales (Nino, 2002).
c) Ley fundamental,donde quedan por escrito y de manera codificada las decisiones que direccionan los poderes del Estado, en especial al Legislativo (Fuentes, 2005, pp. 13-42).
c) Pacto fundacional o fundante, que integra y expresa un acuerdo político que legitima al Estado (Salazar, 2015, p. 1932).

Sucintas e insuficientes como pueden llegar a serlo, a partir de ellas no sólo se definen las Constituciones y sus contenidos, sino que se edifican como el fundamento del propio derecho constitucional y de aquello que se nombra, genéricamente, como "constitucionalismo". Sin embargo, ello no quiere decir que el uso *per se* de las ficciones tenga que ser visto como negativo, inclusive si se emplea la categorización propuesta por Ross, para lo constitucional:

a) Las ficciones creativas relacionadas con la obra constitucional facilitan garantizar una coherencia del sistema, al verlas como punto de irradiación de la validez del ordenamiento.

[22] "La metáfora de la casa, sin embargo, tiene límites y por eso no es una metáfora inocente. Es que una casa es un lugar de habitación, desde donde salen sus moradores para realizar sus planes vitales. Una Constitución, por otro lado, no se llama así porque constituya un lugar de habitación, sino porque crea capacidades de acción. Esta es la función principal de las constituciones y es ahí, en esa dimensión que es oscurecida por la metáfora de la casa, donde yace la explicación de la crisis actual" (Atria, 2020, p. 151).

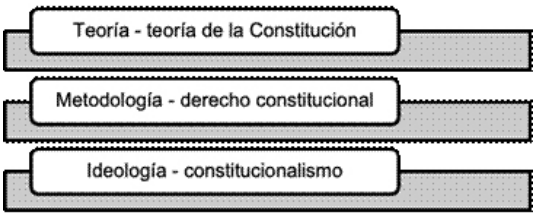
b) Las ficciones teóricas podrán construir las competencias de los jueces constitucionales.
c) Las ficciones dogmáticas que se desprenden crean parámetros interpretativos, sean desde el originalismo o el no originalismo (Laise, 2019).

Ahora, lo cierto es que el uso inadecuado de las ficciones constitucionales logra inducir a un proceso de mitificación e imposición ideológica que desconfigura el fenómeno constitucional, y con él el proceso de interpretación y lo que se espera de la Constitución.[23] Efectivamente,

> Las ficciones pueden degenerar en mitos cuando no se las considera conscientemente como tales, y en este sentido se tornan peligrosas, si se quiere hacer coincidir la realidad en el molde de una ficción a la que se ha quitado de la esfera de lo convencional, y por lo tanto de lo racional. El mito tiene un ingrediente totalizador, porque opera desde un ritual, lo que supone explicaciones "totales y adecuadas de las cosas tal como son y cómo fueron"; y exige aceptación incondicional, mientras que en el terreno de las ficciones siempre se opera desde el "como si", y su aceptación es condicional, y vinculada a su utilidad para leer la realidad (Pérez Galimberti, 2008).

Esta degeneración de las ficciones parece no ser ajena al constitucionalismo en la actualidad —aunque, por supuesto, no a cualquiera—. Por eso cuando se habla de constitucionalismo, una forma sencilla de comprenderlo sería distanciarlo de la teoría y el derecho constitucionales. Para ello sería significativo emplear, verbigracia, la división que Bobbio propuso para el positivismo; es decir, teoría, ideología y forma de acercamiento o metodología (1965). Precisamente, haciendo uso de ésta y teniendo como centro el concepto de *Constitución*, como se ilustra en la figura:

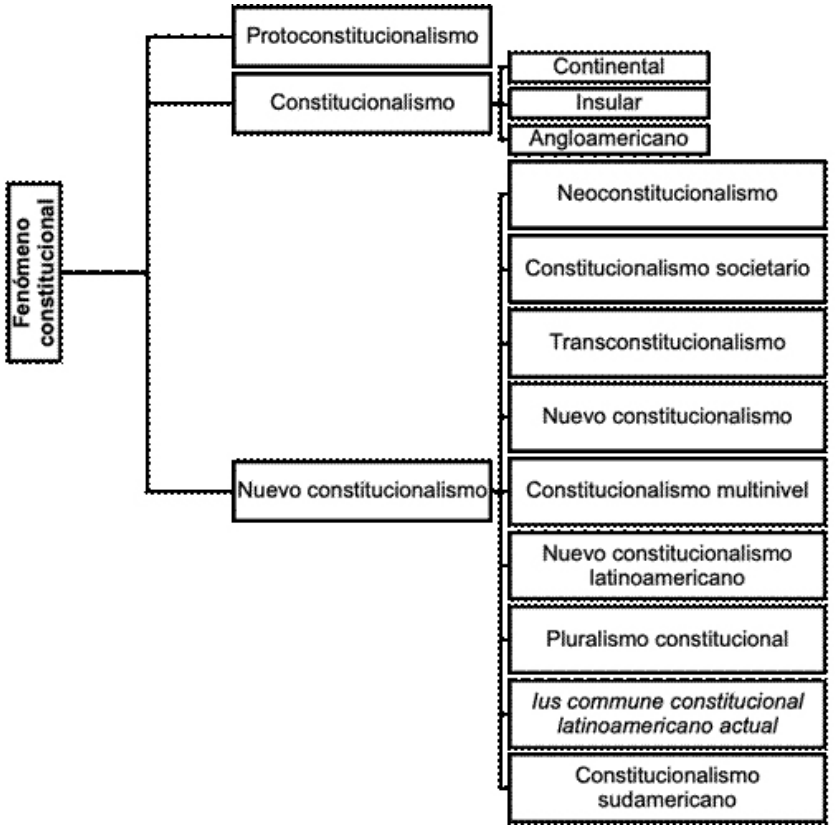
Figura 2. Visiones sobre la Constitución



[23] Una posición opuesta sobre la ventaja del uso de las ficciones está asentada en el relativismo, especialmente, axiológico. Bajo ella, por ejemplo, se pueden sostener los siguientes presupuestos: "la realidad es más que un entorno material; segundo, que el lenguaje no sólo transmite informaciones respecto de esa realidad, sino que la construye, la moldea y le da forma; y tercero, que el sí mismo humano depende de las ficciones para constituirse" (Campos Medina y Campos Medina, 2018, p. 7).

En consecuencia, y admitiendo esta clasificación, debe asegurarse que el constitucionalismo no es una corriente uniforme; no lo fue con su surgimiento, en sentido moderno, a finales del siglo XVIII, ni durante el XIX (Fuentes, 2020b), y tampoco podría serlo en lo que se llama "nuevo constitucionalismo" (Fuentes, 2019, pp. 13-42). En esta dirección, los constitucionalismos se sostienen sobre conceptos y ficciones heterogéneas de la *Constitución* (Rivas & Fuentes, 2022), y, en algunos casos, por la afectación del objeto de estudio; es decir, por los cambios totales de las obras constituyentes, las reformas formales o por las mutaciones constitucionales, y en otras ocasiones, por la trasformación de las metodologías y proyectos para su estudio. Tratando, entonces, de hacer un resumen sobre como esas visiones se logran categorizar, tenemos la siguiente figura:

Figura 3. Visiones sobre la Constitución



En esa variedad de posibilidades, como se puede apreciar, se encuentra el *nuevo constitucionalismo latinoamericano* (Mastromarino, 2020). Dicho movimiento atribuye que sus ideas se concretan y se remontan de manera primigenia a las Constituciones de Brasil (1988) y de Colombia (1991) (Noguera & Criado, 2011). No obstante, en él deben incluirse las experiencias de reforma o formulación constitucional de Costa Rica (1989), México (1992 y 2011), Paraguay (1992), Perú (1993), Argentina (1994), Ecuador (1998 y 2008), Venezuela (1999) y Bolivia (2009), las cuales "confieren a los ordenamientos actuales cierto aire de familia. [Por ello] Es posible entonces hablar de un constitucionalismo latinoamericano actual que tiene rasgos distintivos frente a otros constitucionalismos del mundo contemporáneo o frente a los ordenamientos de la región en el pasado" (Uprimny, 2011, p. 126). Luego, se señala que

> Son constituciones del nuevo constitucionalismo aquellas que cumplen con las dos condiciones esenciales de las nuevas constituciones. Por un lado, tienen que ser necesariamente fruto del poder constituyente; es decir, debe haber un proceso constituyente plenamente democrático, una Asamblea Constituyente y, en la mayor parte de los casos, un referéndum constitucional. En segundo lugar, tiene que incorporar intrínsecamente los elementos propios del nuevo constitucionalismo: la Constitución tiene que ser la norma suprema del ordenamiento jurídico, tiene que ser capaz de limitar los poderes y debe revelar ese tipo de relaciones entre soberanía indirecta y Estado, que sería lo que llamamos democracia participativa o elementos de democracia directa, de legitimidad permanente entre poder constituyente y poder constituido. (Sosa, 2012, p. 304)

Con todo, la exigencia y el planteamiento ficcional del modelo son posteriores a la aparición de la mayor parte de dichos textos constitucionales, y no terminan siendo plenamente excluyentes frente a experiencias semejantes en otros ordenamientos. Incluso si a dichas definiciones se circunscriben asuntos como la incorporación de "principios, derechos y formulaciones que tienen su origen en tradiciones o corrientes autóctonas como el indigenismo o ciertas versiones vernáculas de ecologismo" (Salazar, 2013, p. 387), no se garantiza una independencia plena a elementos previos en dichos órdenes constitucionales. Al final,

> …el llamado "nuevo constitucionalismo" simplemente, refuerza algunos de los rasgos *ya bien presentes* en el marco constitucional de América Latina. Luego de la última oleada de reformas, nos encontramos con que: *i)* la parte orgánica de las nuevas constituciones sigue estando caracterizada por una estructura de poder concentrada políticamente y centralizada territorialmente; mientras que *ii)* la parte dogmática sigue distinguiéndose por la presencia

> de declaraciones de derechos robustas, generosas y extensas, que combinan derechos individuales y sociales de diverso tipo. En otros términos, la "doble marca" que comenzara a definir al constitucionalismo latinoamericano desde comienzos del siglo XX sigue tan vigente como entonces. (Gargarella, 2018, p. 115)

En esa perspectiva, alrededor de este grupo de Constituciones se ha diseñado no sólo un modelo metodológico, como se ha pretendido asegurar, sino también un proyecto ideológico —no siempre manifestado más allá de las aparentes virtudes— y "una narrativa fundacional hipotética o mito" (Calvo, 2010, p. 12), que, por demás, se opone a una visión realista e histórica de la Constitución (Pereira, 2005).

Desde luego, la noción avalada por el nuevo constitucionalismo de que "La Constitución es el pacto fundacional de una sociedad"(Gargarella, 2015),tiene variedad de implicaciones, entre ellas, que refuerza la idea de que la Constitución, según su forma de creación, es una mera decisión, por ende, se aleja a los parámetros de exigencias que suelen pedírsele al sistema:

> La normativa constitucional es el peor ejemplo de la metáfora *chain novel*. Comenzar con una decepción puede juzgarse un mal augurio, que confío no se cumpla, pero haberlo hecho así me parecía obligado. La legislación constitucional, ciertamente, no ejemplifica la teoría del Derecho como integridad. (Calvo, 2016, p. 47)

Conjuntamente, termina desconociendo la existencia de una sociedad política y de su historia antes de la Constitución. Si bien trata de solventarlo con la participación democrática en su aprobación, lo hace desde la generalidad y a partir de la presunción de que no hay intereses de los grupos intervinientes, o que, habiéndolos, se logran fusionar sin ser contradictorios.

A la par, en su generalización de los procedimientos de aprobación no evalúa la calidad de la democracia, tampoco que las reacciones productoras de los cambios constitucionales pueden venir de la efervescencia y, por demás, de medidas populistas[24] basadas en promesas respecto a lo que el mero texto cambiaría. No por poco se habla de un constitucionalis-

[24] "Desde mediados del siglo XX, el populismo latinoamericano ilustró de manera ejemplar esa dimensión constitutiva de los populismos actuales. Esto no puede sorprender, ya que surgió en países poco industrializados que no estaban muy estructurados en clases y se caracterizaban, en cambio, por formas de dominación oligárquica y basada en latifundios. Para gran número de ciudadanos, la oposición más elocuente era entre pueblo y élites. En este contexto, hizo su aparición la temática del hombre-pueblo" (Rosanvallon, 2020, pp. 52 y 53).

mo transformador (Von Bogdandy, 2022; Von Bogdandy, Salazar, Morales & Ebert, 2018) que requiere de Constituciones extensas, expansivas e invasivas que no quieren dejar de lado ningún tema o asunto, por lo que reemplaza otras formas de control (Fuentes, 2022a).

Por consiguiente, este constitucionalismo basa su poder en la presunta capacidad de definir no sólo lo público, sino lo privado, y este último ya no con la idea de que la libertad es todo aquello que prohíbe la ley, sino todo aquello que está reconocido por el sistema jurídico. Esa necesidad de reconocimiento para hablar de la libertad maximiza la regulación y las reformas frente a los cambios sociales: como todo lo que vale está dentro de la Constitución, todo aspira a ser constitucionalizable para no sentirse excluido.[25] Favoreciendo, entonces, un texto de máximos y no de mínimos, que suele ser menos duradero, sólo que ello no tiene importancia especial porque se podrá generar un nuevo pacto fundacional y se empezará de —casi— cero. Verbigracia, es el significativo número de reformas que ha tenido el texto constitucional colombiano desde su creación en 1991 —y hasta 2021— (57 actos reformatorios) y la experiencia ecuatoriana que ya cuenta con dos Constituciones que suelen verse como parte de este constitucionalismo (1998 y 2008).

Este exceso de lo jurídico constitucional no sólo erosiona la distinción público-privado y los límites del poder, la política y el derecho, sino que, de igual modo, da licencia para la disolución de la política como espacio de encuentro y diálogo de lo público, para converger en que ese espacio queda ahora en manos de los jueces constitucionales, quienes, a ciencia cierta, sin la prudencia correspondiente, pueden llegar no sólo a decidir desde un activismo judicial,[26] sino a fomentar que sus decisiones son argu-

[25] "No es imprescindible, e incluso puede ser poco recomendable que abarquen también, como a veces sucede, la organización política y administrativa en detalle, la regulación de la vida social, la economía, los aspectos principales de cada rama del Derecho (penal, procesal, laboral), los valores, y las fuentes del Derecho. Entendemos que para el Derecho constitucional no hay ningún progreso en ocuparse de todo, regularlo todo e invadir el campo de la legislación laboral o civil. Hay que insistir en que el progreso constitucional está en avanzar en la sumisión del poder al Derecho y en el respeto a las libertades, así como dispersar al máximo el poder" (Pereira, 2016, p. 57).

[26] "Si definimos el activismo judicial como aquellas prácticas en las que se toman decisiones judiciales que intervienen en políticas públicas, lo que tendríamos es un colapso del concepto en sus manifestaciones particulares… Parece entonces provechoso también aproximar el concepto de activismo judicial a un uso impropio de las facultades judiciales. Y esto no es un mero capricho, pues está íntimamente relacionado con lo propuesto por Schlesinger en su momento, quien se refería a los jueces activistas como aquellos que iban más allá del *self-restraint* que se esperaba de ellos. Esta moderación, o *self-restraint*, no es otra cosa que las limitaciones impuestas sobre los jueces por las normas de competencia que les dicen específicamente qué potestades tienen. De modo que si queremos tomarnos en serio el activismo judicial como Schlesinger lo concibió en su momento —y como Canon seña-

mento de autoridad.[27] En efecto, debido a que busca que la Constitución no se conciba como instrumento de limitación del poder, sino

> …como una normatividad modalizadora de la vida social, cuya encomienda se encarga ya no al legislador sino a los jueces, bajo la perspectiva que la Constitución aguarda en su contenido todos los valores políticos posibles y, por tanto, al dar cabida a un ámbito abierto de posibilidades corresponde a la acción jurisdiccional equilibrarlo para que en medida de lo razonable puedan coexistir (Medina, 2022, p. 17).

Junto a ello, su inclusión en lo político, y la de los jueces constitucionales, abandona la realidad de que, por su naturaleza, no son sujetos dentro de un diálogo, sino en el medio de un litigio a resolver. Eso provoca creer que "siempre contaremos con jueces políticamente correctos y que nuestras convicciones liberales y democráticas han alcanzado el fin de la historia y prevalecerán para siempre" (Guibourg, 2010, pp. 181 y 182).

> La existencia de este tipo de ficciones teóricas no es nueva en la historia del derecho. Con distintas características las podemos hallar a través de la figura del buen juez en el *ius commune medieval*. Ciertamente, también la encontramos en el mismo legislador racional propio de la dogmática positivista, explicado por Nino. No obstante, es conveniente indicar que la anterior práctica jurídica descansaba en un acervo cultural y ético relativamente compartido, mientras que el actual modelo de juez racional se desenvuelve en un contexto totalmente distinto, en el que la modernidad ha ido diluyendo aquellos lazos comunes que determinan el acuerdo sobre lo que es justo y moralmente aceptable. Por ello, los dilemas de la justificación de la discrecionalidad y de la responsabilidad política hoy resultan más apremiantes. (Villalonga, 2019, p. 785)

De esta suerte, las ficciones dogmáticas que se generan alrededor del nuevo constitucionalismo latinoamericano —como se anticipa y será desarrollado en trabajos subsecuentes— con facilidad consuman una serie de limitantes prácticas: razonan las ficciones constitucionales como realidad y llevan a crear una sociedad constitucionalizada desde el fanatismo,

la— tenemos que definirlo en términos de las poderosas funciones que tienen los jueces en los sistemas jurídicos. Esto es, en términos de las normas de competencia que establecen el límite de lo que es una actuación judicial y aquello que no lo es" (Rivas, 2022a, pp. 88 y 89). *Cfr*. (Rivas, 2022b)

[27] Una posición crítica de cómo ello afecta la labor docente ha sido manifestada en los siguientes términos por Lino A. Graglia: "The function of constitutional law professors and constitutional theory is to perpetuate the central fiction that the Supreme Court's controversia! Rulings of unconstitutionality are interpretations of the Constitution in sorne arcane sense" (1996, p. 296).

en otros términos, que se quiere que viva en la ficción de que en la y con la Constitución terminan sus males, sin percibir que la efectividad o fracaso de la Constitución no es dependiente de la ficción, sino de la realidad empírica que el texto por sí solo no puede, a lo sumo, esperar modificar. Al final, en palabras de Ernesto Sábato, "aun en las ficciones más subjetivas, el escritor [y el receptor] no puede[n] prescindir del mundo" (Sábato, 2002), ni tampoco convertir lo ficcional en imposición.

V. A modo de conclusión

En este punto, se puede decir que los elementos discutidos son ideas fundamentales —aunque aún preliminares— para la comprensión comunicacional del derecho, y en especial de la norma constitucional, en contextos del nuevo constitucionalismo latinoamericano. Así, sin duda, las herramientas y métodos circunscritos a una visualización más allá del texto, confluyen para asimilar que la norma jurídica es un fenómeno complejo que involucra lo previo, lo posterior y, por supuesto, el contexto donde yace la norma.

En esa medida, asumir que el carácter autorreferencial del sistema jurídico carece de límites no sólo es una aproximación errada a una teórica sistemática, sino es estar a un paso de volver mitología e ideología el derecho y perder su esencia misma; es decir, la justicia. Precisamente, los límites del ordenamiento jurídico no son distantes a aquello que se puede comunicar, entender, comprender e interpretar. Pero la recurrencia e intención de dejar de lado la diferencia entre estas competencias y el fortalecimiento de una convicción cerrada y absoluta sobre lo que puede brindar y hacer el derecho, firma, más que un proyecto, una ideología riesgosa y que renuncia a la crítica y al diálogo: el fetichismo hacia las normas y con ella a los recursos que emplea, desconoce la realidad supliéndola con la ficción jurídica. En ese sentido, más que transformar lo empírico, sólo genera una aparente "realidad" esquiva que matiza como errado al que no está en ella. De ahí que

> Es hasta contradictorio afirmar que la realidad es todo lo que decimos de lo real pero no es lo real. Si la realidad es un discurso y un discurso se construye focalizado desde un punto de vista, entonces hay tantas realidades como discursos, miradas y puntos de vista. Es cierto que lo real no permanece estático y que el referente nunca es el mismo, pero eso no implica que no exista o que no sea válido como referente (Espezúa, 2006, p. 70).

Dicho ámbito no puede abandonar los acontecimientos que han rodeado el nuevo constitucionalismo latinoamericano y a sus obras constitucionales, las cuales, en diversos aspectos, muestran una débil efectividad de sus preceptos y, por su naturaleza y estructura, terminan teniendo un efecto de bola de nieve en materia de derechos y políticas públicas simbólicas; es decir, sin observar su naturaleza, sus deberes y la necesidad de una separación del poder público para cumplir los fines estatales. Situaciones que recuerdan que "la Constitución, como el Derecho, debe contar con sentido y con justicia, pero ello no queda garantizando mecánicamente al incluirla en una disposición normativa" (Fuentes, 2022b, p. 82).

En definitiva, si "La Constitución es… una ficción por ser Derecho" (Calvo, 2016, p. 54), ésta no puede abandonar su dependencia con la verdad, con su estatus de decisión y con su pretensión de permanencia, so pena a caer en un ejercicio ilimitado, emocional y momentáneo, tan problemático y polémico como vivir en una historia literaria que sólo existe en la ficción. Dirección que puede estar tomando el nuevo constitucionalismo latinoamericano.

Al final, si existe un mundo o mundos posibles en lo ficcional, la labor del derecho en su creación y completitud no puede carecer de razonabilidad, y menos pretender, racionalmente hablando, reducir al ser humano escasamente a *homo juridicus* (constitucional). Una visión contraria fomenta lo que con facilidad podría denominarse *constitucionalismo paliativo*; sin embargo, esto hará parte del siguiente resultado investigativo, que implicará el rastreo de ejemplos concretos en ejercicio del nuevo constitucionalismo latinoamericano.

VI. Referencias

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La gentileza y amabilidad del profesor J. Alberto Montero Olmedo hizo que el libro objeto de esta reseña llegara a mis manos. Apenas recibirlo me di a la tarea de leerlo con especial entusiasmo, debido, en gran medida, al mucho interés que siempre ha despertado en mí la filosofía de los derechos humanos —es lógico después de haber escrito y enseñado esta materia por más de 25 años en la Facultad de Derecho de la UNAM— y a la intriga de saber cómo abordarían, con perspectivas diferentes, su problemática iusfilosófica cuatro destacados maestros de nuestra Facultad.

Un primer comentario es que el contenido del libro no trata, en forma específica, alguno de los temas considerados tradicionales del fundamento filosófico de los derechos humanos; por ejemplo, el argumento de la dignidad de la persona o de a quién debemos considerar como persona humana y, por tanto, titular de estos derechos, o si son derechos radicados en la naturaleza humana o, más bien, están asentados en el consenso social, etcétera. Lo que sí es el libro, es un análisis de diversos aspectos que integran lo que podríamos llamar una "teoría general de derechos humanos".

En este contexto es en el que se debe entender el contenido general del libro, el cual, desde mi punto de vista, se encuentra dividido en dos grandes partes. La primera correspondería a los primeros dos capítulos, escritos por Walter M. Arellano y Alberto J. Montero, titulados, respectivamente: "Derechos y derechos humanos" y "Los derechos humanos y la filosofía". La segunda parte la escriben Rodrigo Brito Melgarejo e Israel Sandoval Jiménez, y sus capítulos son: "Los derechos humanos y la filosofía política" y "El marco sociopolítico de los derechos humanos". Así, digo que son dos grandes partes en las que se divide el libro porque el paralelismo argumentativo es mayor entre cada par de artículos que componen las respectivas secciones.

El libro se abre con el capítulo de Walter M. Arellano, que aborda diferentes tópicos de los derechos humanos, tales como el concepto de estos derechos, su fundamentación y las garantías que les asisten en su protección. Éstos y otros temas resultan de especial importancia para los derechos humanos y, sin duda, pueden ser abordados desde diferentes puntos de vista y perspectivas. Uno de ellos lo elige el Dr. Arellano, y, sino me equivoco, es el del historicismo, más específicamente, la fundamentación historicista de los derechos humanos. Esta opinión viene a ser confirmada con la siguiente cita: "Los derechos humanos son prerrogativas resultado de luchas históricas y presentes —principalmente del mundo occidental y occidentalizado— por medio de las cuales se ha resistido a la desigualdad y a la injusticia…" (p. 19).

Esta manera de entender el origen y desarrollo de los derechos humanos se observa a lo largo de todo el capítulo, viniendo después a ser confirmada por la bibliohemerografía empleada, lo que nos muestra, con claridad, esa vena historicista de la que hablamos y que identifica a su autor.

Nadie puede negar lo atractivo de la propuesta historicista de la cual yo me encuentro especialmente distante, en gran medida porque creo que dicha corriente filosófica no alcanza a responder con satisfacción muchas preguntas claves para el fundamento de los derechos humanos. Sin embargo, no es el lugar para enunciar todas esas preguntas, sino sólo algunas: ¿cuáles exigencias históricas —por las que se lucha— son las que tendrán que convertirse en derechos humanos?, ¿todas las que aparezcan en la lucha histórica o sólo algunas? Y si fuera el caso, ¿cuáles serían los criterios para determinar qué exigencias históricas tendrían después de ser derechos humanos?, ¿quién sería la persona, o conjunto de personas, que determinaría esos criterios?, ¿sólo los vencedores serían a quienes correspondería imponer su manera de ver el mundo y determinar desde ahí lo que ellos creen que son derechos humanos?, ¿son las revoluciones el medio más idóneo para tener derechos humanos?

Sin duda, como señalábamos, el historicismo como propuesta teórica ha sido muy atractivo, de hecho, ha cautivado a muchos teóricos de la filosofía y del derecho. No obstante, desde aquí no se ve cómo pueda apostarse por un fundamento fuerte de estos derechos, y sí, más bien, por un relativismo axiológico dependiente de revoluciones, conquistas y consensos, nada más alejado de lo que los derechos humanos son. Las preguntas hechas antes son sólo una muestra de las muchas críticas que pueden formulársele.

El segundo capítulo corre a cargo del profesor Alberto J. Montero, quien nos ofrece un panorama muy general de algunos de los principales

temas, tanto de la filosofía como de la filosofía del derecho, y del puesto que han tenido los derechos humanos en tal recorrido histórico. Así, son bastantes los interesantes temas que el profesor Montero desarrolla en su trabajo y sobre los que uno podría explayarse por mucho tiempo, pero me gustaría sólo detenerme en dos aspectos muy puntuales.

El primero es la novedad que causa el profundo apego que Montero tiene a la filosofía kantiana para explicar los derechos humanos, y cuya exposición alcanza de la página 51 a la 70. No quisiera entrar a discutir sobre si es posible ofrecer un sustento filosófico fuerte a los derechos humanos desde coordenadas kantianas; sólo quiero resaltar el interesante esfuerzo que se observa en el artículo por tratar de establecer algún paralelismo entre la filosofía kantiana con la tradición aristotélica. Para confirmar mi dicho propongo la siguiente cita: "Kant al igual que Aristóteles parte de que el hombre posee alma y en ella se ubican las facultades concupiscente, volitiva y racional…" (p. 56).

Es claro que, si ambos pensadores parten de este dato esencial de la persona, la manera en la que fundamentarían los derechos humanos se caracterizaría por profundas simetrías. Por lo tanto, el esfuerzo del profesor Montero es digno de destacar, ya que en gran parte de la bibliografía especializada es prácticamente inexistente esa preocupación por encontrar tales analogías. Ahora bien, más allá de lo que se acaba de apuntar, quisiera destacar la consecuencia a la que nos llevaría entender el fundamento filosófico de los derechos humanos desde tal paralelismo, y que no es otro que el señalado por el propio profesor Montero en la página 61 del libro: "…diríase entonces que *dignidad humana* es el respeto de todo aquello que constituye la esencia de lo humano, y cualquier forma en como lo violentemos o no respetemos es contraria a su dignidad". Expresada de esta manera tal afirmación, coloca el tema del fundamento de los derechos humanos en el corazón mismo del iusnaturalismo clásico, y nos permite pensar que entre el pensamiento de Aristóteles y de Kant hay profundas analogías.

El segundo aspecto que quisiera destacar de este trabajo es el bien logrado resumen que presenta de los diferentes intentos de fundamentación de los derechos humanos que se han dado a través de la historia; a saber: *i)* iusnaturalista; *ii)* iuspositivista; *iii)* el esfuerzo analítico, y *iv)* la propuesta crítica.

Comparto plenamente las críticas y riesgos que acarrean aquellas fundamentaciones distintas de la iusnaturalista, por ejemplo, la del positivismo jurídico, por su visión tan reduccionista, al entender que el derecho y, por consiguiente, los derechos humanos, son sólo aquellos que se encuentran en la ley y que han sido dados por el poder político. O las obser-

vaciones hechas a la filosofía analítica a propósito del riesgo que se corre de que los derechos humanos se queden en un ámbito meramente metadiscursivo. O los graves peligros que entraña entender estos derechos como una simple ideología de dominación, argumento propuesto por la corriente crítica del derecho.

Los riesgos anteriores son verdaderos, por eso los advierte el profesor Montero, y lo hace, en mi opinión, acertadamente. Hay, sin embargo, una observación sobre la que es necesario detenerse. Es la referencia hecha sobre la fundamentación iusnaturalista, la cual debe ser matizada, pues vincula tal fundamentación con una visión religiosa o divina del mundo. Al respecto, habrá que decir que ningún iusnaturalista serio justificaría la existencia de los derechos humanos en un derecho divino, en consecuencia, es falsa la creencia de que todo iusnaturalista es necesariamente creyente, y que, si no lo es, entonces no puede ser iusnaturalista. Por desgracia, esto ha sido una especie de estigma que ha arrastrado el derecho natural desde siempre, pero conviene señalar que no es así.

Los interesantes argumentos expuestos por el profesor Montero me llevan a pensar que su postura, si bien no es iusnaturalista pura, es, en cierto sentido, neo-iusnaturalista. Si es el caso, sería posible entender el párrafo con el que concluye su escrito:

> …desde ese justificacionismo neoiusnaturalista se sostiene que la justicia no solamente es algo de lo cual de forma racional podemos dar cuenta, sino que además es necesario considerarla en el ámbito del derecho, ya que esta permite reorientar al orden normativo y a su práctica a la realización de lo justo… (p. 97).

En este sentido, y siguiendo el análisis del profesor Montero, podemos decir entonces que lo justo de cada persona son, precisamente, los derechos humanos.

La segunda parte del libro se abre con el capítulo tercero, "Los derechos humanos y la filosofía política", a cargo de Rodrigo Brito Melgarejo. Un trabajo bien escrito que se caracteriza por ser una excelente exposición sobre la manera en que, a lo largo de la historia, se han entendido la filosofía política y las ideas centrales que la componen, como democracia, libertad, representatividad, derecho, obediencia a la ley, etcétera. Pero ¿cuál es el objetivo de esta disciplina? El mismo autor nos responde diciendo que la filosofía política no se encarga de otra cosa sino de teorías sobre la *polis*, sobre la que constituye una sociedad justa. La siguiente cita muestra lo afirmado: "Toda acción política se orienta entonces, en sí misma, hacia el conocimiento de lo bueno y, cuando esa orientación se hace explícita… surge la filosofía política" (p. 104).

Como el autor nos muestra, es claro que a lo largo del tiempo han existido distintos intentos por explicar tanto la filosofía política como lo que debería ser una sociedad justa, pero, sin duda, una de las explicaciones que más y mejor da cuenta de esta cuestión es la propuesta aristotélica. De ahí que se eche en falta un tratamiento pormenorizado de esta propuesta en el artículo comentado, aunque, sin duda, como dice el mismo Rodrigo Brito, "…por lo que se refiere a los seres humanos como entes políticos se deben retomar, necesariamente, los planteamientos de Aristóteles" (p. 114).

¿Por qué Aristóteles? La respuesta es obvia: porque Aristóteles nos enseñó que la mejor comunidad política, la más perfecta y completa, no es la familia ni la aldea, sino la *polis*; es decir, aquella comunidad política en la que, a través del lenguaje, el hombre no sólo es capaz de decir lo que le resulta placentero o útil, sino, sobre todo y de manera esencial, lo que es bueno y malo, lo que es justo e injusto. Este argumento central no se volverá a presentar en toda la filosofía política posterior a Aristóteles.

La relación que lo anterior tiene con los derechos humanos es también obvia, y es obvia porque aquello que es lo *justo* en la comunidad política son, precisamente, los derechos que la persona tiene y de los cuales es titular; como a la vida, a la salud corporal y mental, el derecho al trabajo o a vivir en un ambiente sano, etcétera, son derechos de la persona. Esta tesis reseñada me parece mucho más sólida que aquellas otras de la filosofía política que hacen radicar tales derechos en la autonomía y la libertad de la persona, notas que identifican la mayor parte de análisis políticos y filosóficos de la modernidad.

Esta segunda parte del libro, y conclusión del mismo, se cierra con el trabajo de Israel Sandoval Jiménez, quien presenta, en su primera parte, un apartado muy importante relativo al desarrollo histórico del constitucionalismo moderno, con referencia especial al surgimiento y promoción de los derechos humanos en la historia. Alusiones hechas a documentos tan significativos para estos derechos, como la Carta Magna de Juan sin Tierra, de 1215, la Petition of Rights o los propiamente modernos, como la Declaración de Derechos del Buen Pueblo de Virginia, de 1776, o la Declaración de los Derechos del Hombre y del Ciudadano, de 1789, son documentos de los que da cuenta Sandoval Jiménez, destacando aspectos muy puntuales de los mismos. Este ejercicio teórico-histórico es importante destacarlo porque por lo general se olvida en los diferentes artículos o libros que sobre derechos humanos se escriben, trayendo como consecuencia lógica imprecisiones a la hora de hablar de derechos humanos.

Sin embargo, la referencia hecha al origen de los derechos humanos y, en definitiva, al constitucionalismo moderno, no se queda ahí, pues el autor aborda igualmente el fuerte impacto que esta cultura ha tenido en los últimos años en el constitucionalismo mexicano, sobre todo a partir de la reforma a la Constitución en 2011. Temas tan relevantes como el papel del juez en este nuevo paradigma jurídico, o el rol que juegan los documentos internacionales protectores de estos derechos en la custodia nacional de los mismos, o la interpretación constitucional que hacen los jueces sobre los derechos humanos, son sólo algunos de los muchos aspectos destacables en el artículo de Sandoval Jiménez.

No quiero terminar esta reseña sin hacer un público reconocimiento a los autores del libro, por presentarnos un texto útil y rico en ideas iusfilosóficas sobre los derechos humanos; ideas hoy tan ausentes en la enseñanza de estos derechos, tanto a nivel licenciatura como a nivel posgrado, y cuyo déficit afecta la protección de tales derechos en todos los ámbitos, en especial, actualmente, en el ámbito jurisdiccional mexicano, y en particular en la Suprema Corte, que no sabe lo que los derechos humanos son. Vaya, por tanto, mi felicitación a los autores de este texto.

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