CHALLENGES TO A GENERAL THEORY OF DISCRETION

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Discretion is used differently in various legal contexts. This study examines the theoretical foundations of discretion. It addresses four challenges to the general theory of discretion: (1) the scope of agents, (2) necessary limitations, (3) the role of norms, and (4) the sources of discretion. This study argues that the concept of discretion refers to all public agents (any agent empowered by competence norms to produce legal consequences in the public interest), including those producing direct individual acts, and that the concept includes limitations and guidance imposed on the choice between alternatives and explicit or implicit norms on the exercise of power. It explores the sources of discretion through the lens of legal reasoning and proposes a framework that integrates the justified structure of the application of rules and the applicability of rules. This study questions whether a competence norm alone can serve as a source of discretion or whether additional norms are necessary to prevent arbitrary use.

Key words: discretion; public agent; power; legal reasoning; application of rules

1. INTRODUCTION

The varied uses of the term "discretion" reflect its complexity and the diverse ways it can be understood and applied within legal science. The concept is most often associated with executive-administrative power, as if it were an inherent

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feature of that power due to the alleged specific nature of the executive function.[1] This specific nature is reflected in the executive's role in managing situations outside the law and, at times, even avoiding the law.[2] Administrative law scholars connect discretion to decisions that fall within the realm of opportunity rather than legality.[3] In adjudication, legal theory discusses discretion as a consequence of the indeterminacy of law.[4] In the realm of legislation, classical theories of liberal democracy describe political discretion as a "free activity" constrained by judicial oversight[5], while theories of a constitutionalized legal order view it as a constitutionally guided activity[6] akin to executive-administrative power in the "legislative state."[7]

This study aims to contribute to the development of a general theory of discretion. When constructing a general theory, several inherent challenges arise: how to encompass all phenomena related to the object of research and offer an appropriate understanding of it; how to identify all theoretical problems associated with the object and address all aspects of their resolution; and how to develop an appropriate methodology.

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1 Chand, B., *Discretionary Powers of Government*, International Review of Administrative Sciences, *vol.* 15, no. 3, 1949, p. 411.

2 Locke, J., *Two Treatises of Civil Government*, J. M. Dent, London, 1924, p. 199.

3 See: Davis, K. C., *Discretionary Justice: A Preliminary Inquiry*, Louisiana State University Press, Baton Rouge, 1969, pp. 3 and 67; Andreescu M.; Puran A., *Criteria for Delimiting Discretionary Power from Excess of Power in the Work of Public Authorities*, Journal of Law and Administrative Sciences, *vol.* 8, 2017.

4 See: Hart, H. L. A., *The Concept of Law*, Oxford University Press, New York, 1994, pp. 124–136, 272–276; Hart, H. L. A., *Discretion*, Harvard Law Review, *vol.* 127, no. 2, 2013, p. 655; Dworkin, R., *Taking Rights Seriously*, Harvard University Press, Cambridge, 1978, pp. 31–39, 68–71; Dworkin, R., *Judicial Discretion*, The Journal of Philosophy, *vol.* 60, no. 21, 1963; Kelsen, H., *Introduction to the Problems of Legal Theory. A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*, Oxford University Press, New York, 1992, p. 79; Raz, J., *Legal Principles and the Limits of Law*, The Yale Law Journal, *vol.* 81, 1972.

5 See: Allan, T. R. S., *The Rule of Law*, in: Dyzenhaus D.; Thorburn M. (eds.), *Philosophical Foundations of Constitutional Law*, Oxford University Press, New York, 2016, p. 203; Biernat, T. *On the Lawmaking Policy, Discretion and Importance of the Rule of Law Standards*, Studia Iuridica Lublinensia, *vol.* 29, no. 3, 2020, p. 68.

6 See: Guastini, R., *La sintassi del diritto*, Giappichelli, Torino, 2014, p. 201.

7 See: Barberis, M. G., *Introduction: Legal Positivism in the 20th Century*, in: Pattaro E.; Roversi, C. (eds.), *Legal Philosophy in the Twentieth Century: The Civil Law World, Vol II*, Springer, Cham, 2016, p. 181.

This goal will be pursued by following and analyzing the general theory of discretion whose basic ideas were presented by David Duarte.[8] We will use our understanding of his basic ideas from his presentation as the initial theoretical framework from which the scientist can start when investigating the general theory of discretion. In the following text, we will use the term "initial theoretical framework" when referring to our understanding of the basic ideas from David Duarte's presentation (with reference to the place in his work that he presented).

His theory serves as an exemplary starting point because it seeks to understand discretion in a general and abstract manner while addressing all the main theoretical issues related to the concept using a promising method. Duarte begins by (1) defining discretion, aiming to identify the essential elements of discretion that are common across all areas of law creation and application. (2) After establishing this definition, he addresses and resolves the fundamental problems related to discretion, which can be categorized as follows: (i) the problem of the source of discretion, (iii) the problem of defining definitive discretion, and (iii) the problem of judicial review of discretion. (3) Duarte uses the method of legal theory. His analytical approach is manifested in his use of conceptual analysis and analytical tools of legal theory, such as those from the theories of definition, subjective legal positions, norms, language and legal reasoning.

We will examine and question each of the following elements identified in the initial theoretical framework: a) the necessary features of discretion (Section 2), b) discretion as the normative situation of public power (Section 2), c) the role of norms (Section 2) and especially the competence norm as a source of discretion (Section 3), d) the sources of discretion classified into two main groups: linguistic and normative (Section 3). In this study, we will not deal with the two elements mentioned by Duarte, the analysis of which requires separate research: e) *prima facie* and definitively established discretion and f) judicial review as an area beyond definitively established discretion. The analysis of the initial theoretical framework presented in this study will use the same approach as Duarte. In addition, the analysis will offer a framework that integrates the justified structure of reasoning with reasoning on the applicability of rules (Section 3).

[8] Durarte, D., *Discretion: an analytical approach*, presented at 7th Lisbon Meeting on Legal Theory: Discretion, Lisbon, 28 June 2024. Available at: https://www.academia.edu/120808441/Discretion_An_Analytical_Approach and https://www.researchgate.net/publication/381296055_Discretion_An_Analytical_Approach (16.6.2025.).

2. DEFINITION OF DISCRETION

An initial definition of discretion, following the initial theoretical framework[9], can include the following elements grouped into two parts. The first part of the initial definition consisting of two elements limits discretion to: (1) actions of public law subjects (2) in the normative situation of power. These two characteristics – public agents and a focus on public power – are useful, as they clarify the distinction between discretion and liberty and between the actions of public law agents and private individuals. However, a deeper analysis revealed two key remarks (below) regarding these features. The remaining three elements of the stipulated definition demonstrate that, in all instances where discretion is applied: (3) there are alternatives for action; (4) the agent must choose between these alternatives and (5) the discretionary situation is defined by norms. A third remark (below) will be made concerning this second part of the definition.

2.1. First remark: Agents of discretion

When we talk about discretion as the action of an agent in a legal position of power, we can ask whether that power is limited only to the creation of deontic consequences. By defining discretion in terms of actions by public law agents that create only deontic consequences, the theory excludes situations where public law agents apply the law directly through factual ("ontic"; non-deontic)[10] actions without creating new legal positions as part of the law application process (e.g., damaging a person's physical or mental integrity). The theory of discretion

[9] *Ibid.*, 1-2. This paper defines discretion through necessary and sufficient conditions, though prototype-based approaches (see: Jovanović, M., *Prototype theory of concepts and analytical account of law*, Revus [Online], *vol.* 54, 2024) are also viable. Both methods have strengths and limitations, and elements identified by the first (stricter) method can also be seen as "typical" rather than strictly necessary under the second. Ultimately, the usefulness of any definition depends on its intended purpose. The aim is to highlight discretion's necessary link to legal reasoning—clarifying judicial discretion and revealing its role even in contexts where it seems absent (e.g., legislative or political discretion). For this purpose, stricter definitions may be preferable; just as defining chess requires a king, a game must include a king to qualify as chess.

[10] For the distinction between factual (ontic; non-deontic) and legal (deontic) actions see: Ross, A., *On Law and Justice*, The Lawbook Exchange, Clark, 2004, p. 216; Duarte, *op. cit.* (fn. 8), p. 2; Duarte, D., *Rights as formal combinations of normative variables*, Revus (opened edition), *vol.* 51, 2023, par. 25.

primarily aims to explain the power to alter normative positions (i.e., the power to indirectly apply the law through the creation of a new norm by applying another norm). However, it also pertains to the power to apply the law directly – without establishing a norm[11] – by public law agents performing factual actions under "first-order norms" (i.e., "norms of conduct which regulates the exercise of this competence").[12] For example, we can analyze the following situations.

Example A: When a police officer demands that a citizen stop, the citizen must comply (primary legal positions of demand and obligation).[13] In these situations, public agents change legal positions (from liberty to obligation) and create a new primary position (obligation). However, once these primary positions are established, if a police officer uses force[14] (action without creating new legal positions) against a citizen who refuses to stop, the citizen cannot demand that the officer refrain from using force (primary legal position of non-demand) and is obliged not to resist.

Example B: Likewise, if a court orders a convicted person to enter prison voluntarily, the person must comply. If a prison officer uses force to bring a convicted person to prison because the person did not do so voluntarily, the convicted person cannot demand that the officer refrain from using force and is obliged not to resist it.

In such cases, where a public agent applies norms of competence (to use force) while operating within primary legal positions (demand, obligation, liberty, or non-demand), discretion remains relevant in terms of whether to use power and how power (e.g., force) established by the competence norm (X can use force) is used under first-order norms (how to use force).[15]

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[11] On "merely law application" by which no norm is established, and on "execution of the coercive act" and "direct administration" as merely application of law, see: Kelsen, H., *General Theory of Law and State*, Oxford University Press, New York, 1949, pp. 134, 278–280 and Kelsen, H., *Pure Theory of Law*, The Lawbook Exchange, Clark, 1967, pp. 235-236.

[12] Ross, A., *Directives and Norms*, Routledge & Keganpaul, London, 2005, p. 131.

[13] The term primary legal position refers to those positions created by norms of conduct and secondary legal position refers to those positions created by competence norms. See: Guastini, *op. cit.* (fn. 6), p. 78; Duarte, *op. cit.* (fn. 10).

[14] On coercive acts (as a kind of direct administration) see: Kelsen, *General Theory…*, *op. cit.* (fn. 11), pp. 278–280.

[15] Norms of conduct regulating the exercise of power can be seen as part of the competence norm (material competence) or as separate norms accompanying competence norm. See: Ross, *op. cit.* (fn. 10), p. 204.

Additionally, we propose to clarify that a public agent can be any agent empowered by competence norms to produce legal consequences (deontic and ontic) in the public interest (public interest explained in the section 3.1.). This definition of a public agent includes entities such as public hospitals or universities.

2.2. Second remark: The necessary limitation of discretion?

The notion of a "normative situation of discretion" should not be viewed as a new legal position added to Hohfeld's system of eight atomic (elementary) positions.[16] If it is not an atomic legal position, then it must be either a complex legal position composed of several atomic positions or part of an existing atomic position. In the second case, it seems appropriate to consider the normative situation of discretion within the atomic position of power.

However, this thesis of the normative situation of discretion as part of the atomic position of the power position raises several new questions. For instance, does establishing a legal position of power by designating the public agent's competence to exercise the power of creating and applying the law imply the existence of a normative situation of discretion, just as the birth of a person implies a normative position of liberty? Can a public law agent, once assigned the power to act, exercise their authority freely within their domain if it is not constrained by formulated norms in the same way that a person can act freely until constrained by norms? This question will be addressed in the following section (Section 3.1.). However, for now, we can assert that the normative situation of discretion is always limited and guided and must always be subject to the principles of public interest, the rule of law, and possibly other principles that pervade the legal order.

2.3. Third remark: The role of norms

The remaining three elements of the stipulated definition (law, alternatives, choice) apply to all public agents in positions of power. However, it is questionable whether a discretionary situation can be implicitly assigned to public law agents and, if so, whether it can be assigned implicitly as absolute discretion (e.g., without limits or guidance).

[16] Hohfeld, W. N., *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, Yale Law Journal, *vol.* 23, no. 1, 1913.

In administrative law, there is generally an expectation that explicit norms grant discretionary power.[17] This expectation stems from the principle of placing the administration under the law and limiting its actions to what is expressly permitted by the norm.[18] However, even in administrative law, there may be instances where it is unclear whether a norm grants discretion. In such cases, it is crucial to determine the norms that dictate how the rule should be applied.[19] As we will see, these metanorms on the rule's applicability may be implicit.[20]

In the judicial context, discretion is often not granted or constrained by explicitly formulated norms. Nevertheless, the choice between alternatives must be thoroughly explained through structured and justified reasoning subject to the supervision of higher courts.[21] This requirement, not always explicitly formulated but inherent in the understanding of adjudication[22], places judicial discretion firmly within the realm of legality, making absolute discretion impossible. The need for structured reasoning, detailed explanations, and institutional supervision can, at least in some types of legal orders, be extended to all forms of law application, including administrative actions.

In the legislative sphere, according to one view, discretion appears to be inherently present in the legal order due to the mere existence of a competence norm for law creation. According to this view, it initially represents absolute discretion. However, by subordinating legislation to the Constitution, it is widely recognized that merely assigning a legislative function to an agent is not sufficient for granting legislative discretion. Such discretion also has limits imposed by constitutional norms[23] – whether explicit or (at least in some types of orders) implicit.[24] Moreover, in certain types of legal orders, it is understood that the legislator is not only restricted by the Constitution, but also guided

[17] For statutory bounds of discretion and statutory authorization, see: Grey, J. H., *Discretion in Administrative Law*, Osgoode Hall Law Journal, *vol.* 17, no. 1, 1979, p. 119 and 125. On the view that discretion should be explicit in peacetime, and exceptionally implied in war time, see: Henry William R. Wade, H. W. R.; Forsyth, C. F., *Administrative Law*, Oxford University Press, New York, 2009, p. 266.

[18] Guastini, *op. cit.* (fn. 6), p. 141.

[19] On norms about applicability see: section 3.2 below.

[20] See: section 3.

[21] Guastini, *op. cit.* (fn. 6), p. 433.

[22] *Ibid.*, p. 444.

[23] *Ibid.*, p. 139–140.

[24] *Ibid.*, p. 193.

by it.[25] This perspective on the guidance of legislative function is based on the existence of unformulated constitutional norms.

Thus, just as discretionary situations for legislators, adjudicators and administrators can be seen as sometimes arising from unformulated norms assigning power, discretionary situations can also be seen as arising from explicit or implicit norms that restrict and possibly guide the exercise of that power. If we accept the assumption that discretion should be limited and directed, then it can be claimed that the normative situation of discretion results from explicit or implicit norms on the limitations and guidance of the exercise of power.

With these three remarks (agent, limitations, role of norms) in mind – on the agents of discretion, the necessary limitation of discretion, and the implicit norms on the limitation and guidance of discretion – the initial definition at the beginning of this section can be supplemented as follows:

Discretion is (i) the normative situation of an agent empowered by a competence norm to produce legal consequences in the public interest (public agent), when (ii) in the legal position of power to create and apply law (including direct application). In this normative situation the agent faces (iii) alternatives of action (iv) that leads agent to a necessary choice. (v) This normative situation results from the explicit or implicit norms limiting or governing the exercise of power. The exercise of power must always be subject to the principles of public interest and the rule of law as well as potentially other principles that pervade the legal order.

3. SOURCES OF DISCRETION

In legal theory, several well-known tools are useful for the analysis of the sources of discretion: the indeterminacy of law due to the vagueness of language[26], the indeterminacy of law due to uncertainty about which norms belong to the legal order[27] which results from different methods of legal interpretation and legal construction, the distinction between provisions and norms[28], and the distinction between different types of norms.[29]

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[25] *Ibid.*, p. 190.

[26] See: Guastini, R., *An Analytical Foundation of Rule Skepticism*, in: Duarte, D.; Moniz Lopes P.; Silva Sampaio, J. (eds.), *Legal Interpretation and Scientific Knowledge*, Springer, Cham, 2019, p. 19.

[27] See: Guastini, *op. cit.* (fn. 26), p. 20.

[28] See: *Ibid.*, p. 21.

[29] See: Guastini, *op. cit.* (fn. 6), pp. 33–75 and 103–107. However, theoretical disagreements remain regarding the main types of norm as entities and the content for some of them.

The initial theoretical framework was built using these tools to classify all sources of discretion. It groups all sources of discretion into linguistic and two types of normative categories. Normative sources of the first type involve (i) an obligatory norm with alternatives, (ii) a permissive norm, and (iii), in some cases, a norm of competence (power-conferring norm) itself.[30] Linguistic sources of law include the syntax, semantics, and pragmatics of language, the test of proportionality, and the test of equality.[31] Normative sources of the second type include conflicts of superior norms, conflicts of interpretative norms, and other conflicts of norms where no single norm resolves the conflict.[32]

In the following section, we first examine the competence norm as a source of discretion. We then consider separately the sources of discretion for individual and general acts.[33]

3.1. Competence norm as a source of discretion?

According to one view, if no additional provisions are specified, an alternative arises from the competence norm itself. In this situation the agent can conceive any deontic action and no limitation comes from norms at a higher level regarding its content.[34] To clarify this view, we define the permission norm with "may" and the competence norm with "can".[35] This view then means that the permission norm "X may do Y" is implied by the competence norm "X can

[30] Duarte, *op. cit.* (fn. 8), pp. 12–15.

[31] *Ibid.*, pp. 3–11 and 17–22.

[32] *Ibid.*, pp. 15–17.

[33] The term "act" refers to linguistic and non-linguistic actions used to create and apply the law. However, in the case of linguistic deontic actions, the term can be also used to denote the result of such actions – a normative sentence or a document containing such sentences.

[34] Duarte, *op. cit.* (fn. 8), 16.

[35] For the meaning of empowering as "he/she can" and the meaning of permitting as "he/she may," see: Kelsen, H., *General Theory of Norms*, Oxford University Press, New York, 1991, p. 97. According to Lindahl, this "can" concept of competence norm is shared by Ross, Hart and Hohfeld. They are considering competence norms as a special case of "can." See: Lindahl, L., *Position and Change*: *A Study in Law and Logic*, D. Reidel, Dordrecht, 1977, p. 207 and 211.

do Y"[36] and presents an absolute discretion[37] to (i) decide whether to exercise the power or not and, (ii) if the decision is made to exercise the power, to do so without restrictions or adherence to specific directions (guidelines).

However, the question is whether discretion must be conferred by other norms defining its limits or guidance once the power has been assigned to an agent by a competence norm. We present six arguments to support the claim that it must be conferred by such norms.

Argument 1: Use of language and interpretation. The term "discretion" is typically understood not as the power granted by a competence norm but as a specific manner of exercising power determined by an additional norm.[38] This additional norm authorizes the agent to choose between alternatives when deciding on the content of an act, while the competence norm merely designates the authority to act. For instance, the norm that grants a government ministry the power to issue passports does not specify how the passport should be issued. Similarly, the norm that empowers courts to judge does not detail how to judge. Likewise, the norm conferring power on Parliament to enact statutes does not outline how the legislative process should be conducted. If nothing else is specified about how to exercise authority, according to one interpretation, it implies that it can be performed in any manner. However, this is not the only possible interpretation; one could also argue that if no additional norm is formulated, *argumentum a contrario* leads to the conclusion that it may not be performed.[39] We can moderate this position by adding that at least some limitations or guidance must be implied. This second interpretation, strict or moderated, is closer to how discretion is typically understood.

Argument 2: Effectiveness. Assigning power to an agent does not necessarily imply that the agent may choose never to perform that activity, as the argument on competence norm as a source of discretion suggests. If the competence norm

[36] Ross called the norm that designates an activity to agent "personal competence norm" and Guastini "competence norm in the strict sense" (more precisely the "norms on production in the narrow sense"; norms on production are competence norms and norms on procedure). See: Ross, *op. cit.* (fn. 10), p. 204 and Guastini, *op. cit.* (fn. 6), p. 103. In the following text we will use the term "competence norm."

[37] See the concept of "the strongest discretion" in Grey, *op. cit.* (fn. 17), p. 109.

[38] See: Ross, *op. cit.* (fn. 10), p. 204.

[39] On how this argument can be used to explain an "unchangeable Constitution" when the Constitution does not explicitly mention how it can be amended, and a dualistic Constitution when the Constitution does not explicitly address the relationship between international law and national law, see: Guastini, *op. cit.* (fn. 6), p. 179 (note 16) and 367.

is ineffective because the power is never exercised, it could be considered void under the ineffectiveness principle, which posits that ineffective norms cease to exist. This means that the competence norm must be applied at least sometimes.[40] Even if power is exercised occasionally, the competence norm remains ineffective if there is insufficient adherence to the norms produced by such power.[41] For example, absolute discretion allows an agent to exercise power in any manner, including in a totally unacceptable manner to addressees, such as by producing only retroactive laws.[42] This kind of arbitrariness can lead to noncompliance with produced norms and thus render the competence norm ineffective, essentially leading to its nonexistence. In other words, the arbitrariness of how power is exercised is constrained by the principle of effectiveness.

Argument 3: The nature of law. The concept of a legal order inherently includes the principle of the rule of law, which aims to eliminate arbitrariness.[43] At a minimum, this principle requires that power must not be exercised arbitrarily but should be based on established standards.[44] When power is granted to a public agent, it must always be exercised in the interest of the legal order: the interest that a legal norm be applied when it has to be applied (the public interest principle in the narrow sense). Thereby, the principle of the public interest limits arbitrariness.[45] "Unrestricted permissive language confers unfettered discretion, [but] the truth is that, in a system based on the rule of law [this] is a contradiction in terms."[46] It is important to note that an arbitrary failure to exercise power is also against the public interest.

Argument 4: The closure system norm. The principle of legality, as an advanced form of the foundational principle of the rule of law (the exercise of power based on standards), introduces the closure system norm for public

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[40] *Ibid.*, p. 120.

[41] *Ibid.*

[42] On systematic retroactive manner of exercising the power as an unacceptable manner of exercising legal power, see: Fuller, L. L., *The Morality of Law: Revised Edition*, Yale University Press, New Haven, 1969, p. 51.

[43] See: Raz, J., *The Authority of Law: Essays on Law and Morality*, Oxford University Press, New York, 1979, p. 212.

[44] For "legality" (i.e., thin version of justice) as the requirement for correct application of law, see: Kelsen, *General Theory… op. cit.* (fn. 11), p.14; Ross, *op. cit.* (fn. 10), p. 21. This understanding of "legality" i.e., thin version of the "rule of law" could be considered as constitutive of the concept of law.

[45] Ross, *op. cit.* (fn. 10), p. 204; Endicott, T., *Administrative Law*, Oxford University Press, New York, 2011, p. xv.

[46] Wade; Forsyth, *op. cit.* (fn. 17), p. 296.

agents. This principle of legality requires public authorities to act only within the boundaries permitted by law.[47] This implies that a competent authority may not exercise its power unless its exercise is at least minimally regulated by law.

Argument 5: The technical gap. The existence of a competence norm without at least some explicit norm regulating its execution can be seen as a technical gap.[48] This gap needs to be addressed with supplementary norms to ensure the competence norm's effectiveness.

Argument 6: No silence of law allowed. According to the principle of legality, courts and administrative bodies are obligated to make judgments or decisions and cannot refuse to act.[49] For courts, this means prohibiting *non liquet* decisions. For administrative bodies, this means a prohibition on remaining silent. Therefore, the assignment of competence to public agents does not imply that they are free never to exercise their power. Similarly, while it might seem that a competence norm granting Parliament power to enact statutes allows it to regulate as it wishes, this is not the case in a constitutionalized order. In such an order, the explicit and implicit norms of the Constitution restrict and direct legislation, and constitutional norms can be applied directly if the Constitution is not properly implemented by laws.[50] Thus, inactivity or improper activity by the legislator can lead to the legal construction of technical and axiological gaps in statutes.

3.2. Sources of discretion in the production of individual acts

According to the initial theoretical framework, the sources of discretion in the process of enacting individual acts arise from[51] (a) the alternatives presented in the antecedent or consequent parts of the norm once definitive discretion is established, and (b) prior to that, discretion arises from the activities aimed at reaching definitive discretion, i.e. (i) the linguistic interpretation of provisions and the application of equality and proportionality tests through linguistic interpretation and (ii) the resolution of conflicts between norms.

We will approach the analysis of the sources of discretion from the perspective of legal reasoning, framed as including two conceptions: the conception

47 Guastini, *op. cit.* (fn. 6), p. 410.

48 On technical gaps, see: Guastini, *op. cit.* (fn. 6), p. 399.

49 *Ibid.*, p. 406.

50 *Ibid.*, p. 190.

51 Duarte, *op. cit.* (fn. 8), pp. 3–21 and 23–27.

of (i) justified structure of the application of the rule and (ii) the applicability of the rule.[52] The first can be seen as reasoning about the internal content of the norm and facts, and the second as reasoning about the norm's external (attributed) character.

Legal reasoning can be divided into two main groups: a) legal interpretation and b) legal (juristic) construction.[53] Activities related to determining the meaning of normative sentences are considered legal interpretations. In contrast, all others outside of interpretation, but still within the realm of law application, are considered legal construction. The sources prior to the establishment of final discretion mentioned in the initial theoretical framework correspond to these activities. However, the concept of legal construction includes several activities, some of which are not specifically listed by the initial theoretical framework. The enactment of individual acts is a paradigmatic form of legal reasoning, usually used in legal theory to explain the production of indirect individual acts (i.e., individual acts producing deontic consequences). However, it can also be applied to direct individual acts whenever the law-applier seeks a standard for his or her action.

The justified structure of applying the rule can be presented as reaching a conclusion based on three justified premises[54]: a) which rule should be applied, b) what are the facts of the particular situation, and c) whether these facts can be subsumed under the chosen rule.[55]

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[52] We recognize the difference between principles, rules and norms following Guastini, *op. cit.* (fn. 6), p. 67. In the conceptions of "justified structure" exposed by Guastini and "applicability" exposed by MacCormick the term "rule" is used. Guastini uses this term in opposition to the term principle while MacCormick use it in meaning of "an explicitly articulated norm." MacCormick, N., *Institutions of Law: An Essay in Legal Theory*, Oxford University Press, New York, 2007, p. 25. Although both conceptions can also refer to principles (at least some kinds of principles defined by Guastini), we will maintain the original terms referring to rules. The term "rule" applies mainly in the contexts of justified structure and applicability since Guastini use it.

[53] On the difference between these two, see: Guastini, *op. cit.* (fn. 6), p. 382; Guastini, *op. cit.* (fn. 26), p. 17.

[54] See: Wróblewski, J., *Legal decision and its justification*, Logique & Analyse, *vol.* 14, no. 53–54, 1971, p. 412; Wroblewski, J., *Legal Syllogism and Rationality of Judicial Decision*, Rechtstheorie, *vol.* 5, no. 1-2, 1974, p. 43; MacCormick, N., *Legal Reasoning and Legal Theory*, Oxford University Press, New York, 1978, p. 197; Aarnio, A., *The Rational as Reasonable*: *A Treaties on Legal Justification*, D. Reidel, Dordrecht, 1987, p. 119; Alexy, R., *A Theory of Legal Argumentation*, Oxford University Press, New York, 1989, p. 221.

[55] The legal syllogism is usually present as containing two premises. The third premise – qualificatory or subsumptive premise - is explicitly mentioned by some authors, for

(a) Discretion over the choice of rules involves selecting between several alternative rules available in the legal system that can be applied to a case. These alternatives arise from different possibilities of[56] (i) vagueness of language (in a broader sense) in which norms are formulated, (ii) interpreting sentences (not only linguistically), (iii) resolving conflicts between norms, (iv) identifying legal gaps, including axiological gaps, (v) developing unexpressed norms, (vi) concretizing norms, (vi) establishing hierarchies between norms, including the axiological hierarchies, (vii) testing reasonableness of norms, including equality and proportionality tests, and (viii) using theoretical conceptions and attitudes toward norms.[57] The activities under the first two points are considered legal interpretation, while all other activities fall under legal construction.

(b) Discretion in describing an event involves selecting between multiple alternative scenarios about what happened.[58] These alternative scenarios arise from discretion over the choice of internal system standards (rules) regulating the fact-finding procedure, and from discretion over the choice of external system standards[59] directing how facts are determined and integrated into a coherent whole.[60] Different theoretical conceptions and attitudes about law and reality also contribute to these discretions.[61]

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instance see: Chiassoni, P., *Interpretation without Truth. A Realistic Enquiry*, Springer, Cham, 2019, p. 206.

[56] All mentioned sources correspond to the theory of interpretation and legal construction as presented in Guastini, *op. cit.* (fn. 6).

[57] On the use of theoretical constructions (dogmatic conceptual constructs and theories) in legal reasoning see Guastini, *op. cit.* (fn. 6), pp. 389 and 415–417 and Guastini, *op. cit.* (fn. 26), pp. 17–18 and 22.

[58] Guastini, *op. cit.* (fn. 6), p. 437. Canale, D.; Tuzet, G., *What Is Legal Reasoning About: A Jurisprudential Account*, in: Cserne, P.; Esposito F. (eds.), *Economics in Legal Reasoning*, Palgrave Macmillan, Cham, 2020, pp. 13–17.

[59] On internal and external systems of norms, see: Raz, *op. cit.* (fn. 4), p. 844; Bulygin, E., *The Problem of Legal Validity in Kelsen's Pure Theory of Law*, in: Bulygin E. *et al.* (eds.), *Essays in Legal Philosophy*, Oxford University Press, Oxford, 2015, p. 320.

[60] On sources of discretion in evidentiary reasoning based on interpretation of rules and conducting the process of fact-finding see for instance: Delisle, R. J., *Evidence-judicial discretion and rules of evidence - Canada Evidence act, s. 12: Corbett v. The Queen*, Canadian Bar Review, *vol.* 67, no. 4, 1988, pp. 710–712.

[61] On the role of political elements (which can also be part of legal doctrines) and cultural contexts in shaping the evidentiary procedure norms and fact-finding processes see e.g., Damaška, M., *Epistemology and Legal Regulation of Proof Law*, Probability and Risk, *vol.* 2, 2003, pp. 123–126.

(c) Discretion in subordinating the event to the antecedent of the rule involves choosing whether the terms used in the antecedent encompass the described event in its entirety.[62] Alternatives arise from diverse ways of using language and varying theoretical conceptions and attitudes about law and reality.[63]

Besides the conception of the justified structure of the application of rules, the theory of legal reasoning includes the conception of the rule's applicability. For the purpose of this paper, we included five elements of this conception.[64] First is the recognition of the background principles of the institution and constitutional principles as limitations and guidance in legal reasoning.[65] Second, the rules are defined as absolute, strict, and discretionary of the dispositive type.[66]

In the absolute rule, there is no discretion; the legal consequences must be applied when the operative facts appear, and they must not be applied when the operative facts are not present. In strict and discretionary rules, additional standards are used to evaluate whether legal consequences must not be applied even when the operative facts are present or if they must be applied even when some of the operative facts are not present. For a strict rule, applicability depends on whether applying the legal consequences would undermine the purpose of the institution to which the rule belongs. In the case of a discretionary rule of a dispositive type, applicability depends on whether the institution's purpose can be achieved without activating the legal consequences.

Third, the norm can be seen as directly applicable by judges or indirectly applicable (i.e., non-applicable until additional general acts are enacted).[67] Fourth, the metanorms instruct whether a rule is absolute, strict, or discretionary of a dis-

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[62] Guastini, *op. cit.* (fn. 6), p. 436. Guastini distinguishes between text-oriented and fact-oriented interpretation. See also: Guastini, *op. cit.* (fn. 26), p. 14.

[63] Hock Lai, Ho, *A Philosophy of Evidence Law,* 2008, Oxford University Press, New York, pp. 8, 27, 189–190.

[64] Other elements can be added when talking about the applicability of rules that are not important for this study. For instance, the moment when judges are obliged to apply norms (external applicability) or personal, territorial, temporal and material spheres of validity (internal applicability). See: Navarro, P. E.; Moreso, J.J., *Applicability and Effectiveness of Legal Norms*, Law and Philosophy, *vol.* 16, no. 2, 1997.

[65] MacCormick, N., *Norms, Institutions, and Institutional Facts*, Law and Philosophy, *vol.* 17, no. 3, 1998, p. 336. MacCormick, *op. cit.* (fn. 52), pp. 28–30.

[66] *Ibid.*, 26–27.

[67] Alf Ross makes a distinction between (national) law directly binding upon individuals and (international) law with no direct authority over individuals but only "through the medium of internal law," i.e., production of general acts. Ross, A., *A Textbook of International Law,* The Lawbook Exchange, Clark, 2006, p. 17.

positive type[68] and whether it is directly applicable. Following these metanorms, the final status of applicability is ascribed to the norm. Fifth, the reasoning on the rule's applicability can lead to narrowing or broadening the discretion after the justified structure of the application of the rule is established *prima facie*.[69]

3.3. Sources of discretion in the production of general acts

In the production of general acts, according to one view, the source of discretion is the competence norm, with possible limitations arising from other norms. If other norms do not limit the competence norm, this discretion is based solely on a competence norm.[70] The previous subsections were dedicated to the arguments supporting the thesis on the necessary limitations of discretion and conceptualizing sources of discretion through legal reasoning. If the theory is to be consistent, these two elements must be applied to the production of general acts.

On the one hand, the exposed arguments regarding the limitations on discretion (section 3.1) are the same for individual and general acts. On the other hand, making an analogy between individual and general acts concerning legal reasoning is challenging. While the structure of legal reasoning for individual acts has been well elaborated in legal theory, a similar structure does not exist for general acts.[71] This is partly because legislation is often viewed as a primarily political activity inherently free of restrictions. However, we can outline a structure of quasi-legal reasoning[72] that includes identifying the following elements: (i) the goal of the act, (ii) limiting principles and rules that constrain the scope of the act, (iii) the facts about reality that are planned to be influenced by the rules, and (iv) the connection between rules and facts (i.e.,

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[68] According to MacCormick these are "second-tier norms laying down the terms of authorization or empowerment of the decision-maker." MacCormick, *op. cit.* (fn. 52), p. 27.

[69] The elements of the applicability conception are explained in Krešić, M., *Refugee and COVID-19 crisis: emergency regimes – yes or no?*, Croatian Academy of Legal Science Yearbook, *vol.* 15, no. 1, 2024. Separate research is needed to explain how "narrowing" works.

[70] Duarte, *op. cit.* (fn. 8), p. 14 and 15.

[71] On levels of rationality of legislation, see: Atienza, M. *Practical Reason and Legislation,* Ratio Juris, *vol.* 5, no. 3, 1992, pp. 277-278.

[72] "Quasi-legal" because in legislation and legal politics, relation between arguments (four elements) and conclusion (general act) does not have a logical character. See: Ross, *op. cit.* (fn. 10), p. 337.

whether rules adequately influence facts).[73] Legislators are usually not expected to justify statements in the form typical for individual acts.[74] However, this is a contingent situation, and the choice of statements in the production of general acts can also be justified.

The possible goals of general acts and limitations by norms are relatively determined by the act delegating the production of general acts and, in any case, by the Constitution[75] but also by the background principles of the institution.[76] When applying other rules to the adoption of a general act, it is important to determine the applicability of these rules, the background principles of the institution, and the principles of legal order. Furthermore, we must determine whether discretion in creating general acts will be narrowed or broadened when the conception of applicability is used.

Sources of discretion related to goal selection and identification of limiting and guiding norms are the same as those for identifying rules in the production of individual acts: language, interpretation, resolution of conflicts of norms, identification of legal gaps, unexpressed norms, concretization of principles, establishment of hierarchies, tests of reasonableness of norms and theoretical conceptions and attitudes toward norms.[77] In the legislative context, the discretion to address critical axiological gaps is subsumed under the discretionary situation arising from goal selection.[78] Concerning discretion over fact-finding and establishing the connection between rules and facts, the sources of discretion are the same as those for fact-finding and subsumption in individual acts production: external system standards directing how facts are determined and

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[73] The proposed structure is in line with Alf Ross' tasks of legal policy: description of objectives and attitudes (values), description of social facts and causal correlations. Only the second element mentioned here is not expressed by Ross. Ross, *op. cit.* (fn. 10), pp. 334-337.

[74] On the difference between legislation and adjudication based on "justification" and reasons for making such a difference, see: Guastini, *op. cit.* (fn. 6), p. 440 and 443.

[75] Kelsen, *General Theory…, op. cit.* (fn. 11), p. 132.

[76] See: MacCormick, *op. cit.* (fn. 52), pp. 28–30.

[77] These are the typical legal activities in creating legal politics. On the role of lawyer in legal politics see: Ross, *op. cit.* (fn. 10), p. 331.

[78] The interpretative axiological gap refers to the descriptive statement resulting from a "reconstruction of the axiological system presupposed by the normative authority." The critical axiological gap is the prescriptive statement "expressed from the internal point of another normative system (the interpreter's axiological system)." Navarro, P. E.; Rodriguez, J. L., *Deontic Logic and Legal Systems*, Cambridge University Press, New York, 2014, p. 171.

integrated into a coherent whole (for fact-finding), language (for the identification of facts-norm connection), theoretical conceptions and attitudes toward law and reality (for both).[79] Compared to fact-finding when producing individual acts, the fact-finding when producing general acts is generally not guided by legal rules; consequently, the sources of discretion regarding identifying these rules are irrelevant.

4. CONCLUSIONS

The introductory section presented discretion as a complex concept that is used differently across various legal contexts to explain the phenomena. The study began with the thesis that a general theory of discretion must encompass all these phenomena under a single concept, systematize solutions to the theoretical issues that arise in different contexts, and include an appropriate methodology for such an endeavor. Following the initial theoretical framework this study structured the primary components of such a general theory, identified potential disagreements, and clarified and expanded upon initial theoretical framework, supplementing some of its basic assumptions.

This study identified key issues that must be addressed when developing a definition of discretion: the scope of agents (the agent problem), necessary limitations (the limitation problem), and the requirement for the formulation of norms (the role of norms problem). The study also identified the main challenges when developing the theory. It focused on the challenges of explaining the sources of discretion (the source problem). The challenges when defining the definitive discretion (the definitive discretion problem) and establishing the boundaries of the judicial review of discretion (the boundaries of the legal reasoning problem) will be elaborated in separate research.

With the aim of resolving definition-development and theory-development problems, the previous sections analyzed the following: the features of discretion; the thesis on discretion as a normative situation of power; the role of norms and especially the role of competence norms in discretion; and the sources of discretion.

a) The analyzed definition of discretion has the following necessary elements: public agent, the normative situation of power, norms defining the normative situation, alternatives, and necessary choice. The analysis addressed three problems.

[79] On how beliefs (theoretical conceptions) and attitudes shape the normative solutions for changing facts see: Ross, *op. cit.* (fn. 10), pp. 305–315.

(i) The agent problem. Discretion refers to public agents producing general acts, indirect individual acts and direct individual acts (e.g., use of physical force). The concept of a public agent includes all agents empowered by competence norms to create legal consequences in the public interest.

(ii) The limitation problem. Discretion is not absolute; it is constrained by public interest, the rule of law, and potentially other legal principles. The normative situation of discretion results from norms limiting or guiding the exercise of power.

(iii) The role of the norms problem. Discretion can be explicitly granted or implicitly assumed, but explicit or implicit norms always constrain it.

b) To understand the sources of discretion, this study aimed to 1) analyze the thesis on competence norms as a source of discretion and 2) use a legal reasoning conception consisting of two main parts: (i) the justified structure of reasoning (the usual conception when legal theory discusses legal reasoning) and the applicability of the rule, and (ii) extend the legal reasoning conception to the production of general acts and direct law application.

This study questioned whether competence norms can be a source of discretion or whether competence norms merely grant authority and require additional norms to prevent arbitrary use. The arguments against competence norms being a source of discretion include language and interpretation, effectiveness, nature of law, closure system norm, technical gap, and "no silence of law allowed."

This study approached the analysis of sources of discretion from the perspective of legal reasoning originally developed for indirect individual acts (but also applicable to direct individual acts). The justified structure of reasoning for individual acts consists of rule selection, fact description, and subsumption. The study offered a structure of quasi-legal reasoning to produce general acts: goal, constraints, facts, and connections between rules and facts.

In the processes of producing individual and general acts, discretion arises from different possibilities of activities in legal reasoning referring to language, interpretation, conflicts between norms, legal gaps, unexpressed norms, the concretization of norms, hierarchies between norms, testing the reasonableness of norms (including equality and proportionality tests), and theoretical conceptions and attitudes toward norms and facts.

The conception of the rule's applicability recognizes the institutional and constitutional principles as limitations and guidance in legal reasoning. Based on the metanorms for the applicability of rules, norms can be absolute, strict, and discretionary dispositive rules, or directly and indirectly applicable rules. The applicability conception leads to the possibility of narrowing discretion.

c) Finally, this study confirms the applicability of the analytical approach of legal theory in resolving the problems of the general theory of discretion. The application of this methodology included the use of legal theory tools: definitions, subjective legal positions, types of norms, the distinction between provisions and norms, indeterminacy, and legal reasoning within a specific framework suggested as an appropriate tool for analysis.

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Sažetak

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IZAZOVI ZA OPĆU TEORIJU DISKRECIJE

Diskrecija se različito rabi u različitim pravnim kontekstima. Ovaj rad ispituje teorijske temelje diskrecije. U radu se obrađuju četiri izazova za opću teoriju diskrecije: (1) opseg subjekata, (2) nužna ograničenja, (3) uloga normi i (4) izvori diskrecije. Rad tvrdi da se pojam diskrecije odnosi na sve javne agente (svakog agenta ovlaštenoga normama o nadležnosti proizvoditi pravne posljedice u javnom interesu), uključujući one koji proizvode izravne pojedinačne akte, te da pojam uključuje ograničenja i usmjeravanja nametnuta izboru između alternativa i eksplicitne ili implicitne norme o izvršavanju vlasti. Rad istražuje izvore diskrecije kroz prizmu pravnog rasuđivanja i predlaže okvir koji integrira opravdanu strukturu primjene pravila i primjenjivost pravila. U radu se propituje može li sama norma o nadležnosti poslužiti kao izvor diskrecije ili su potrebne dodatne norme kako bi se spriječila proizvoljna uporaba diskrecije.

Ključne riječi: diskrecija, javni agent, vlast, pravno rasuđivanje, primjena pravila

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