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Hart's judicial discretion revisited

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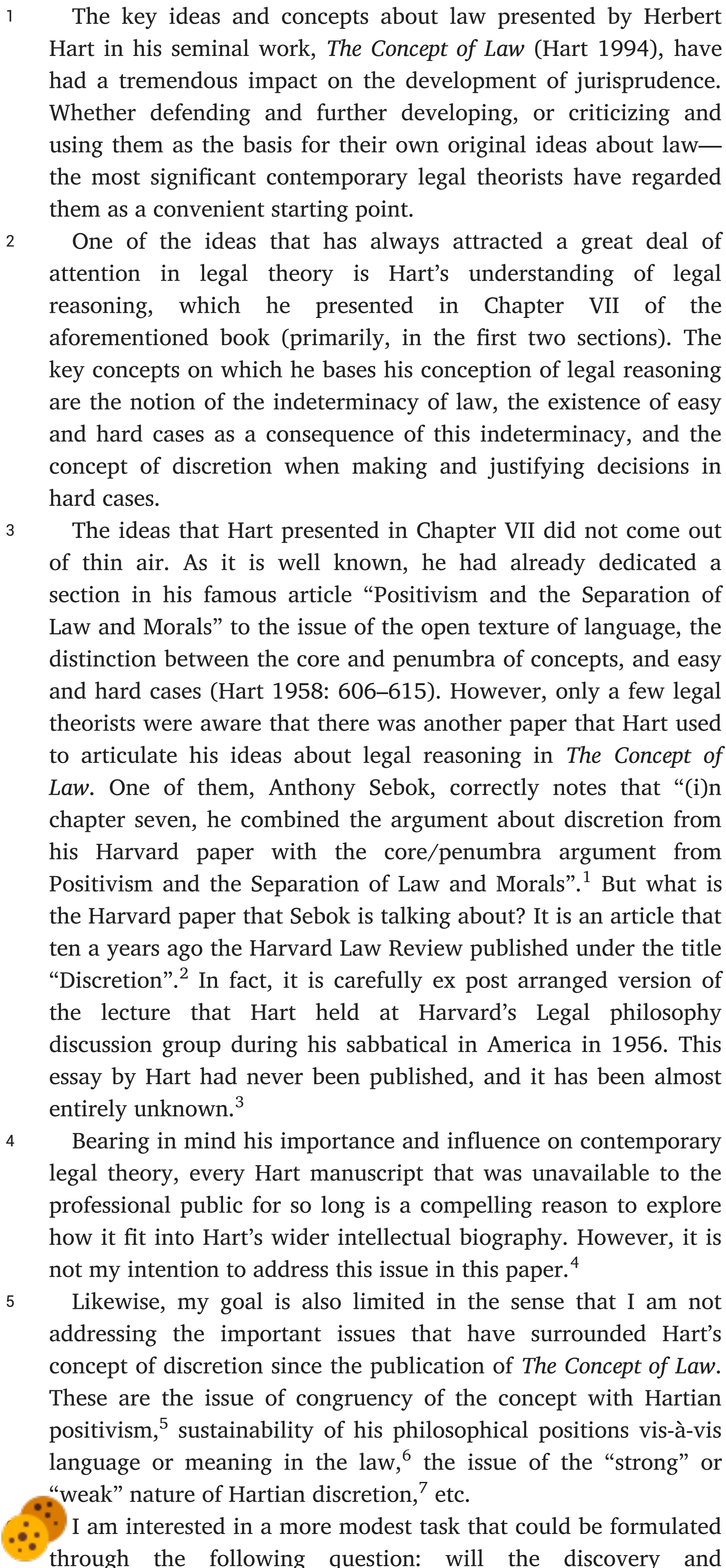
Abstract

The Harvard Law Review recently, for the first time, published Hart's essay titled "Discretion". It is a carefully arranged version of the lecture which he gave at Harvard in 1956. This essay fills significant gap in Hart's work concerning judicial reasoning. In my paper attention is devoted to his conception of judicial discretion, its two main types (express and tacit), and his understanding of interpretation and rationality related to Hartian discretion. According to Hart, discretion is a form of decision-making in hard cases, which is rational and to some extent constrained by law. However, because no combination of legal rules and principles, properly interpreted, will always give only one legally right answer, the judge in some cases must resort to non-legal reasons, i.e. exercise discretion. Hart's insight that the law is not the sole ground for (judicial) decisions suggests that there is something "out there" (in our "practical universe") that plays a role in the legal "earthly" world, and consequently, in the judicial world as well.

Index terms

Keywords: Hart, discretion, interpretation, practical rationality

Full text



1 Introductory remarks

1 The key ideas and concepts about law presented by Herbert Hart in his seminal work, *The Concept of Law* (Hart 1994), have had a tremendous impact on the development of jurisprudence. Whether defending and further developing, or criticizing and using them as the basis for their own original ideas about law—the most significant contemporary legal theorists have regarded them as a convenient starting point.

2 One of the ideas that has always attracted a great deal of attention in legal theory is Hart's understanding of legal reasoning, which he presented in Chapter VII of the aforementioned book (primarily, in the first two sections). The key concepts on which he bases his conception of legal reasoning are the notion of the indeterminacy of law, the existence of easy and hard cases as a consequence of this indeterminacy, and the concept of discretion when making and justifying decisions in hard cases.

3 The ideas that Hart presented in Chapter VII did not come out of thin air. As it is well known, he had already dedicated a section in his famous article "Positivism and the Separation of Law and Morals" to the issue of the open texture of language, the distinction between the core and penumbra of concepts, and easy and hard cases (Hart 1958: 606–615). However, only a few legal theorists were aware that there was another paper that Hart used to articulate his ideas about legal reasoning in *The Concept of Law*. One of them, Anthony Sebok, correctly notes that "(i)n chapter seven, he combined the argument about discretion from his Harvard paper with the core/penumbra argument from Positivism and the Separation of Law and Morals".[1] But what is the Harvard paper that Sebok is talking about? It is an article that ten a years ago the Harvard Law Review published under the title "Discretion".[2] In fact, it is carefully ex post arranged version of the lecture that Hart held at Harvard's Legal philosophy discussion group during his sabbatical in America in 1956. This essay by Hart had never been published, and it has been almost entirely unknown.[3]

4 Bearing in mind his importance and influence on contemporary legal theory, every Hart manuscript that was unavailable to the professional public for so long is a compelling reason to explore how it fit into Hart's wider intellectual biography. However, it is not my intention to address this issue in this paper.[4]

5 Likewise, my goal is also limited in the sense that I am not addressing the important issues that have surrounded Hart's concept of discretion since the publication of *The Concept of Law*. These are the issue of congruency of the concept with Hartian positivism,[5] sustainability of his philosophical positions vis-à-vis language or meaning in the law,[6] the issue of the "strong" or "weak" nature of Hartian discretion,[7] etc.

I am interested in a more modest task that could be formulated through the following question: will the discovery and

publication of the Hart's temporarily lost manuscript about discretion refresh and advance our understanding of known Hart's ideas about it? And having in mind my opening claim about the attraction of his (undeveloped) conception of legal reasoning and discretion, I take instructive to explore how it fit into another of Hart's theses about the topic.

7 Briefly speaking, the rediscovered paper seems to be a sort of "transitional form", a missing link, between the final form of his ideas, explained in *The Concept of Law*, and the theses from "Positivism and the separation of Law and Morals". However, it undoubtedly sheds light on the concept of discretion, which is an important part of his conception of legal reasoning, but nevertheless is not developed in *The Concept of Law*.[8]

8 One final caveat: in the taxonomy of discretion in law, Hart did not consider discretion solely in courts. He was concerned with other institutional settings where the concept plays a significant role as well. However, in this article I will deal exclusively with *judicial* discretion, because judges and courts are at the centre of Hart's attention, and the attention of other legal philosophers, when it comes to legal reasoning.

9 In the second section I will describe something what we have already known about Hart's understanding of the concept of discretion as it is presented in *The Concept of Law* and several other of Hart's well-known works. Next, I will look at the discovered manuscript and analyse the concept of discretion that is central topic of the paper. Special attention will be paid to Hart's understanding of the general concept of discretion and taxonomy of discretion in law. In the fourth section, I will try to draw several tentative conclusions from Hart's considerations about judicial discretion (both from his previously published works and from the rediscovered Harvard's lecture), that is, those related to his two main types of discretion, *express* and *tacit* discretion. The fifth section is devoted to conceptual clarifications regarding the two concepts that are closely related to the Hart's concept of (judicial) discretion: interpretation and rationality.

2 Hart on judicial discretion – what we already knew

10 At the beginning I will briefly recall what is already known, namely what Hart said about *legal reasoning and adjudication generally* in his published papers, especially in *The Concept of Law* and the Holmes lecture, also held in Harvard, about Positivism and the separation of law and morals, as well as in several other works.

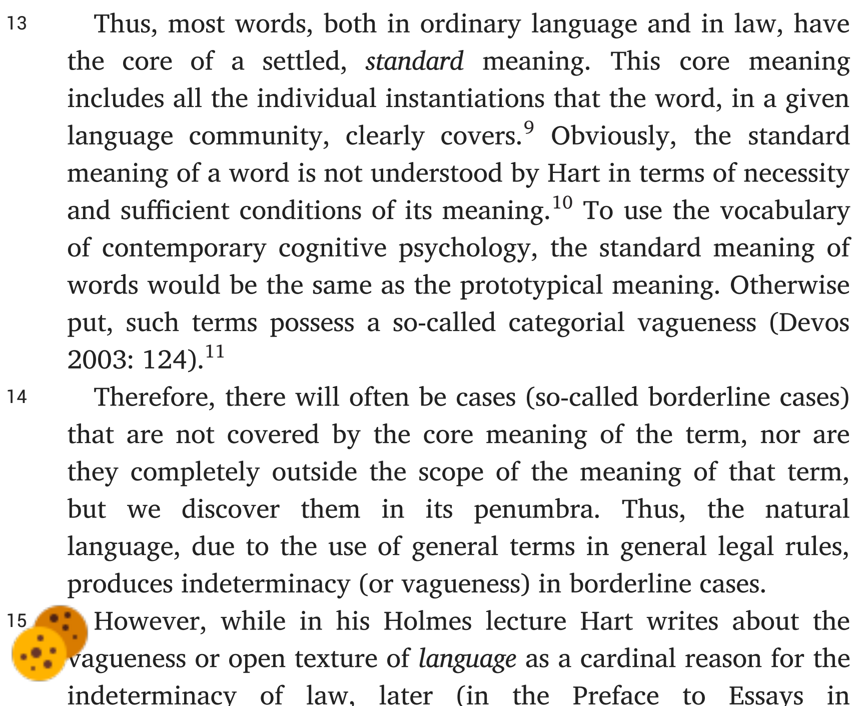
11 I start with something which can perhaps be considered as his initial, theoretical and practical motivation for addressing these questions. As it is well known to legal philosophers, at the very end of the article about American jurisprudence (Hart 1983: 123–144), Hart depicted American jurisprudence as captivated by

two extreme views, the Nightmare and the Noble Dream. The nightmare run as follows: the judges always make and never find the law when they decide the litigation, On the other hand, noble dreamers claim that judges never make the law, and the noblest of them all contends that in every legal case there is the right *legal* answer. However, Hart thinks that

> (l)ike any other nightmare and any other dream, these two are … illusions, though they have much of value to teach the jurist in his waking hours. The lesson is that sometimes judges do one and sometimes the other. It is … of course a matter … of very great importance which they do and when and how they do it (Hart 1983: 144).

12 This "matter of very great importance", Hart particularly considered in several works, beside this recently discovered paper, although he wrote them after it. What are his principal theses about this "matter"? In the "Positivism and separation of law and moral", the main conceptual tool in the struggle with problems of adjudication is the distinction between core and penumbra of meaning, which is the consequence of the open texture of language. In the article, Hart explains the difference between core and penumbra of meaning in the following way:

> If we are to communicate with each other at all and if, as in the most elementary form of law, we are to express our intentions that a certain type of behaviour be regulated by rules, then the general words we use ... must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some features in common with the standard case; they will lack others or be accompanied by features not present in the standard case (Hart 1958: 607).



13 Thus, most words, both in ordinary language and in law, have the core of a settled, *standard* meaning. This core meaning includes all the individual instantiations that the word, in a given language community, clearly covers.[9] Obviously, the standard meaning of a word is not understood by Hart in terms of necessity and sufficient conditions of its meaning.[10] To use the vocabulary of contemporary cognitive psychology, the standard meaning of words would be the same as the prototypical meaning. Otherwise put, such terms possess a so-called categorial vagueness (Devos 2003: 124).[11]

14 Therefore, there will often be cases (so-called borderline cases) that are not covered by the core meaning of the term, nor are they completely outside the scope of the meaning of that term, but we discover them in its penumbra. Thus, the natural language, due to the use of general terms in general legal rules, produces indeterminacy (or vagueness) in borderline cases.

15 However, while in his Holmes lecture Hart writes about the vagueness or open texture of *language* as a cardinal reason for the indeterminacy of law, later (in the Preface to Essays in

Jurisprudence and Philosophy) he finds that the vagueness of language, in itself, does not have to lead to indeterminacy of law. The language in law has a normative function.[12] Therefore, it is an oversimplification to designate language conventions as the source of indeterminacy of law, as itself. Hart underlines that the judge can clearly determine the content of the rule using other resources beside plain meanings of words. Thus, Hart states that “the obvious or agreed purpose of a rule may be used to render determinate a rule whose application may be left open by the conventions of language”.[13]

16 This subsequent correction and “concession” (Schauer 2007: 1129) is actually *the reverse side* of Hart’s central idea as to why there is indeterminacy in law, which he described in *The Concept of Law*. Namely, it is not possible to regulate all future situations and combinations of facts with rules that clearly and precisely provide in advance the legal consequences of each of them and thus exclude the possibility of the “fresh choice between open alternatives”.[14] It is necessary that such a choice sometimes exists, according to Hart,

> because we are men, not gods ... we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim. If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility (Hart 1994: 128).[15]

17 The indeterminacy of law is, therefore, a consequence of the basic inability of people to predict the future, from which comes the ignorance of the facts that will appear and to which law should be applied. A consequence of this ignorance is the indeterminacy of the aims that we want to be achieved by law. Because of that, lawmakers cannot encompass and regulate completely all the cases that might require regulation or express aims with enough clarity to resolve all future cases without contestation (Hart 1994: 131–132).[16]

18 And, as a consequence of the indeterminacy of law, easy and hard cases before the courts can be distinguished. Easy cases are those in which there is general agreement that they fall within the scope of a rule, where there are no doubts about the content and straightforward applicability of a single legal rule (Hart 1983: 105–106). Indeed, legislators regulate a large number of situations with relatively clear rules, which do not leave room for choice between open alternatives. In other words, in easy cases, people will easily recognize the actions, circumstances or persons that are provided for in the rules, as instantiations of generic terms in the rules, and will simply and routinely apply them on particular cases.

19 On the other side, in so-called hard cases there are (legal) reasons both for and against one or more resolutions under consideration. In addition to hard cases where categorically vague concepts cause uncertainties, they also sometimes appear in the application of so-called legal standards. Namely, very aware of the described predicaments of the human condition (ignorance of fact and indeterminacy of aims), or precisely because of them, lawmakers often resort to the long-standing and prolific regulatory technique—they “produce” legal standards. Although they are indeterminate directives, standards are necessary legal “device” to achieve

> compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case (Hart 1994: 130).

20 As an illustration, Hart refers to the standard of due care in cases of negligence,[17] and explains that “owing to the immense variety of possible cases where care is called for, we cannot ab initio foresee what combinations of circumstances will arise nor foresee what interests will have to be sacrificed or to what extent”.[18]

21 So, it is clear that Hart belongs to the long tradition of lawyers who understand the legal system as a body of rules, standards and principles that occasionally give place to indeterminacy and *open texture of law* in particular legal cases. But, what does the judge really do or should do when in a particular case he confronts legal indeterminacy? In other words, what does the judge really do or should do in hard cases? There is a belief that, if a particular legal rule proves itself as indeterminate in a given case, preventing the court from justifying its decision in the form of deductive syllogism, then the decision which the court gives is and can only be a legally unconstrained, arbitrary decision. It is also referred to as a notorious nightmare or at least as a bad dream. However, Hart does not think so.

> (I)t is obvious that … the dichotomy of logical deduction and arbitrary decision, if taken as exhaustive, is misleading. Judges do not generally, when legal rules fail to determine a unique result, intrude their personal preferences or blindly choose among alternatives; and when words like “choice” and “discretion” ... are used to describe decisions, these do not mean that courts do decide arbitrarily without elaborating reasons for their decisions—and still less that any legal system authorizes decisions of this kind (Hart 1983: 106–107).

22 Hence, Hart’s answer to the conundrum from the beginning of this section is the “middle path”.[19] In hard cases the judges do and should exercise discretion. But oddly enough, in his published works, he mentions this term very rarely. In one

important statement, he says that “in every legal system a large and important field is left open for the exercise of *discretion* by courts … in rendering initially vague standards determinate, in resolving the uncertainties of statutes”.[20] But, still it stands the strange fact that Hart did not define or analyse discretion anywhere. Or at least—almost nobody knows that he has.

3 Hart on judicial discretion – what did we not know?

23 Let’s turn now to Hart’s misplaced essay and identify the basic tenets of the concept of discretion, which he extensively explained in it. In his lecture, Hart intended to set the stage for the future work of the Harvard discussion group, because discretion was the main subject of discussion that year. In this respect, he begins with a few conceptual questions about discretion. According to the exercise of his linguistic method, Hart believed that providing an account of a concept requires analysing the way native speakers use the words associated with that concept. Therefore, to analyse discretion, Hart investigates the standard uses of the word “discretion” in different contexts —legal and nonlegal—and then establishes the general features of the concept.[21]

24 Regarding the legal context, Hart considers a list of cases where the word “discretion” is used in the legal system. He does not mention discretion in courts alone, because it appears not only in judicial adjudication, but also in other institutional settings. Hart’s taxonomy of discretion in law is not quite simple, however, for the purpose of this paper, it can be reduced to two main types. First, lawmakers explicitly delegate discretionary power to administrative officials or agencies—the powers, say, to issue licences for fishing, to set tax reliefs, to provide subsidies for start-up businesses, etc. In Hart’s terminology, these are examples of “Express or Avowed Discretion”. More important for this analysis, the court’s application of legal standards in particular cases also belongs to this type of discretion (Hart 2013: 655), such as standards of due care in civil negligence, or the best interests of child. On the other hand, in cases of so-called “Tacit or Concealed Discretion”, there is no explicit allocation of discretionary authority to an official. This type of discretion exists when legal rules do not provide one and only one legally acceptable result in a particular case. Key examples of this category are “disputable questions of interpretation” of statutory or other written legal rules (Hart 2013: 656).[22]

25 In accordance with his favourite philosophical method of conceptual analysis, Hart “enumerates” cases of standard use of the term discretion only in order to arrive at a definition of the concept of discretion by analysing them. Namely, when it is taken that the word X denotes the concept “X”, it is actually claimed that all those “situations” that are “covered” by that concept have

a certain common structure or that they are constituted in a mutually coherent manner. In other words, we assume that all members of the set of phenomena that we commonly label with the same term are interconnected in a deeper, more significant way, and not just by the use of the same word to label them. Most often, there are also certain common characteristics that each member of the set possesses and because of which we classify all members of the given set as the same concept. To clarify these characteristics of the concept "discretion", Hart further analyses some extra-legal situations in which the term discretion is also used. Actually, as Shaw notes "the full contour of Hart's account began to take shape at this stage in the analysis, as he set out simultaneously to distinguish discretion from raw choice and from determinate rule application".[23]

26 Firstly, Hart concludes that it would be wrong to equate the exercise of discretion with the concept of choice, even though the two concepts are related. For instance, when someone at the cocktail party chooses to take a martini instead of a sherry, they do not exercise discretion, if the reason for the choice is their taste. Unlike this "mere" choice, "discretion is ... a near-synonym for practical wisdom or sagacity or prudence".[24] Even its etymology suggests that it is, "the power of discerning or distinguishing what in various fields is appropriate".[25] Therefore, in Hart's opinion, it would be absurd to speak of discretion when we make a choice according to our personal liking, prejudices or, simply, following a hunch or a whim. Discretion is exercised only when the choice is exhibited "as wise or sound", and that means, as justified by a "principle deserving of rational approval".[26]

27 Secondly, and more importantly for law, there is no discretion when we "choose" to respect a clear rule. For instance, when the national anthem is played and you stand up, the answer to the question "why did you do this?" is not "because I wanted to", but you will refer to the clear rule that dictates such behaviour in the particular situation. And although it can be said that you rightly "choose" to stand up, according to Hart "it would be misleading to describe [it] as the exercise of a discretion".[27] Briefly speaking, "if the answer is clear … and there is no plausible way the decision could go differently consistent with the rules being applied, the decision does not involve discretion".[28]

28 To establish more definitive elements of the concept of "discretion", Hart calls on us to imagine a young hostess who is throwing her first dinner party and faces the dilemmas: should she use the best knives for this occasion (beautiful old silver) which are well suited for snowy tablecloth and the classy glasses. On the other hand, the knives are heavy, not very sharp dull, and a little bit pretentious. Generally, the hostess's aims are relatively clear: to have a beautiful dinner table, but also to please her guests. How will she reach the decision? Having in mind the aims, "costs and benefits", maybe even advices from an older cousin, "the hostess … thinks out the possible disasters and some possible good consequences from the courses before her: she *balances* one consideration against another".[29]

29 Based on all the previous considerations, Hart summarises his explanations of *the core* of the concept of discretion through six features. First, there is no "clear right" decision. Second, "[t]here is not a clear definable aim", which would conclusively determine the content of the decision, because "we … have to weigh and choose between or make some compromise between competing interests and thus render more determinate our initial aim".[30] Third, the consequences of possible decisions are not clearly known in advance. Fourth, "[w]ithin the vaguely defined aim of a successful dinner party, there are distinguishable constituent values or elements (beauty of the table, comfort of the guests, etc.), but there are no clear principles or rules determining the relative importance of these constituent values or, where they conflict, how compromise should be made between them".[31] Fifth, words like "wise" and "sound" make more sense when describing discretionary decisions than words like "right" or "wrong". Sixth, Hart believes that discretionary decisions are defended in two different ways if they are called into question: justification and vindication (Hart 2013: 660).

30 Now let's get back to the law. According to his own words, the basic classification of discretion in the law

> [I]s designed to emphasize the contrast between the cases where the sphere to be controlled is recognized ab initio as one demanding control by the exercise of discretion [Avowed Discretion] rather than by specific rules … and on the other hand cases where there is an initial attempt to regulate by specific rules but these are found in the course of actual application not to yield a unique answer in specific cases because combinations of circumstances … are outside the range of concrete applications considered at the time of the formulation of the rule. This is the common choice of disputable questions of interpretation of statutes or written rules. (Hart 2013: 656).

31 Judges confront hard cases, observing both kinds of discretion. When they decide about applicability of legal standards (such as "due care in cases of civil negligence" or "best interests of a child") judges have *express* or *avowed* discretion. On the other hand, when the indeterminacy of law is about vagueness of legal rules, then it is *tacit* discretion at play. In relation to this basic taxonomy, Hart believes that the optimal conditions and factors that affect the exercise of express discretion are different from those that affect the exercise of tacit discretion. For example, Hart states that "where discretion is used in the course of judicial determinations in the attempt to apply rules, the weight of factors such as consistency with other parts of the legal system will be prominent, whereas they may be at their minimum in cases of Avowed Discretion".[32] In the following section, I will attempt to (re)construct the Hartian image of these two types of discretion in more detail.

32 However, before that, at the end of this section it should be mentioned, that Hart does not stop his work at the conceptual

level. He continues his lecture with remarks about the place and institutional and normative importance of discretion in a legal system. First, he asks “must we accept discretion or tolerate discretion, and if so, why?” The answer to that question is well-known, because it was later reiterated in *The Concept of Law*. Briefly, the reasons why we must accept discretion in the law are two predicaments of human conditions: ignorance of fact and indeterminacy of aims. There is no need here to repeat what was said about it in the previous section.

33 Second, in the lost essay, Hart also considers normative questions like “What values does the use of discretion menace, and what values does it maintain or promote?”[33] Hart’s answer is that discretion is the best way of resolving cases with no clear answer, i.e. the virtue that allows such inevitable cases to be ruled by law instead of whim (Shaw 2013: 703; Hart 2013: 661–665). Otherwise put, in borderlines cases, and the cases in which they must apply legal standards, judges *should* decide discretionally, because only in deciding so, they do not make arbitrary decisions. On the other hand, if judges decide by whim, personal preferences, or prejudices, they indulge in some other kind of game other than the game of the legal system, to borrow Hart’s own word. One of the basic rules of the “rule of law” game is that judges should be guided by law and *reason* rather than political predilection, personal passion, or prejudice. Consequently, judges should not decide hard cases in accordance with individual preferences but in accordance with the directives of law *comprehended by reason* (Vandevelde 2011: 241). According to Hart, only discretionary decision-making in hard cases is in line with the idea of the rule of law. Therefore, his idea of discretionary decision-making is not only a description of the part of the court’s practice but also the normative principle of good judicial practice. In that sense, Hart’s Harvard paper also carries strong normative message.

4 (Re)construction of Hart’s typology of judicial discretion

34 The principal difference between “express” (avowed) and “tacit” discretion is that the former made no pretence to setting out standard instances of a rule at the core, while the latter offered a set of standard instances through the authoritative written language of the statute. Even though it is usually endorsed “to describe the distinction between rules and discretion in terms of a distinction between rules and standards”,[34] Hart considers both rules and standards as potential “sources” for exercising discretion.

35 Both kinds of discretion, Hart believes, must be exercised rationally. In both (“express” and “tacit”) forms discretion occupied a middle position between whim and the “choice” of following clear rules and principles. However, he also believes

that these two types of discretionary decision-making require attention to different factors (Hart 2013: 656). Therefore, this (re)construction will examine what Hart claims about two basic types of judicial discretion, taking into account both his ideas that were already known and as those that we have recently come to know.

4.1 Express (avowed) discretion

36 Legal standards, such as "due care" or "best interests of the child", are the cases of so-called "extravagant", excessive vagueness (Endicott 2011: 18–19). Their fundamental property is that they "include" a multidimensional evaluation with (at least some) incommensurable constitutive elements.[35] Excessively vague terms are also vague in the basic meaning of the term "vagueness": they have a core of clear meaning and a penumbra (Hart 2013: 663). However, in the case of these terms, whether something is in the penumbra is determined by a series of mutually incomparable dimensions or factors, which distinguishes them from categorical vagueness involving the presence or absence of typical characteristics of the term.[36]

37 Precisely because of this indeterminacy of the factual predicate, the standards do not offer a single correct answer to legal questions *in every case*. However, even in such "no-single-correct-answer" cases they do provide some constraints. For example, if an officer orders a sergeant to select the three experienced soldiers from his platoon to scout enemy positions (Dworkin 1977: 31–32), the general framework for selecting soldiers exists—the sergeant will not be able to rationally justify the selection of three novices for that task. However, if it happens that there are more than three experienced privates in the platoon, the sergeant—if he decides discretionally, in accordance with Hart's understanding of discretion—will take into account other factors in the selection. For example, he can consider specific experience in the execution of the specific type of task, the current physical and mental condition of the soldiers, the fact that some of them know the local terrain better than others and so on and so forth. Finally, in these further considerations, if there are several "candidates" for the execution of the task, and some of them better satisfy one factor while others better satisfy another, the sergeant will rationally balance between different factors, and then he will make his choice.

38 Similar can be said for legal standards such as the standard of "due care" (Hart 2013: 663) or "the best interests of the child". For example, "the best interests of the child", which guides the judge when deciding where the child will live after the parents' divorce, is a multidimensionally vague concept, as there are many potential dimensions or factors that the judge takes into account when making the decision (Vandevelde 2011: 96). These factors include "external" ones, such as the cultural and moral values of the community. On the other hand, internal factors are related to

the child's personal characteristics, such as the child's wishes, age, and gender, their physical and emotional needs, as well as the suitability and ability of the parents to meet the child's needs (Vlašković 2011: 355–361). The latter includes the parents' financial, health, and mental states, their current family circumstances, their occupations, quality of their relationship with the child, etc. When dealing with borderline cases, the judge will weigh different factors, as Hart describes in the example of a hostess organising dinner party. Although these factors are, broadly speaking, subordinate to the child's interest, it does not mean that they cannot be in conflict, and the judge, if they are in conflict, will choose the ones they consider more important.

39 As can be seen, the example described has elements that Hart attributes to the concept of discretion (analysing the case of the hostess and her dinner party),[37] because in both situations there is no "clear right" decision and "a clear definable aim", although this vaguely defined aim ("the best interests of the child") undoubtedly excludes certain factors and answers from the outset.[38] In addition, this general aim includes "distinguishable constituent values or elements but there are no clear principles or rules determining … where they conflict, how compromise should be made between them".[39] Therefore, as in the case of the dinner party, the decisionmaker must rely on her own reasonableness, sagacity and experience (or "older cuisine") in weighing different factors.

40 Finally, it is clear that no matter how they decide in hard cases of application of the legal standard, the judge does not interpret the law, strictly speaking, that is, they do not attribute meaning to the words from the standard.[40] As Endicott stated about the standard of reasonableness: "If … the law requires you to do what is reasonable, you will need a technique other than interpretation in order to identify the reasons at stake".[41]

41 One of the most important among these techniques, in my opinion, is a sense of appropriateness that develops through life experience in the community. Application of legal standards, as instances of excessive vagueness, rely on the experiences and understandings of a particular community. On the one hand, the diversity of concrete experiences and understandings condensed into an indeterminate (vague) formulation is the reason for their indeterminacy; but on the other hand, it contributes to their reference in a specific context remaining dependent on that context, based on the general understanding of the community about what is an appropriate pattern of behaviour in a particular situation that the standard prescribes "here and now". This allows legal subjects to have an idea of how to conform their behaviour to the standard in a specific situation, for example, most parents will know what is "in the best interests of the child". However, this can also be helpful for a judge who is a member of the same community when applying such a standard. On the other hand, as

[B]arak observes, the exercise of discretion can be informed by the experiences and perspectives that develop within a narrower, *legal* community, i.e., by "the professional views of the legal

public" (Barak 2005: 208).

42 Finally, it seems that Hart himself takes the similar route. Namely, he argues that when it comes to discretion, the focus should be on "the study of what standards we appeal to when looking back upon a range of discretionary decisions we say typically such things as, 'That was a satisfactory compromise between different values'". He mentions "*the judgment of a plurality of impartial spectators*" as one of the two possible standards (Hart 2013: 665).[42] It is clear that this "plurality of spectators" can be none other than (members of) the (wider or narrow) community.

4.2 Tacit discretion

43 According to Hart, tacit discretion appears, among other situations, when courts *interpret* statutes in a particular case. It is mentioned in section three that Hart, as an example of tacit discretion, refers to cases that cannot be classified as belonging to the core of categorically vague concepts but are located in their penumbra (for instance, whether an electric scooter is a "vehicle" in terms of the "no vehicles in the park" rule). How does a judge reason when a borderline case appears—a case that falls under a concept that is located in the penumbra of a categorically vague concept? It seems that the (re)construction of Hart's ideas from the analysed article, as well as from his subsequent works, can proceed in the following direction.

44 In penumbral cases, the judge cannot directly and routinely apply the rule, because "such unprovided cases will certainly have some features in common with the clear standard cases and yet differ from them in respects which are relevant".[43] In such hard cases, the judge is, of course, bound by the relevant rule or set of rules. The judge must not ignore the applicable rule; that is, they are obligated to include it as a basis for their decision-making, which is why in such cases judges resort to interpretation.[44]

45 However, Hart argues that in order to come to a solution that is not predetermined by the rule[45] judges use (tacit) discretion in their interpretation. In the next section I will consider in more details the relationship between discretion and interpretation in Hart's theory. At this point, I will only highlight the difference, which is recognizable from the (re)construction of Hart's thesis on discretion, between the "discretion" that exists in the course of interpretation and the discretion that appears (and which, in my opinion, is the Hartian discretion, "properly so called") when none of the traditional formal interpretative arguments[46] can serve as a prevailing reason for a decision in the hard case. What is the difference here?

46 Namely, when it comes to the "factors" that influence a judge's decision in a hard case, Hart mentions some of them here and there. For instance, one of these factors that Hart points out in Harvard paper is the legal system. Namely, he says that "where

discretion is used in the course of judicial determinations in the attempt to *apply rules* the weight of factors such as *consistency* with other parts of the legal system will be prominent”.[47] The purpose that may be attributed to the rules is the latter. Namely, judges resort to “some general aim or purpose which some considerable relevant area of the existing law can be understood as exemplifying or advancing and which points towards a determinate answer for the instant hard case”.[48]

47 There is no doubt that these Hart’s words actually describe some of the commonly accepted interpretative reasons for judicial decisions (arguments from statutory purpose, systemic arguments).[49] Therefore, the judge will endeavour to decide a hard case without resorting to Hartian discretion (“properly so called”), by using systemic and purposive interpretation. For instance, it is often possible to identify purposes *in a standard case* that can be, *by using analogical reasoning*,[50] applied to determine whether the penumbral case can or cannot be resolved in the same way as the standard, easy case. Or, it would be possible to ascribe to *rule* the meaning which coheres best with a legal principle or principles “operative within the field in which the case falls”.[51]

48 On the other hand, as it is well known, hard cases are “hard” precisely because the interpretative arguments that are applicable in those cases can lead judges in different directions. As Hart himself observes, “[m]ay not the legal system contain conflicting principles? May not a given rule or set of specific rules be equally well explained by a number of different alternative hypotheses? If so, will there not be need at these higher levels for judicial choice … ?”[52]

49 Indeed, when judges must decide, faced with conflicting interpretative reasons, they will be forced, when making a decision, to “choose” between them. However, is this the kind of “choice” Hart would qualify as an exercise of discretion? Some ways of judge’s “choosing” between conflicting interpretations certainly are not choices at all.[53] But when, for instance, the conflict between different interpretative arguments (for example, between linguistic arguments and argument from intention) is consistently resolved by “choosing” one of the interpretive doctrines (textualism vs. intentionalism), it can be said that such a “choice” is an exercise of discretion, as it is justified by certain principled, doctrinal beliefs about how the law should be interpreted.

50 Still, in my opinion, this situation is not encompassed by the Hartian “core meaning” of (the concept of) discretion. This can be easily noted by comparing such a situation with the key characteristics that Hart identifies as properties of the concept of discretion. Let us go back to the case of the young hostess and at least three characteristics of the framework of her reasoning:

51 - there is not a clear definable aim, which would *conclusively* determine the content of the decision;

52 - there are no clear principles or rules determining the relative importance of constituent values or, where they conflict, how

compromise should be made between them—because of that she should *balance* different considerations;

53 - words such as “wise” and “sound” make more sense to describe discretionary decisions than words such as “right” or “wrong”.

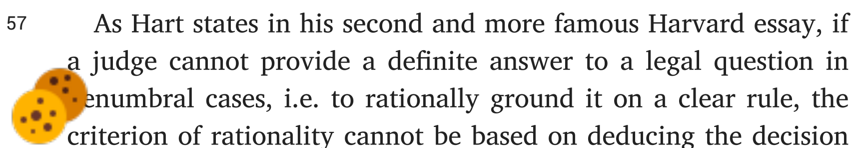
54 If we compare this with the application of (any) normative doctrine of interpretation, we can see that it is not applied through balancing, but rather, it is applied because it is based on clear, definable principles. Besides, “choice” of doctrine cannot be characterized as “wise” or “sound”, as it is not contextualized but rather predetermined by a “chosen”, accepted doctrinal position, regardless of the circumstances of the specific case.

55 However, there is one way of resolving the conflict of interpretive reasons that *does* involve the elements of Hart’s definition of discretion. This is the process of weighing conflicting arguments. “An argument is outweighed when the reasons behind that argument or the evidence in support of it are not as strong as those behind or supporting a competing argument”.[54] When such weighing and balancing is based on *substantive* reasons (see note 46), there is no predetermined principle by which the conflict is resolved. Instead, there is a weighing of different, opposing interpretative arguments and reasons, and the outcome of the balancing is based on rational choices. MacCormick and Summers describe this weighing as follows:

> [I]n this case, the weight attached to an interpretation on the ground that it favours some goal or upholds some state of affairs or concept of rightness is dependent wholly on the degree of value attached to the relevant goal or state of affairs or concept of rightness from the standpoint of economics, or political or moral principle. … [T]hese substantive reasons do not have to be conceived or represented as system-independent ... But the point is that substantive reasons carry a weight dependent on general practical reasoning or on the considered judgement of the interpreter, from the point of view of economics, politics or ethics, or all three in combination (MacCormick & Summers 1991: 521, emphasis by author).

56 In these instances, the court must make a decision in a hard case, but it cannot ground it on authoritative (formal) reasons from the sources of law, and it cannot find an answer to the disputable question of law in permissive sources of law,[55] or it cannot decide the case by using widely accepted methods for interpreting legal texts (intention, system or purpose). The only way that court can rationally decide how to apply the rule in such a case is to resort to substantive, non-legal reasons. It ushers the judge in the field of some kind of (limited) open-ended reasoning, or reasoning on the balance of reasons, as Raz names it (Raz 1986: 41–42; Raz 1999: 36).

57 As Hart states in his second and more famous Harvard essay, if a judge cannot provide a definite answer to a legal question in penumbral cases, i.e. to rationally ground it on a clear rule, the criterion of rationality cannot be based on deducing the decision



from premises (the rule and the facts of the case). “What is it then”, Hart asks “that makes such decisions correct or at least better than alternative decisions?” And his answer is: “[T]he criterion which makes a decision sound in such cases is some concept of what the law ought to be”.[56]

58 Finally, it appears that everything that has been said confirms Hart’s thesis that different factors play different roles in different types of discretion, and that judicial application of “tacit” discretion is much more limited compared to express discretion, both in terms of the cases in which it is applied to, and in terms of the alternatives available to it. Therefore, it seems too strong to claim that judges’ discretion is “not bound by standards set by the authority concerned”.[57] This cannot be the case with tacit discretion, because it is more limited by the applicable interpretative arguments in a specific case than by loosely formulated legal standards in the exercise of express discretion.

59 However, in order to fully understand Hart’s concept of judicial discretion, two additional clarifications need to be made. This need apparently comes from the considerations in these two subsections. Namely, the *concept of interpretation* is important both for understanding tacit discretion, and for Hart’s understanding of legal reasoning. On the other hand, the *concept of rationality* is crucial for both types of discretions that Hart analyses. The next section will look at these concepts and their relationship to Hart’s concept of judicial discretion.

5 Two additional clarifications of Hart’s concept of judicial discretion

5.1 Discretion and interpretation

60 Legal sources (statutes, by-laws, precedents, etc.) reduce the number of possible alternatives available to a judge when deciding a particular case. Moreover, in easy cases, the available legal reasons unambiguously guide the judge towards a single possibility. Therefore, the decision-making process in such cases is routine and straightforward. But what happens in hard cases, i.e. in cases where there is indeterminacy of law, where there are different, legally admissible answers?

61 When a judge is faced with a penumbral case *where the formulation of rule* does not provide a single legal answer, it does not mean that they should immediately resort to (full-fledged Hartian) discretion. They still have certain legal “devices” (formal, legal reasons[58]) at their disposal to justify their decision, although no longer in the form of a clear authoritative linguistic meaning of a legal rule.

62 Therefore, the penumbral case can be resolved by *interpreting*

the rules in the context of the legal system and legal principles and values that can determine which of the possible meanings of the legal rule the judge will ascribe in the specific factual circumstances of the case. Such a "solution" is reached through the traditionally accepted interpretative arguments within the legal community.

63 However, when discussing the concept of discretion, its place in the legal system, and its justification, Hart does not consider the relation of that concept to the concept of interpretation, and the similarities and differences between the two. After all, what does Hart say about interpretation itself?

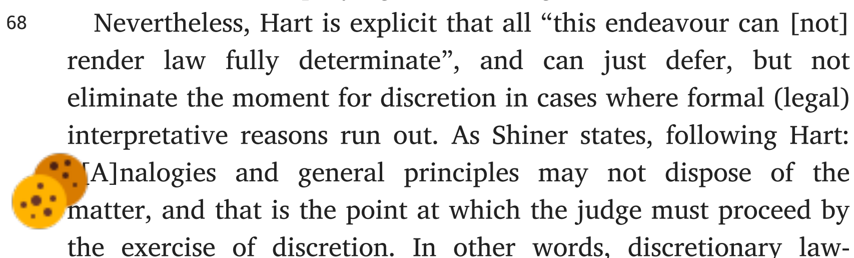
64 Hart used the word "interpretation" only with regard to the penumbra, not the core (Hart 1958: 610). In *The Concept of Law*, Hart described "plain" cases as those *that do not need interpretation* because the recognition of what to do is "unproblematic or 'automatic'".[59] According to this claim, it seems that both interpretation and discretion have the same function and effects: if every discretion is a law-making activity (as Hart believes) and if interpretation also creates a law (because it is undertaken only in hard cases, i.e. when the law cannot be applied routinely and when there are different, legally acceptable answers), is there a difference between interpretation and discretion? In *The Concept of Law*, Hart clearly implies that there is. In that place, he notes that "[c]anons of 'interpretation' cannot eliminate, though they can diminish, these uncertainties [of meaning]; for these canons are themselves general rules *for the use of language*, and make use of general terms which themselves require interpretation".[60]

65 Apparently, according to that sentence, it seems that Hart reduces interpretation to linguistic canons. However, as it was demonstrated in the previous section, some of Hart's theses could be (re)constructed in the sense that in hard cases he takes into account other generally accepted canons of statutory interpretation or interpretative arguments.[61]

66 In that sense, he explicitly states that "a legal system often has other resources besides the words used in the formulations of its rules which serve to determine their content or meaning in particular cases".[62] For example, Hart emphasizes that an agreed purpose of a rule can help a judge to ascribe, through purposive interpretation, a meaning to the words in the context of a legal rule "different from that which they have in other contexts".[63]

67 In addition, systemic interpretive arguments can also be helpful to the judge in hard cases. Thus, Hart noted that "[v]ery often in deciding such [indeterminate] cases courts cite some general principle … which a considerable area of the existing law can be understood as exemplifying or advancing".[64]

68 Nevertheless, Hart is explicit that all "this endeavour can [not] render law fully determinate", and can just defer, but not eliminate the moment for discretion in cases where formal (legal) interpretative reasons run out. As Shiner states, following Hart:



[A]nalogies and general principles may not dispose of the matter, and that is the point at which the judge must proceed by the exercise of discretion. In other words, discretionary law-

making by judges begins at the moment when the ability of existing law to be dispositive ends”.[65]

69 That moment when discretion enters the scene, Barak explains with a vivid analogy: “It is as though the law stops walking at an intersection, and the judge must decide—without a clear and precise standard—which direction to take. Discretion is the freedom to choose between multiple legal solutions”.[66] For Hart, this does not mean that these decisions were reached solely on the basis of legal reasons, but rather that they are not contrary to possible alternatives that are all legally acceptable. In fact, at this “interpretative crossroad” the judge engages in reasoning that is not limited to legal reasons. Moreover, Hart explicitly points out that on such occasions, they reason more like a legislator than like a lawyer:

> [I]n any hard case different principles supporting competing analogies may present themselves and a judge will often have to choose between them, relying, like a conscientious legislator, on his sense of what is best and not on any already established order of priorities prescribed for him by law (Hart 1994: 275).

70 In my opinion, this passage, as well as what was said in the previous section, undoubtedly shows that in cases where discretion is exercised, the judge resorts to what, in that section, I termed non-legal reasons. Our experience (as lawyers and citizens) with the legal system suggests that law has a “limited domain”, which means that legal reasons for (judicial) decisions and their justifications represent only a subset of all possible reasons that are applicable to decision-making and justification in practical action in a specific case. “Law ... is a domain in which at least some reasons, arguments, and facts available in other decisional domains are not available in the domain of the law”.[67] The large majority of (judicial) decisions on rights and duties are made on the basis of the legal reasons (including formal interpretative reasons and arguments).

71 However, Hart undoubtedly, although implicitly, claims that in exercising discretion, one goes beyond this limited domain of legal reasons and enters into the field of non-legal reasons,[68] because if legal reasons are ultimately of no help in some of the hard cases, judges resort to those other (substantive) reasons.[69]

72 At the end of this section, it is pertinent to remind that the relationship between the concepts of interpretation and discretion in Hart’s theory is primarily important in the context of tacit discretion. Interpretation does not have the same role in penumbral cases of categorical ambiguity and in hard cases that are “result” of excessive vague concepts, such as legal standards.

73 Namely, resolving indeterminacies as to the content of the law does not necessarily involve interpretation. It means that there is “no necessary link between indeterminacy and interpretation”.[70] The judge’s reasoning in particular cases of the application of legal standards best illustrates this thesis. As stated in subsection 4.1., when the legislator leaves it to the judge to determine the

content of multidimensionally vague terms, the judge in a specific hard case will usually not do so by interpretation, but by reasoning about what they consider to be proper, reasonable, or convenient in the case. For instance, in hard cases where the judge must decide what constitutes “respect for private life” under the European Convention on Human Rights or what is in “the best interests of the child” under the Convention on the Rights of the Child (Art. 3), “determining the undetermined” is not, according to Endicott, an interpretative task.[71]

5.2 Discretion and rationality

74 The second important question that Hart did not answer in his Harvard paper (nor later), concerns the relationship between the concept of discretion and the concept of rationality, namely, what “rational” means in the context of discretion (Shaw 2013: 707). This is a crucial question, because Hart emphasizes that discretion is a way of decision-making grounded on rational principles or “rational approval” (Hart 2013: 657). If rationality “limits” (judges’) decision-making when exercising discretion, then, undoubtedly, it would be helpful if Hart had explained those limitations in more detail. Still, there is no such explanation.[72]

75 Hart connects the rationality of a discretionary decision to the manner in which the choice has been reach. Accordingly, a decision is rational if the judge, when deciding hard case, uses of experience[73] in the field and deliberately excludes private interests and prejudices. But Hart takes “the word ‘manner’ here must be understood to include not only narrowly procedural factors … but also the determined effort to identify what are the various *values* which have to be considered and subjected in the course of discretion to some form of compromise or subordination”.[74]

76 Apart from this mentioning of values, Hart elsewhere stresses that discretionary decisions are based, as it is said, on “principle[s] deserving of rational approval” (Hart 2013: 657). But what are the rational principles on which discretion is based? The need to exercise it arises precisely in situations when “there remains a choice to be made by the person to whom the discretion is authorized which is not determined by principles which may be formulated beforehand”.[75]

77 Obviously, it is not enough to say that a decision is rational if it is based on values and principles rather than subjective factors such as whim, intuition, or prejudice. It is clear that racists and homophobes can also be “principled”, but Hart certainly would not agree that decisions based on such “principles” are consistent with his understanding of exercising judicial discretion. After all, the exercise of discretion takes place within the framework of contemporary legal systems, which reject such “principles”.

78 However, as it is well known, Hart is a moral non-cognitivist. He does not believe that, for example, moral (or political)

principles are based on an undisputed value (integrity of law or specific conception of distributive justice, etc.). For instance, the “best interests of the child” standard in a hard case can be applied by a judge by invoking such a doctrine (take for example Aristotle’s conception of the “good life”). However, Hart emphasizes that, ultimately, it is a matter of the judge’s discretionary choice, and that there are different general principles, equally practically rational, that could justify their decision.

79 As evidenced by the example of exercising discretion that Hart describes (both in legal and non-legal contexts), it seems that he is inclined not to understand discretion simply as a choice between principles or a compromise of principles on which a decision should be based. It is also important that the decision is “wise”[76] in the sense that it balances opposing principles, gives preference to one of them, or applies them in an optimal way *in the specific case*. In this way, practical wisdom, which has the basic characteristic of contextualizing general principles and adapting to the specificities of a particular hard case, emerges as the primary virtue of a rational judge in exercising discretion. Metaphorically said, a wise (rational) judge is “cross-eyed”: observing with one eye the relevant general principles and values, and with the other, the circumstances of the specific case, in order to optimally apply those principles and values, choosing the decision that will be the most suitable mean for their realization. Therefore, for a decision to be rational, it is not only important that it is based on reasonable principle and their balancing, but also that the decision itself is a proper and well-chosen means of applying the principle.[77]

80 In order to fully understand, after all, what Hart means by rationality, it seems that a useful conceptual clarification can be made between rationality and reasonableness. For example, according to von Wright, rationality is “goal-oriented” and is manifested through the formal correctness of reasoning, the skill of choosing the appropriate means for a certain goal, and empirical confirmation. In contrast, reasonableness is “concerned with the right way of living, with what is thought good or bad for man” (Wright 1993: 173).[78] However, from everything that has been said so far, Hart does not take up this distinction. In fact, when it comes to exercising discretion, it seems that he undoubtedly combines these two concepts into one. The words of Alexy depict this “merged” concept well.

> [R]easonableness and rationality are the same or at least more or less the same. This interpretation is often indicated where the adjective “practical” is added to “rationality”. “Practical rationality” then refers to all criteria that practical reason has to apply in order to determine whether a practical judgment is correct (Alexy 2009: 6).

81 Considering that “reasonableness invites one’s attention more directly to some special features of practical rationality … in

focusing on a special form of argument, namely, balancing",[79] it becomes clear that Hart's "rationality" could be conceptualized as *practical rationality*. This means that his understanding of rationality is concerned with the practical aspects of decision-making and the ability to balance different considerations in a given situation. Therefore, Hart's concept of rationality can be seen as encompassing both means-ends reasoning and balancing of practically relevant values and interests.

82 Eventually, one of the features of the Hart's concept of discretion that is particularly important for its rationale character is the "defence" of discretionary decision. In the case of the hostess, Hart stresses, she can *vindicate* it by effects—if the dinner was pleasant and the guests left satisfied, her decisions were confirmed as wise and rational. On the other hand, she can defend her decision by appealing to "controlling principles or values as applied to the case" and by striking impartial "compromise between them where they conflicted".[80] This *justification* of a discretionary decision generally involves a reconstruction of the process through which the decisionmaker reached the decision, and an elaboration of reasons that influenced this process (Shaw 2013: 702). And it is clear that in the case of judicial discretion, the only way to make a defence of decision is justification, not vindication, because the judge cannot defend their decision retrospectively, based on the effects it has achieved.

6 Conclusion

83 In Postscript to the second edition of *The Concept of Law*, Hart himself confessed that he "said far too little in [the] book about the topic of adjudication and legal reasoning".[81] Concerning the concept of discretion, he did even less. For instance, in *The Concept of Law*, and in the Postscript to the second edition, Hart mentions the word only a few times. But now we can say that this gap is, to a certain extent, filled with rediscovered paper of Hart's Harvard lecture about discretion.[82]

84 Hart argues that discretion is a necessary component of any legal system, because positive law is inherently indeterminate. Therefore, there will be cases that require the judges to "make" rather than merely to "find" law, i.e. to exercise discretion. Discretion is a specific form of decision-making, which is rational and to some extent constrained by law. But Hart was very clear that no perfect combination of legal rules and principles, properly balanced, would *always* give us only one right answer.[83] In spite of all legal constraint and rational elements of the judicial decision-making process, Hart firmly believed that "after we have done all we can to secure the optimum conditions for its exercise", (discretion) is a form of *rational* choice—choice constrained to a certain extent by the law and institutional role of the decisionmaker, but choice all the same (Hart 2013: 665; Shaw

2013: 724). In short, it is the illusion that judges never reach the point where they must choose between conflicting principles or values, without further guidance in the form of some higher *legal* principle or value. Therefore, there is something “out there” (in our practical universe, so to speak) that plays and should play a certain role in our legal “earthly” world, and consequently, in the judicial world as well.

85 On one occasion, Patterson observed that “[f]rom the vantage point of the present, Hart’s discussion of discretion is simple and unsophisticated”, and that “[i]n fact, Hart’s entire discussion of adjudication is of largely historical interest”.[84] Patterson made this assessment before Hart’s Harvard manuscript appeared, and perhaps he would change it today. Nevertheless, even if we accept Paterson’s assessment, the fact remains that Hart’s understanding of legal reasoning and discretion, *viewed historically*, establishes a convenient, although basic, conceptual framework and indicates theoretical “markers” for contemporary debates about judicial adjudication and reasoning. In light of what we have learned from the discovered manuscript, this assertion seems even more well-founded. Metaphorically speaking, his thoughts about discretion and judicial reasoning are like a good old X-ray machine. It is true that new, more precise and better diagnostic machines, like scanners and MRI, have been invented, but it can still “visualize” the anatomy and uncover potential pathologies of the “organism” of judicial reasoning.

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Notes

1 Sebok 1999: 104

2 Hart 2013: 652–665.

3 Only a small group of scholars have known that Hart wrote an essay on discretion for the Legal Philosophy Discussion Group, and one of them was Anthony Sebok. He read Hart’s manuscript and in a short section of one of his articles analysed some of the essay’s themes. (Sebok, 1999: 75, 99–100). The other scholars who have mentioned “Discretion” believed the essay had been lost completely (Shaw 2013: 670). However, as soon as it was published in the HLR, the article attracted the attention of the academic public. For instance, the following year its translation into Spanish appeared (cf. Hart 2014: 85–98).

4 In the same issue of the Harvard Law Review, this task was already performed by Nikola Lacey, Hart’s biographer. She reflects “from a biographer’s viewpoint, on the significance of ‘Discretion’ for our understanding of the trajectory of Hart’s ideas” and “conclude by considering what contribution the essay makes to our overall interpretation and evaluation of Hart’s legal philosophy” (Lacey 2013: 637).

5 Cf. Baylis 1992: 174–175; Himma 1999: 73–82.

6 Cf. Vila 2001: 43–76; Sebok 1999: 91–97.

7 Cf. Dworkin 1977: 31–33; Shiner 2011: 3–10.

8 The concept of discretion has especially entered the mainstream of theoretical discussions since the 1970s (cf. Vila 2001: 1–4).

9 “General terms would be useless to us as a medium of communication unless there were such familiar, generally unchallenged cases”. Therefore, “if anything is a vehicle a motor-car is one” (Hart 1994: 126).

10 As Marmor put it, “(a)lthough no single defining feature shared by all the standard examples (in the core) can be specified … this does not mean that they are not standard examples” (Marmor 2005: 102).

11 Categorically vague concepts do not have a clearly defined content, which means that it is not always clear whether a “narrower” concept falls under a given concept or not. With these concepts, there is an “internal” indeterminacy in terms of features that would be considered necessary and sufficient to bring a phenomenon under the concept (Devos 2003: 124). The most famous illustration of such a concept in legal theory is the concept of “vehicle” from Hart’s example of the “no vehicles in the park” rule (Hart 1994: 126 – 128).

12 Application of rules means that the judge must decide that “words do or do not cover some case in hand”, having in mind *practical consequences* involved in the decision (Hart 1958: 607).

13 Hart 1983: 8, 106.

14 Moreover, Hart adds that even if it were possible to achieve this, even if natural language does not have an open texture, this would not be desirable (Hart 1994: 128)

15 In fact, Hart mentions for the first time the indeterminacy of aims and

the ignorance of facts as reasons for the indeterminacy of law in the temporarily lost Harvard paper. These passages were not mentioned in the lecture from 1958, but they reappeared in *The Concept of Law*. Actually, as Shaw rightly notes, “Discretion was in some respects a rehearsal for parts of his later published work, the essay presented vivid examples, detailed explanation of ideas he would mention only in passing in other writings, and ideas that, in the context of his broader work, mark uncharted territory” (Shaw 2013: 694).

16 In the discovered paper, Hart uses “no vehicles in the park” not to ground the argument for indeterminacy of law in vagueness of language, but as an example to illustrate the idea that rules are indeterminate because no legislator can predict all the cases that might require regulation or determine aims without ambiguity in order to resolve all future litigations fully (Shaw 2013: 704).

17 Hart mentions same example in the Harvard paper. Generally, in later works Hart often uses thoughts, analysis, even verbatim formulations from this paper.

18 Hart 1994: 133.

19 This “middleness” of Hart’s thought vis-à-vis judicial reasoning is briefly explained by Shiner. “It is clear in Chapter 7 that some of Hart’s main philosophical opponents are the rule-sceptics, those who deny any certainty anywhere in the legal system. How can such views be better countered than by simple straightforward reminders of just how much certainty there is in legal rule-making and rule-following? Others of Hart’s opponents are the formalists, those who find complete certainty everywhere in the legal system. How can such views be better countered than by simple straightforward reminders of just how much flexibility there is in legal rule-making and rule-following?” (Shiner 2011: 12).

20 Hart 1994: 136, emphasis by author.

21 Hart intended to give a description of the core meaning of discretion: when we all agree that it is present, what is discretion? Therefore, he did not deal with penumbral situations that may or may not be classified as discretion. (Hart 2013: 654; Shaw 2013: 696).

22 In this context, Hart also mentions the use of precedents, but in the article, I deliberately avoid the idiosyncrasies of the common law system.

23 Shaw 2013: 698.

24 Hart 2013: 656.

25 Ibid.

26 Hart 2013: 657.

27 Hart 2013: 658.

28 Shaw 2013: 700.

29 Hart 2013: 659. Emphasis by author.

30 Hart 2013: 663.

31 Hart 2013: 659.

32 Hart 2013: 665.

33 Hart 2013: 652.

34 “where rules, under this terminology, are highly precise, and standards are broad and open-ended” (Schauer 2005: 11).

35 Distinguishing this type of concepts, Hart calls them “multidimensional generalities” (Hart 1958: 607).

36 What makes legal standards attractive to legislators is precisely this “elusiveness” of reference, which stems from their multidimensionality. The reference of such terms can change from context to context, and this makes them suitable for the legislator, which uses them to leave it up to the courts to determine what they “mean” in each specific case.

37 “Nearly every one of the factors which characterize the dinner party situation may be found in the legal literature concerning discretion in the

Law" (Hart 2013: 660).

38 General terms as "a successful dinner party" "excludes quite definitely a number of determinate things such as the discomfort of the guests, ugly appearance of the table, and so on" (Hart 2013: 659).

39 Hart 2013: 659.

40 "(A)lthough it is true that determining what behaviour is 'unreasonable', or what decision is in 'the best interests of the child' is in the totally formal sense a process of subsumption under those words ... these formal similarities may mask substantial, non-formal differences" (Schauer 2012: 314).

41 Endicott 2012: 109.

42 It is clear that Hart, at this point, evokes the old idea of Adam Smith's "impartial spectator" procedure (Alexy 2009: 11).

43 Hart 2013: 662.

44 "(W)here a statute is involved, particular regard must be had to the exact words used. The fixed verbal formulae of the statute, then are, in a particular way, always essential 'material' on which 'interpretation' does its work" (Summers & Taruffo 1991: 475).

45 When it is said that "it is not predetermined by the rule", this does not mean that it is not predetermined by the meaning of a single term (as is the case with the example of "no vehicles in the park"). As Raz argues: "(P)roblems of interpretation are rarely problems of the meaning of one term or phrase. They are more often than not questions of the interpretation of sentences, or of articles in statutes or in constitutions" (Raz 1998: 177).

46 Insights presented in the well-known book on comparative theory and practice of interpretation (MacCormick & Summers 1991) served as a convenient heuristic framework for this analysis. In one of the summary chapters of the book, the difference between formal and substantive reasons for a court decision is emphasized as follows: "(F)ormal (interpretative) reasons are ones that arise essentially from authoritative sources of law including the statute itself and related statutes, any constitution, any precedent on the meaning of the statute, any precedent on interpretational method, any relevant regulations or official interpretations, any general principles of law, the logic of relevant legal concepts, any authoritative policies in the area, and official *travaux preparatoires*". On the other hand, "substantive reasons include rightness reasons arising under moral norms, goal reasons arising from possible social policy goals, and various institutional reasons arising from features of legal institutions and processes" (Summers & Taruffo 1991: 488–89). The force of the latter "depends more or less on their weight" and is not dependent on a connection with authoritative sources, to which formal reasons are attached. In the following pages, I will refer to the first reasons as legal, and the second as non-legal.

47 Hart 2013: 665. Emphasis by author.

48 Hart 1994: 274.

49 In another context, as will soon become apparent, Hart mentions other interpretative arguments, such as arguments appealing to general legal principles or arguments from analogy.

50 Cf. Dajović 2021: 747–749.

51 "The legal character of such principles may be grounded in the constitution, or in general statutory law, in non-constitutional case-law, or in a pervasive legal tradition" (Summers & Taruffo 1991: 466).

52 Hart 1983: 136.

53 Summers and Taruffo note several distinct modes of resolution for conflicts of interpretative arguments. For instance, "when two or more arguments come into conflict, one argument may rationally prevail because (1) the other argument proves to be, on close analysis, unavailable inasmuch as the very conditions required for it to exist simply are not present; (2) the other argument (or arguments) is

deprived of all or most of its prima facie force by the prevailing argument, a process we call cancellation; (3) the other argument (or arguments) is mandatorily subordinated pursuant to a general rule or maxim of priority" (Summers & Taruffo 1991: 480).

54 Summers & Taruffo 1991: 480–481.

55 "The legal system does not require (judge) to use these sources, but it is accepted as perfectly proper that he should do so...(S)uch writings are recognized as 'good reasons' for decisions. Perhaps we might speak of such sources as 'permissive' legal sources to distinguish them ... from 'mandatory' legal or formal sources such as statute" (Hart 1994: 294).

56 Hart 1958: 608. In this respect, for instance, it should remind that Hart deemed as "the chief and very great merit of … natural law approach is that it … fosters awareness of the way in which unspoken assumptions, common sense, and moral aims influence the law and enter into adjudication" (Hart 1983: 11).

57 Shiner 2011: 14.

58 See note 46.

59 They are the familiar and constantly recurring cases, "where there is general agreement in judgments as to the applicability of the classifying terms" (Hart 1994: 126).

60 Hart 1994: 126. Emphasis by author.

61 "(W)e set forth 11 major types of arguments and advance our 'universalist' thesis that all systems in our study share these as a common core of good reasons for interpretative decisions ... and classif(y) all 11 of the major types of (interpretative) argument in terms of four basic kinds: linguistic, systematic, teleological-evaluative and intentional" (MacCormick & Summers 1991: 3, 5–6).

62 Hart 1983: 8.

63 Ibid.

64 Hart 1983: 7.

65 Shiner 2011: 14.

66 Barak 2005: 208

67 Alexander & Schauer 2007: 1581

68 Sebok considers that Hart's idea of differentiating between core and penumbral cases is reflected in the type of reasoning used by judges when making decisions in each type of case. He asserts that "the difference between the core and penumbra was the type of reasons that counted in each category. The sort of reasons that governed decision making in the core were different in kind from the reasons permitted in the penumbra" (Sebok 1999: 86). However, as I have tried to explain, that is not entirely correct, because a judge may resort to legal reasons even when resolving a hard case through interpretative arguments, i.e. through formal legal reasons, but it is true in the sense that non-legal reasons are only used in penumbral and not in core cases.

69 Of course, the field of available substantive (non-legal) reasons can also be limited by law. For example, in modern secular states, religious texts cannot be invoked as sources of (non-legal) reasons when applying the law.

70 Endicott 2012: 111.

71 Endicott 2012: 114. See note 40.

72 "Indeed, a weakness of his essay is that he did not discuss in more detail how, precisely, the demand for rationality constrains decisionmaking" (Shaw 2013: 707).

73 This is explained in more detail at the end of subsection 4.1.

74 Hart 2013: 664.

75 Hart 2013: 661. "… although the factors which we must take into account and conscientiously weigh may themselves be identifiable" Hart

continues (Ibid.).

76 Is there Hartian discretion at all, if not “wise”, “sound”? Is not an expression “wise discretion” for Hart pleonasm? For instance, for Barak “wisdom is a component of discretion” (Barak 2005: 2013).

77 “He seemed to have expected sound discretionary reasoning to display not just logical integrity but also a form of practical wisdom, associating the term discretion with practical wisdom or sagacity or prudence” and with words like ‘wise’ and ‘sound’ (Shaw 2013: 707).

78 Von Wright says about the relationship between these two concepts: “The reasonable, is, of course, also rational—but the ‘merely rational’ is not always reasonable” (von Wright 1993: 173). According to this interpretation, the criteria of rationality form a subclass of the criteria of reasonableness.

79 Alexy 2009: 6.

80 Hart 2013: 660.

81 Hart 1994: 259.

82 “The ideas in “Discretion” are consistent with what little Hart did say on the subject in later years but they are far more comprehensive. The essay fills significant gap in Hart’s work” (Shaw 2013: 674).

83 The reason for this is, as Hart repeatedly insisted, that we are humans, not gods, and if I could add, not even “superheroes” like Hercules. “For Hercules, who masters all the legal and moral materials, there are single right answers to hard cases. Among mere mortals, though, hard cases are contested due to epistemic limitations” (Poscher 2012: 138).

84 Patterson 2009: 119.

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