Abstract
Rights are, without a doubt, the most outstanding feature of contemporary legal systems. It can be argued that since the middle of the past century we are immersed in a culture of rights. “Neo-constitutionalism” is one among other such concepts that has been used to designate and study this phenomenon. The hypothesis we will attempt to address in this paper is that some of the central characters of our culture of rights, here termed as neo-constitutionalism, cannot be explained consistently without an explicit reference to natural law.

Is neo-constitutionalism a «third philosophy of law», beyond natural law and legal positivism? We will specifically examine the connection between the assertion that there exist natural law principles of justice and the following characteristics of our culture of rights: the recognition of rights; the reference of state or national legal systems to supranational legal systems; constitutions as a result of a network of principles and rules; the principle of proportionality; and the principle of reasonableness. While the first three characteristics constitute the structure of any neo-constitutional practice, the two latter ones are features of the processes of legal reception and legal allocation of rights in such a legal practice.

Therefore, we will distinguish between three forms of neo-constitutionalism: as a theory of law; as an ideology of law; as a method of analysis of law.

Keywords: Analytical legal theory of norms, balancing, constitutional argumentation and interpretation, defeasibility, democracy, Genoa Realism, legal reasoning analysis, neo-constitutionalism, principles of proportionality and of reasonableness.

«Description maybe description, even if it is an evaluation».  
Herbert Hart, The Concept of Law.

«Death has dominion because it is not only the start of nothing but the end of everything, and how we think and talk about dying (the emphasis we put on dying with 'dignity') shows how important it is that life ends appropriately, that death keeps faith with the way we have lived it».
Ronald Dworkin (1931-2013).

«If men were angels, no Government would be necessary».
James Madison, The Federalist; and then Jerome Frank, If men were angels.
1. INTRODUCTION: SOME REALISM ABOUT «GENOVA LEGAL REALISM »

Neo-constitutionalism is a term recently suggested in legal and political philosophy to label what appears as a new perspective to look at and to discuss of law, of its ontological, phenomenological and epistemological dimension; i.e.: of its forms of identification, application and cognition.

Namely, the term neo-constitutionalism has been proposed and first used by some exponents of the Genoa School of Law («Tarello Institute for Legal Philosophy»)\(^1\) to capture and to account for what, despite any difference in the arguments adopted and/or in the tenets maintained, emerges as a common assumption in the last two or three decades writings by legal and political philosophers as Ronald Dworkin, Robert Alexy, Carlos Nino, and, in Italy, Luigi Ferrajoli and Gustavo Zagrebelsky.

(Separately necessary, but jointly sufficient, conditions for the existence of a school of thought are: some headquarters; one or more founding fathers; a lot of disciples; a Word to be spread. In fact, Genoa Realism satisfies all these conditions. The headquarters are just in Genoa, Italy, in the old «Legal Culture Department». The founding father was Giovanni Tarello,\(^2\) Italy’s foremost philosopher and

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\(^1\) «Tarello Institute for Legal Philosophy» is one of the world’s leading centres for legal research and education. The works are focused on topics in analytical legal theory and philosophy of positive law, constitutional democracy, human rights, bioethics, sociology of law and history of European legal culture. The library in Balbi Street has an outstanding collection of works in legal philosophy. Most of it is in English, Spanish and Italian, though we also have numerous publications in French and German.


\(^2\) The founder of the School was unquestionably Giovanni Tarello (Genoa, October 4, 1934 – April 20, 1987). He would regularly strike people since the start as a born story-teller, with a very personal sense of humour. Here we cannot analyze, even less interpret, his large and multi-faceted body of work. In it, with remarkable versatility, he managed to combine legal theory with history of institutions, sociology of law, and legal dogmatics, too. He was largely a man from a time in which specialization was not yet an inescapable destiny for a philosopher of law: he was, at the same time, jurist, historian, sociologist, and
historian of law. Disciples are by now a legion, but the more distinctive theoretical contributions – seen as different from historical and sociological ones – have been provided, until now, by the very contributors to the studies on neo-constitutionalism: Riccardo Guastini (actually he is the Director of new «Tarello Institute for Legal Philosophy»); Paolo Comanducci (the representative of Genoa’s School who is better known in Latin America was elected Chancellor of
As for the neo-constitutionalism debate, Comanducci contributed, along with Pozzolo and Mauro Barberis to the proposal of the very label «neo-constitutionalism» – a label, and no more than this, to be applied to many and different authors (Dworkin, Alexy, maybe Carlos Nino, Atienza and Ruiz Manero) representing a «third» theory of law beyond natural law and legal positivism. Comanducci, who is an updated methodological legal positivist, does not share the opinion of many who, also within the school, would rather see neo-constitutionalism as a mere «constitutionalistic» variant of the millenary natural law tradition – on the contrary, it sees it as an evolution of positivist tradition too (COMANDUCCI (2001): op. cit.). As a third example of Comanducci’s moderate stance, I cite his role in the debate (both inside and outside the School) on Genoa-style interpretive scepticism. He sometimes embraced a by now widespread tendency to read, on a metatheoretic level, the School’s legal realism as a more complex theory, progressively distancing itself from Tarello’s hard scepticism and thus approaching the Hartian mixed or eclectic theory.

Cf. BARBERIS, MAURO: Genoa's Realism: a Guide for Perplexed, in Revista Brasileira de Filosofia, 2013, RBF, 240-252. In BARBERIS (2011): op. cit., today’s metaethics faces more specific questions than moral objectivity debated in XX Century: e. g., the problem of constitutional interpretation discussed in this work. First section, on the tracks of David Hume, Friedrich Nietzsche and Michel Foucault, tries to imagine an other metaethics: an evolutionary, genealogic, and legally oriented one. Second section criticizes the idea, often shared by moral philosophers and legal theorists, that the role of law and constitution in division of ethical work must be only application of morals. Third section, finally, sketches a constitutional metaethics: an objectivist, pluralistic and relativistic answer to methodological questions on constitutional interpretation.

See also BARBERIS, MAURO: Law and Morality Today, in Revus 16, 2012, 55-93. Four philosophies of law are compared and discussed in this paper: natural law, legal positivism, legal realism, ans neo-constitutionalism. Each of them is defined upon its answers to three questions: one regards objectivity or subjectivity of ethical (i.e. moral, political, legal) value judgments, another one refers to legal interpretation, and the main one to the relationships between law and morality. Natural Law is thus characterized by a) ethical objectivism, b) interpretive formalism, and c) the idea that law and morality are necessarily connected. Positivism stands for 1) ethical subjectivism, 2) mixed theory of legal interpretation, and c) the separability thesis. Legal realism – which is, to some extent, a mere radicalization of positivistic views – is cauterized by a) ethical subjectivism, b) interpretive skepticism, and c) the separation thesis. Neo-constitutionalism holds 1) ethical objectivism, 2) interpretive formalism, and 3) the view that law and morality are anyhow connected in a constitutional state (thus making the debate between natural law and positivism outdated). Each of the four philosophies of law is then articulated into its respective theoretical, methodological and ideological aspects. This is how the author points to certain similarities between the opposite standpoints, and to some plurality of views inside of every one of them. He stresses furthermore the challenges for particular views on law and morality with the final analysis of three interpretations of the separability thesis – given by inclusive, exclusive and normative positivists.

In BARBERIS, MAURO: Neo-constitutionalism: Third Philosophy of Law, in Rivista di Filosofia del Diritto – Journal of Legal Philosophy, 1/2014, 153-164, there is the meaning of a «third philosophy of law», other than natural law and legal positivism, which Barberis
(the Director of the “Master in Global Rule of Law & Constitutional Democracy”, with Master courses can be attended, since 2011, in the Imperia Campus); Susanna Pozzolo; Giovanni Battista Ratti and Giovanni Damele. Finally, the Word-To-Be-Spread is an interpretation – centered, but realistically – minded, theory of law, and a corresponding analysis of jurisprudence – in fact, a form of legal realism).

That is to say, to put it roughly, the assumption along which the very notion of law together with its forms of identification, application and cognition (i.e., in its ontological, phenomenological, and epistemological dimension) requires to be radically revisited because of the prominent role and pervasive influence fundamental rights have been acquiring since the conclusion of the second world war both in the domestic law of an ever increasing number of (western) countries and in international law. In other words, the assumption is that fundamental rights have been so deeply affecting law in all its major aspects, to justify the need and to urge the claim for a new understanding of its notion. 9

The suggestion to name neo-constitutionalism the demand for such a new understanding of the notion of law is captivating. Simple and plain as it sounds, the term neo-constitutionalism in fact both recalls constitutionalism as the immediate antecedent of the demand dealt with and acknowledges what in such a demand can be taken to be distinguishing and innovative. 10

labels neo-constitutionalism, and others describe as constitutionalism, nonpositivism, theory of law as integrity or as interpretation, inclusive positivism, postpositivism, and so on. This paper distinguishes neo-constitutionalism from constitutionalism, old and new; in the following three sections it reconstructs neo-constitutionalist stances on law-moral problem, theory of norms, and legal reasoning analysis.

8 Susanna Pozzolo (born 1967) is now working also on political philosophy, but she is, since 1999, well-known for coining the label «neo-constitutionalism», now widely employed by almost the whole «Latin» scholarship in order to characterize what can be seen as the «mainstream» trend in contemporary legal philosophy. Pozzolo introduced this label in her contribution to an international conference in Argentina (POZZOLO (1998) (2004), op. cit.). Interestingly enough, however, we can by now apply the label also to authors (such as inclusive or critical positivists or postpositivists as well), who, in particular in English-speaking world, would rather ignore or reject it – the names of Neil MacCormick, Gustavo Zagrebelsky and Luigi Ferrajoli are the first which come to mind. But one has to insist that the label cannot absolutely apply to its own originators (Pozzolo, Comanducci and Barberis), who always used it in order to criticize a variety of positions, which of course they took seriously, but could not in any way endorse.


10 The standpoint by BARBERIS (2000b): op. cit., 147-162, can be taken to be paradigmatic of such a view, namely: „neo-constitutionalism differs from inclusive legal positivism just
The other way round, the quite dominant opinion on the way to perceive what can be referred to as an expression of neo-constitutionalism, far from being captivating, appears restrictive if not even misleading. Namely, what appears restrictive if not even misleading is the opinion according to which neo-constitutionalism, despite any difference in the way it may happen to be phrased and argued for, is mainly, if not exclusively, a form of natural law; i.e., one of the different forms natural law has been given as the time goes by.

Despite such a widespread dominant opinion, actually there is no reason why neo-constitutionalism shouldn't be conceived of as a form of positive law rather than as a form of natural law. To the contrary, it seems sound to maintain that, both as a matter of fact and as a matter of law, neo-constitutionalism deserves and requires a legal positivist reading in order to account for its true distinguishing feature: the demand for a new definition of the notion of law because of the radical changes a great number of positive legal systems have been going through since the statement and the protection of fundamental rights have been taken to be their grounding constitutive components; i.e., since fundamental rights have been acquiring a prominent and pervasive influence in affecting them in all their major aspects.

The recognition of human rights is, without a doubt, the most outstanding feature of contemporary legal systems. It can be argued that since the middle of the past century we are immersed in a culture of rights. Neo-constitutionalism is one among many concepts that has been used to designate and study this phenomenon. The hypothesis we will address in this paper is that some of the because it maintains the natural law thesis of the (identificative) necessary connection between law and morals; it differs from the traditional natural law, getting closer to inclusive legal positivism, insofar as it places such a connection at the level of fundamental or constitutional principles”.


12 Though not always explicitly stated nor similarly defended, the need to think and define from anew the forms of identification, application and cognition of law because of the role fundamental rights have been acquiring in many contemporary positive legal systems is recurrent in the literature on neo-constitutionalism. In particular, one of its explicit and most determined formulation is spelt out by Ferrajoli who writes of constitutionalism (Ferrajoli himself does not use the term neo-constitutionalism) as a new paradigm of law as contrasted both with what he terms the pre-modern paradigm of law (judicial and doctrinal in character) and the modern paradigm of positive law (legislative in character). Cf., e.g., FERRAJOLI, LUIGI: Per una sfera pubblica del mondo, in Teoria politica, Vol. 17. No. 3. (2001) 3-21.

13 Material criteria of identification are not ignored by legal positivists. To the contrary, since the 1934 edition of his Reine Rechtslehre, Kelsen writes: „the essential function of the constitution consists in governing the organs and process of general law creation, that is, of legislation. In addition, the constitution may determine the content of future statutes, a task not infrequently undertaken by positive-law constitutions, in that they prescribe or
central characters of our culture of rights, here referred to as “neoconstitutionalism,” cannot be explained consistently without a reference to natural law.

In order to avoid any confusion that may arise in this paper I would like to stress the dual meanings attached to the terms ‘constitutionalism’ and ‘neo-constitutionalism’. A primary meaning of both lexemes is one of a theory and/or ideology and/or method of analysis applied to law. A secondary meaning of both terms indicates some structural elements of a legal and political system, which are described and explained by (neo) constitutionalism as theory or which satisfy the requirements of (neo) constitutionalism as ideology. It is in this second meaning that ‘constitutionalism’ and ‘neo-constitutionalism’ designate a constitutional model, namely that collection of normative and institutional mechanisms realised in a historically determined legal-political system which limit the powers of the

preclude certain content. The catalogue of civil rights and liberties, a typical component of modern constitutions, is essentially a negative determination of this kind. Constitutional guarantees of equality before the law, of individual liberty, of freedom of conscience, and so on are nothing but proscriptions of statutes that treat citizens unequally in certain respects or that interfere with certain liberties”. The quotation is from the English translation, 64-65. Kelsen, Hans: Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik, 1934, Deuticke, Wien. [English translation by B. Paulson, Litsczewski – Paulson, Stanley L.: Introduction to the Problems of Legal Theory, 1992, Clarendon Press, Oxford.]

Nor material criteria of identification are disregarded by Ross, Alf: On Law and Justice, 1958, Stevens, London, 78-81, and Ross, Alf: Directives and Norms, 1968, Routledge and Kegan Paul, London, 96; when taking into account material rules of competence as well as personal and procedural ones. Nevertheless, though far from being ignored, material criteria of identification have not been paid any special attention, nor acknowledged any peculiar import in affecting and conditioning legal systems way of functioning.

14 Great emphasis on constitutional fundamental rights as material criteria of identification is devoted, e.g., by Ferrajoli, Luigi: Lo stato di diritto fra passato e futuro, in Costa, Pietro – Zolo, Danilo (ed.): Lo stato di diritto. Storia, teoria, critica, 2002, Feltrinelli, Milano, 349-386. See also Palombella, Gianluigi: L’autorità dei diritti, 2002, Laterza, Roma-Bari, 7 and 23-29. Focusing more on the problem of the identification (and interpretation) of the constitutional rules than on the problem of the identification (and interpretation) of the statutory rules coping with the material criteria of validity, the topic is dealt with at length by the contributions to Alexander, Larry (ed.): Constitutionalism. Philosophical Foundations, 1998, Cambridge, Cambridge University Press.

15 With regard to domestic law, insofar as the Italian legal system is concerned, a critical overview of shortcomings and deficiencies concerning the judicial protection of fundamental rights is provided by Taruffo, Michele: Diritti fondamentali, tutela giurisdizionale e alternative, in Mazzarese, Telca (ed.): Neocostituzionalismo e tutela (sovra)nazione dei diritti fondamentali, 2002, Giappichelli, Torino. With regard to international law, a rich exemplification of the limits met in securing legal implementation and judicial protection of fundamental rights is offered by Cassece, Antonio: I diritti umani nel mondo contemporaneo, 1994, Laterza, Roma-Bari.
State and/or protect fundamental rights.¹⁶

The foregoing introductory remarks (meant to make clear the reason why of the claim for a new understanding of the notion of law) lead to a preliminary distinction about the term neo-constitutionalism and its possible uses. Namely, they lead to distinguish what might either be taken to amount to three different notions of neo-constitutionalism, or, perhaps even more convincingly, to what might rather be conceived of as a threefold significance (import) of one and the same notion.

Being more precise, the term neo-constitutionalism can be used, first, in the language of jurists to refer to legal systems where a catalogue of fundamental rights has been expressly laid down in the constitution and/or in constitutional amendments, and where such a catalogue has been supplemented with a variety of legal devices, different as the case may be, to further their implementation and/or to grant them legal protection. Such an use of the term simply refers to a distinguishing feature which some legal systems may happen to possess; that is to say, it simply refers to a (possible) component of positive law and/or to its corresponding notion in legal dogmatics.¹⁷

Second, the term neo-constitutionalism can be used in the language of legal theorists and philosophers to refer to a new paradigm of law together with its modalities of (judicial) application and forms of cognition. Such an use of the term does not refer just to a (possible) component of positive law and/or to its corresponding notion in legal dogmatics. It rather refers to an explicative model which (positive) law can be given because of the way legal systems may happen

¹⁶ That is to say that the validity of a domestic provision might be challenged and/or its interpretation affected by making reference to fundamental rights listed in regional and/or international declarations, charters and covenants, though not included in domestic law. Further, a query not coincident with such an eventual practice is the problem as to whether to conceive of any catalogue might happen to be written down in a legal system, be it domestic, regional or international, as open or closed; that is to say, the problem as to whether to understand it as a mere exemplification rather than a sort of utterly definitive list of what rights are to be legally and judicially protected.

Arguments in favour of the open character of any such a catalogue can be found, beside any natural law attitude, in positive constitutional provisions. That is so, e.g., with the IX amendment of the United States Constitution: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”, or else with art. 2 of the Italian Constitution: “The Republic recognizes and protects the inviolable human rights...”. Insofar as the Italian Constitution and its art. 2 are concerned, the query is dealt with, e.g., by PACE, ALESSANDRO: *Metodi interpretativi e costituzionalismo*, in Quaderni costituzionali, Vol. 21. No. 1. (2001), 35-61. Further, cf., GUASTINI, RICCARDO: *Teoria e dogmatica delle fonti*, 1998b, Giuffrè, Milano, 343-344.

¹⁷ This can be taken to be the case, though his main concern is not the definition of the notion of constitutionalism, with GUASTINI, RICCARDO: La “costituzionalizzazione” dell’ordinamento italiano, in Ragion Pratica, Vol. 6. No. 11. (1998a), 185-206, when providing a list of what he terms “conditions of constitutionalization”. 

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to be figured out.\textsuperscript{18}

Third, the term neo-constitutionalism can be used in the language of legal and/or political and/or moral philosophers to refer to law as it should be because of the law as it is; that is to say because of the principles and the values which it explicitly states: the fundamental rights, the principles and values which are within, nor without it.\textsuperscript{19} Such an use of the term does not refer just to a (possible) component of positive law and/or to its corresponding notion in legal dogmatics. Nor it refers just to an explicative model of particular (positive) legal systems. Rather, such an use of the term refers to an axiological-normative model of law.

Three different notions, perhaps. Or, rather, perhaps a threelfold significance and import of one and the same notion: empirical and descriptive in its significance and import, when the term is used in the language of jurists and/or legal dogmaticians; reconstructive and explicative in its significance and import, when the term is used in the language of legal philosophers and theorists; axiological and normative in its significance and import when the term is used in the language of legal, political or moral philosophers.\textsuperscript{20}


\textsuperscript{19} A similar understanding of the notion occurs in FERRAJOLI, LUIGI: I fondamenti dei diritti fondamentali, in \textit{Teoria Politica}, Vol. 16. No. 3. (2000), 41-113, when maintaining that the new paradigm of constitutionalism “represents a completion not only of the rule of law but also of the very legal positivism [...] since the change it has led to, has provided legitimacy with a twofold artificial and positive character: not only of the law as it is, i.e. of its conditions of existence, but also of the law as it ought to be, i.e. of its conditions of validity made constitutionally positive them too, as law on the law, in the forms of legal limits and constraints on its production” (author’s italics, the English translation is mine). Further, cf. also RAZ, JOSEPH: Legal Rights, in \textit{Oxford Journal of Legal Studies}, Vol. 4. No. 1. (1984), 1-21, when stating: “Legal rights can be legal reasons for legal change. They are grounds for developing the law in certain directions. Because of their dynamic aspect legal rights cannot be reduced, as has often been suggested, to the legal duties which they justify. To do so is to overlook their role as reasons for changing and developing the law” (p. 15), and “Legal rights [...] are legal reasons for developing the law by creating further rights and duties where doing so is desirable in order to protect the interests on which the justifying rights are based” (p. 18).

\textsuperscript{20} Such a deficiency has been denounced from a variety of perspectives. From a theoretical perspective, it constitutes the main concern of those who concentrate on the difficulties of the identification and/or judicial implementation of fundamental rights because of the interpretative difficulties their formulations can give rise to: that is the case, e.g., with BOBBIO, NORBERTO: (1968). Presente e avvenire dei diritti dell'uomo, in \textit{La comunità internazionale}, Vol. 23. 3-18. English translation by CAMERON, A.: Human Rights Now and in the Future, in BOBBIO, NORBERTO: \textit{The Age of Rights}, 1996, Polity Press,
2. MODERN CONSTITUTIONALISM

Modern constitutionalism intended as legal ideology can be presented in the form of three dichotomies. The first is connected to the objectives and ambitions of constitutionalism. The second is related to those institutional means through which the realisation of the objectives of constitutionalism is sought. The third concerns the political means of realising the objectives of constitutionalism.

The first dichotomy is between weak and strong constitutionalism.

a) Weak constitutionalism is the ideology which requires a constitution only to limit existing powers, without necessarily foreseeing the specific defence of fundamental rights. Strong or liberal constitutionalism demands a constitution which is able to guarantee fundamental rights and liberties in face of state powers.

b) The second dichotomy is between the constitutionalism of checks and balances and that of rules. I refer to and adopt the distinction made by Bernard Manin.21


From a (meta)ethical perspective, it constitutes the main concern of those who doubt any alleged universality of fundamental rights because of the differing values of different cultures and/or ideologies and/or religions: that is the case, despite any distinguishing feature of different trends, with the advocates of multiculturalism and/or of (political) realism and/or of the gender theory. From a political perspective, it constitutes the main concern of those who maintain that their legal positivization deprives fundamental rights of their political innovative potentiality: that is mainly the case, e.g., with the adherents of the so called critical legal studies movement. Cf., e.g., MCILAWAIN, CHARLES HOWARD: Constitutionalism: Ancient and Modern, 1947, Cornell University Press, New York; SARTORI, GIOVANNI: Constitutionalism: a Preliminary Discussion, in American Political Science Review, Vol. 56. No. 4. (1962), 853-864; TROPER, MICHEL: Il concetto di costituzionalismo e la moderna teoria del diritto, in Materiali per una storia della cultura giuridica 18, (1988), 61-81; FLORIDIA, GIUSEPPE G.: La costituzione dei moderni. Profili tecnici di storia costituzionale. I Dal Medioevo inglese al 1791, 1991, Giappichelli, Torino; DOGLIANI, MARIO: Introduzione al diritto costituzionale, 1994, il Mulino, Bologna; and MORESO, JOSÉ JUAN: In Defense of Inclusive Legal Positivism, in CHIASSONI, PIERLUIGI (ed.): The Legal Ought, 2001, Giappichelli, Torino, 37-63.


The constitutionalism of checks and balances is the ideology which, in order to limit the powers and/or guarantee fundamental rights, posits an institutional system in which these checks and balances are present. Clearly, Montesquieu’s theory is the main doctrinal source for this type of constitutionalism.22

The constitutionalism of rules is the ideology which, in order to limit powers and to guarantee fundamental rights, sees a hierarchical relationship between a range of fundamental liberties and the power of the State in which the former has a chronological and an axiological priority over the latter. A collection of fundamental rules (a constitution or a charter of rights) must prevent the State’s intruding into this sphere. The constitutionalism of rules could also be called, as Manin proposes,23 market constitutionalism if one were to highlight the importance

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I had the pleasure to meet and to discuss with Frederick Schauer (Distinguished Professor of Constitutional Law at the University of Virginia – Charlottesville, U.S.A.) when he explained his theories during the residential courses of “Master Global Rule of Law and Constitutional Democracy”, taught on Genoa University’s Campus in Imperia, on February 12, 2013. He was one of the teachers of the course “Constitutional Rights & Multiculturalism”.

I visited the School of Law of the University of Virginia together with Charles Strauss, a former judge for the 22nd Judicial Circuit in Danville, at Pittsylvania County, Virginia. I was housed in his house in Chatham in March 2012, because I was a “Team Member” of Rotary International Group Study Exchange 2012. I had the opportunity to visit a part of Tennessee and almost the whole Commonwealth of Virginia, and the White House, too; I knew a lot of friends, Lawyers, Judges, Sheriffs Officers, Professors.

A special “thanks” to the Italian and American Rotary Foundation for the splendid and unique forty days we spent together. But a very special “thank you” also to Lawyer Jeffrey Van Dooren and to his family for the final period in which he housed me in his house in Salem; can not be also forgotten the consorts Jim and Janet Johnson, as well as Attorney at Law Stephanie Cox (Firm “Spicer, Frank & Cox” in Blacksburg, Virginia) after my visit to the Campus of Virginia Polytechnic Institute (Virginia Tech). Now all that people and places belong to me, as well as I belong to them.

22 TARELLO: op. cit., 311-342.
23 MANIN (1997): op. cit., 25-31. Bernard Manin (Marseille, April 19, 1951), is Professor of Politics at Institut d’Etudes Politiques (Paris); M.A. 1974 (political science), Paris I. Pantheon-Sorbonne and Ecole Normale Supérieure (Paris). He reminds us that the Athenian Assembly, which often exemplifies direct forms of democracy, had only limited powers. According to Manin, the practice of selecting magistrates by lottery is what separates representative democracies from so-called direct democracies. Consequently, Manin argues that the methods of selecting public officials are crucial to understanding what makes representative governments democratic. He identifies four principles distinctive of representative government: 1) those who govern are appointed by election at regular intervals; 2) the decision-making of those who govern retains a degree of independence from the wishes of the electorate; 3) those who are governed may give expression to their opinions and political wishes without these being subject of the control
given by liberal constitutionalism from the beginning of the 19th century to property rights and contractual freedom. The principal cultural source of this type of constitutionalism is, in my opinion, 18th century rationalist and voluntaristic natural law doctrine.

(c) The third dichotomy is that between reformist and revolutionary constitutionalism.

Reformist constitutionalism is the ideology which demands that the existing power should concede to, or agree to negotiate, the drawing up of a constitution.

Revolutionary constitutionalism proposes the destruction of the existing power and/or requires that the new revolutionary power should prepare a constitution.

The following relationships existing between the single elements making up the three dichotomies can be foreseen:

- Reformist and revolutionary constitutionalism are mutually incompatible;
- there is a unidirectional relationship between strong and weak constitutionalism: strong constitutionalism includes weak constitutionalism whereas the weaker form does not necessarily imply the stronger form;
- the constitutionalism of rules is incompatible with weak constitutionalism;
- the constitutionalism of checks and balances, and the constitutionalism of rules are instrumental with regards to strong constitutionalism.

It is more difficult to outline the relationship between the constitutionalism of those who govern; and 4) public decisions undergo the trial of debate. For Manin, historical democratic practices hold important lessons for determining whether representative institutions are democratic.

While it is clear that representative institutions are vital institutional components of democratic institutions, much more needs to be said about the meaning of democratic representation. In particular, it is important not to presume that all acts of representation are equally democratic. After all, not all acts of representation within a representative democracy are necessarily instances of democratic representation.

24 As Sartori himself points out [SARTORI, GIOVANNI: Costituzione, in SARTORI, GIOVANNI: Elementi di teoria politica, 1987, il Mulino, Bologna, 11-24], the following threefold distinction recalls the distinction drawn by LOEWENSTEIN, KARL: Political Power and the Governmental Process, 1957, University of Chicago, Chicago. Such a threefold distinction which, following Loewenstein, is adopted by Sartori, is not, clearly enough, exhaustive of all the possible notions of constitution which can be, and to a large extent, have already been distinguished. For a carefully, multidimensional overview of such a variety of notions, cf. FLORIDIA, GIUSEPPE G.: ‘Costituzione’: il nome e le cose, in COMANDUCCI, PAOLO – GUASTINI, RICCARDO (ed.): Analisi e diritto 1994, Giappichelli, Torino, 131-152. Further, cf. also, e.g., DOGLIANI, op. cit., 11-30; GUASTINI, RICCARDO: Lezioni di teoria costituzionale, 2001, Giappichelli, Torino, 307-321. Needless to be remarked that the net of (relationships among the) different notions of constitution provides one more reason, beside those ones already listed in the text, for the plurality of possible understandings of constitutionalism.
checks and balances and the constitutionalism of rules. Both appear to be either complementary or incompatible. I believe this surprising statement can be explained if one points out that the constitutionalism of rules has always been associated with the idea of the popular origins of sovereignty, whilst this has not always been the case with the constitutionalism of checks and balances. Therefore the two constitutionalisms are complementary if both presuppose popular sovereignty; they are incompatible if this is not the case.

In the first case, the constitutionalism of checks and balances is conceived as an ideology which requires a complex separation of powers. State powers are delegated, separated and limited step-by-step in order to guarantee the basic individual rights of popular sovereignty. Power is here simply the function of the State: it is legitimate in that it represents the whole population and/or because this power is enacted in the name of the people.

In the second case, the constitutionalism of checks and balances is conceived exactly as in Montesquieu’s doctrine related to monarchical government. The checks and balances are put in place between those bodies which represent the different interests of different groups and social classes: the court, the aristocracy, the clergy, the bourgeoisie, etc. Sovereignty belongs to the State in the person of the king: institutional equilibrium reflects social and political equilibrium and guarantees certain limited individual freedoms. The principal function of the constitution is not to assure individual and universal rights but to sanction legally a political compromise stipulated amongst factions fighting to maintain or obtain power.

In this way it is hoped that a conceptual structure has been put in place which allows, on one hand, for the distinction between the constitutionalism of the 18th and 19th centuries and contemporary neo-constitutionalism, and, on the other, a detailed analysis of the differing forms of constitutionalism which developed in Europe up to the Second World War.

3. THEORETICAL, IDEOLOGICAL AND METHODOLOGICAL NEO-CONSTITUTIONALISM

At this stage I will turn to an analysis of contemporary neo-constitutionalism. Bobbio’s distinction of three types or meanings of legal positivism is well

25 Norberto Bobbio, who has died aged 94 (Turin, October 18, 1909 – Turin, January 9, 2004 but buried in Rivalta Bormida -AL-), was Italy's leading legal and political philosopher, Senator for life and one of the most authoritative figures in his country's politics. His status was marked by the Italian president's immediate departure for Turin to be among the first mourners, and an extensive discussion of his writing in the media. Bobbio had taken degrees in jurisprudence and philosophy at Turin. His first book, The Phenomenological Turn In Social And Legal Philosophy (1934, Einaudi, Torino), had been followed by a monograph on The Use Of Analogy In Legal Logic (1938, Einaudi, Torino). He set himself the task of elaborating a general theory of the practice and validity of law,
known. It is convenient at this point to create a similar classification, albeit somewhat forced, for the three different forms of neo-constitutionalism – theoretical, ideological and methodological. In this way, the critical comparison between homogenous types of positivism and, respectively, neo-constitutionalism will be more useful.

The use of this three-way division allows us also to show the differences breaking with the attempts of most contemporary Italian philosophers to offer a speculative philosophy of the idea and morality of law. In elaborating his version of legal positivism, Bobbio drew on the writings of Hans Kelsen, whose work he had come across as early as 1932. This research ultimately bore fruit in a number of books based on his Turin lectures, of which the most important are A Theory Of Judicial Norms (1958, Giappichelli, Torino) and A Theory Of The Legal Order (1960, Giappichelli, Torino), and studies of Locke, Kant and legal positivism. Between 1955 and 1970, he also published three collections of essays. These writings had a similar place in Italian academic legal circles to the work of H.L.A. Hart, the late Oxford professor of jurisprudence, and both men, at different times, expressed their mutual esteem for each other to me.

Bobbio's legal studies fed into his political writings. Influenced again by Kelsen, he adopted a procedural view of democracy as consisting of certain minimal "rules of the game", such as regular elections, free competition between parties, equal votes and majority rule. His theory was enriched by a strong, realist current, deriving partly from Hobbes and partly from the Italian pioneers of political science, such as Gaetano Mosca and Vilfredo Pareto (whose reputation he did much to resurrect). He had produced the first Italian edition of Hobbes's De Cive in 1948 (Giuffrè, Milano), and later dedicated numerous studies to the English philosopher, a collection of which were published in 1989 (and appeared in English a couple of years later). He drew on Hobbes to modify what he now saw as unsatisfactory elements of his earlier Kelsenism.

Bobbio regarded Kelsen as caught uncomfortably between a purely formal account of law and a substantive position grounded in what he called the "basic norm" underlying all law. The missing dimension was the institutional context of law-making, and its relationship to the exercise of power. Unlike earlier legal positivists, such as John Austin, Bobbio did not thereby equate law with the commands of the sovereign; his point was rather that law and rights were best conceived as a historical achievement belonging to a particular form of state.

Bobbio's shift from a pure theory of law to a concern with its political embodiment was marked by his moving to a chair in the newly created faculty of political science in Turin in 1972, where he remained until the then statutory retirement age of 75 in 1984. The essays from this period were later collected as The Future Of Democracy: A Defence Of The Rules Of The Game (1984, Einaudi, Torino) – to my mind, the most original of his books – State, Government And Society (1985, Einaudi, Torino) and The Age Of Rights (1990, Giappichelli, Torino), all of which appeared in English.

He was a passionate critic of nuclear weapons, which he saw as making war intrinsically unjust, and a member of the Bertrand Russell Foundation. His writings on this issue were collected in the volumes The Problem Of War And The Roads To Peace (1979, Giappichelli, Torino).

The threefold distinction of legal positivism as (a) an approach to (i.e., a methodology), (b) an ideology, and (c) a theory of law is drawn by BOBBIO, NORBERTO: Sul positivismo giuridico, in Rivista di filosofia, Vol. 52. (1961), 14-34.
which exist between constitutionalism and neo-constitutionalism. Constitutionalism, as considered previously in this paper, is fundamentally an ideology which aims at limiting power and defending a sphere of natural liberties or fundamental rights. This ideology, on one hand, usually has as a backdrop the doctrine of natural law (despite there being no reason why this should be so), which maintains the view that there is a connection between law and morals; on the other hand, it is in conflict with ideological positivism. Constitutionalism is not, however, significant as a theory of law: the dominant theory of the 19th century and the first part of the 20th century was undoubtedly positivist and I do not believe that constitutionalism has ever attempted to contrast this situation with a competing theoretical proposal.

Neo-constitutionalism does not present itself only as an ideology, with a related methodology but also and explicitly as a rival to positivist theory.

3.1. Theoretical neo-constitutionalism

Neo-constitutionalism, as a theory of law, aims at describing the results of ‘constitutionalisation’, namely that process which has brought about a change in contemporary legal systems in comparison to those which existed prior to the full application of the process itself.

In many European legal systems there has been a progressive constitutionalisation of law, especially in the second half of the 20th century. The process ends with the constitution’s saturation of law: constitutionalised law is characterised by an invasive nature which conditions legislation, legal theory and doctrine as well as the behaviour of political actors. This process is gradual: a legal system can, in fact, be constitutionalised to a greater or lesser extent. Following Guastini,27 the principal conditions of constitutionalisation are the following:

GUASTINI (2001): op. cit. 301. The internationally best known and most influential member of the Genoa School of Law (see footnote n. 1) is doubtless Riccardo Guastini (Genoa, January 25, 1946), a Giovanni Tarello’s scholar who has already had three philosophical lives. In his first life, Guastini wrote on Marx’s and Marxism’s legal lexicon; during the second one, he was active teaching, and writing on, Italian Constitutional Law; and, in the third one, he developed a general theory of law which is original with respect to Tarello’s. It is first of all a theory in the tradition of analytic (Oxford-Cambridge) philosophy, but it also puts to a new use Hans Kelsen’s conception of meanings’ framework (Rahmenlehre) of legal dispositions. Among contemporary legal analysts, the «third» Guastini chooses as masters and friends the representatives of the Argentinian School – see the journal Analisi e diritto, founded by him with Paolo Comanducci in 1990 and now edited by Marcial Pons, as well as the collection of books by the same name, published by Giappichelli Publishing House, Italy, which put out, until now, more than one hundred titles. Interestingly, Guastini’s theory is as moderately sceptical as Tarello’s was radical: it is not the interpreter who «creates» norms, rather he picks them out from within the framework of meanings provided by formulation of legal texts. Since the «second» Guastini, finally, such a legal theory focuses on the processes of «constitutionalization» of law.

With this particular expression, Guastini understands a process currently under way in civil
1. the existence of a rigid constitution, which incorporates fundamental rights;
2. jurisdictional guarantees of the constitution;
3. the binding force of the constitution (constitution as a body of preceptive rather than programmatic norms);
4. the ‘over-interpretation’ of the constitution (extensive interpretation generates implicit principles);
5. the direct application of constitutional norms also in order to regulate relations between private individuals;
6. the interpretation of statutes makes the same adequate to the constitutional framework in which they are set.

The model of legal system which emerges from the reconstruction of neo-constitutionalism is characterised by, in addition to the pervasiveness of the constitution, the positivisation of a catalogue of fundamental rights which range from the inclusion within the constitution of principles and rules to certain peculiarities of interpretation and application of constitutional norms regarding the interpretation and application of statutes. As a theory, neo-constitutionalism represents, therefore, an alternative to the traditional theory of legal positivism: the transformations which the object of the analysis undergo mean that traditional legal positivism no longer reflects the real situation of contemporary legal systems. In particular, statism, legal-centrism and interpretive formalism, three key features of law legal cultures, but also constantly present in European and International Law – judges and jurists constantly re-interpret the whole of the law in force in terms of the principles derived or constructed starting by rigid and warranted-by-judicial-review constitutions. In such a process a key role is just played by principles, which Guastini sets apart from rules in a more articulated way than the early Dworkin, Robert Alexy, Atienza and Ruiz Manero, and so on. Rules and principles are, to him, norms, i.e. meanings of legal provisions which can be interpreted either as rules, or as principles, or as both. Both rules directly apply to real cases, by a sort of specific subsumption, whereas principles are applied only in the sense that rules are derived from them, through a concretization process maybe analogous to generic subsumption (as to such a terminology, different from Guastini’s one, cfr. Bulygin (2005): op. cit.). The rules/principles distinction was often criticized – the very reasons of such criticism, however, allow us to grasp the original import of the distinction itself. Such a distinction could be criticized by the point of view of such logico-structural theories of norms as Alchourrón and Bulygin’s. From the standpoint of a phenomenological-functional analysis, however, Guastini’s distinction comes out unsathed, as it explains constitutional interpretation much better. The same distinction could be criticized for its allegedly «weak», or «non-dichotomic», character, as some norms can be seen both as rules and as principles: and yet it still provides a working distinction.

Finally, it is sometimes said that such a distinction in fact endangers the very normativity of principles, since it sees them as not directly applicable to concrete reality. But, one must reply, it is a matter of fact that constitutional principles as such are typically less normative – or more abstract – than the statutory rules – in fact, they would be always at risk of go unapplied without constitutional rigidity and judicial review.

19th century legal positivism, today no longer appear sustainable.²⁹

One must also observe that theoretical neo-constitutionalism – which is characterised also and above all by focusing its analysis on the structure and role which, in contemporary legal systems, the constitutional document possesses³⁰ – adopts at times as its object of analysis that which elsewhere I have defined either as the ‘descriptive model of the constitution as a norm’ or the ‘axiological model of the constitution as a norm’.

In the first model, ‘constitution’ designates a body of positive legal rules, expressed in the form of a document or conventionally accepted unwritten laws, which are, with regards to other legal rules, fundamental (and therefore representing the foundations of the entire legal system and/or hierarchically superior to other rules).

In the second model, ‘constitution’ designates a body of positive legal rules, expressed in the form of a document or conventionally accepted unwritten laws, which are, with regards to other legal rules, fundamental (and therefore representing the foundations of the entire legal system and/or hierarchically superior to other rules) – and so far this is identical to the first model – ‘on condition that they have a determined content to which a specific value is attributed’. In this model, as Dogliani³¹ states, the constitution is ‘imbued with an intrinsic value: the constitution is a value itself’.

One of the distinguishing characteristics of theoretical neo-constitutionalism (distinguishing it from traditional legal positivism) is without doubt the view according to which constitutional interpretation, as a result of the constitutionalisation of law process, today reveals some distinctive characteristics in comparison to the statutory interpretation. These particular characteristics however assume a different form according to who adopts one constitutional model or the other. In the light of the fact that, in my opinion, wherever the axiological

²⁹ Reference to the logic of approximate reasoning (fuzzy logic) as contrasted with the deductive classical logic account for the distinguishing features of the neo-constitutional view on judicial decision-making may sound provocative, at least insofar as a natural law understanding of neo-constitutionalism is concerned. Namely, that is so since, despite its claim for the material justice of judicial decision as opposed to any alleged positivist formalism, the natural law understanding of neo-constitutionalism would never renounce to the contention for the ultimate rational objectivity of practical reasoning. On the logic of approximate reasoning (fuzzy logic) and judicial decision-making, cf. MAZZARESE, TELCA: Forme di razionalità delle decisioni giudiziali, 1996, Giappichelli, Torino, 222-229.

³⁰ As SARTORI (1987): op. cit. 18, writes: “historically, constitution was an “empty” term which constitutionalism has taken possession of in XVIII century to account for the idea of the rule of law (not of men) through the limits of law. The term was defined from anew, adapted and appreciated not because it was meaning just “political order”, but because it was referring to that peculiar political order which rather than simply “shaping” was also limiting governmental action” (author's italics); the English translation is mine. In a similar, though not coincident way, cf. also SARTORI, GIOVANNI: Constitutionalism: a Preliminary Discussion, in American Political Science Review, Vol. 61. Issue 4. (1962) 853-864.

³¹ DOGLIANI: op. cit. 122.
model of the constitution as a norm is adopted, neo-constitutionalism appears not as a theory of law rather as an ideology, I will illustrate in the following section dedicated to ideological neo-constitutionalism the corresponding doctrine of constitutional interpretation.

Those who adopt however the descriptive model of constitution as a norm hold that the constitution shares at least one characteristic in common with statutes: both are normative documents. Who adopts such a model, therefore, usually views constitutional interpretation as a form of legal interpretation, the latter being generally defined as the attributing of meaning to a normative text. In effect, one can find in the recent literature a tendency to distinguish peculiarities of constitutional interpretation with regards to the statutory interpretation on the basis of degrees rather than qualitatively. Within this shared position, however, amongst writers there are visible differences of degree, which stems from the fact that some writers from a moderate external perspective take into account the interpretive activity of constitutional courts, the latter in turn appearing often to prefer the axiological rather than the descriptive model of the constitution.

3.2. Ideological neo-constitutionalism

Presented (also) in the form of an ideology, neo-constitutionalism tends in part to be distinguished from constitutional ideology in that its relegates to a secondary role the limitation of state power – which was absolutely central in 18th and 19th century constitutionalism – posing as its prime objective the guarantee of fundamental rights. This change in priorities can easily be explained by the fact that state power, in contemporary democratic systems, is no longer viewed with fear and suspicion by neo-constitutionalist ideology. Indeed, neo-constitutionalism is characterised by its support for the constitutionalised and democratic model of rule of law; a model which progressively became a benchmark in the West and which continues to expand its influence throughout the world.

Ideological neo-constitutionalism does not limit itself to describing the results of constitutionalisation but it evaluates them positively, proposing their defence and possible extension. In particular, it underlines the importance of institutional mechanisms which protect fundamental rights – we could at this stage talk of ‘neo-constitutionalism of checks and balances’. What is more, it stresses the need for legislative and judiciary activity which primarily aims at the enactment and guarantee of fundamental rights foreseen in the constitution – we could at this stage talk of ‘neo-constitutionalism of rules’.

Given that some of its champions (for instance, Alexy, Dworkin34 and

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32 A similar tenet is assumed by TARELLO: op. cit. 124, when stating: “Great Britain hasn't had any codification: neither a constitutional one (despite, or perhaps just because of its precocious constitutionalization), nor of any other branch of law.”

33 ALEXANDER, op. cit.

34 Following DWORKIN, RONALD: Taking Rights Seriously, 1977, Harvard University Press, Cambridge, Mass., such a contention is often given a quite strong antipositivist import. That is the case, e.g., despite any difference in the arguments adopted, with ALEXY,
Zagrebelsky) sustain that in contemporary democratic and constitutionalised systems there is a necessary link between law and morals, ideological neo-constitutionalism is inclined to believe that a moral obligation of obedience can today exist with regards to the constitution and constitutionally compatible statutes. It is in this specific sense that ideological neo-constitutionalism can be considered a modern-day variant of 19th century ideological positivism, which preached the moral obligation of obedience to the law.

As ideological neo-constitutionalism adopts the axiological model of the constitution as a norm (mentioned above), it generally highlights the radically different nature of, firstly, the interpretation of the constitution in comparison to the statutory interpretation, and, secondly, the application of the constitution with regards to the application of statutes. These shifts in emphasis derive from the diversity which exists between constitution and statutes and become evident above all in the interpretive techniques used. A clear case in point is Ronald Dworkin.

ROBERT: *Theorie der Grundrechte*, 1985, Nomos, Baden-Baden; ZAGREBELSKY: op. cit. 192, and ATIENZA: op. cit. 12-16. Nevertheless, nothing prevents that the same contention be accounted for in positivist terms. To be sure, the alleged ultimate moral character of fundamental rights and legal principles affecting and/or grounding judicial reasoning and decision-making is far from being obvious and plain.

DWORKIN, RONALD: *The Moral Reading of the Constitution*, 1996, Harvard University Press, Cambridge. In this book there is a particular way of reading and enforcing a political constitution, which Dworkin called the moral reading. Most contemporary constitutions declare individual rights against the government in very broad and abstract language, like the First Amendment of the United States Constitution, which provides that Congress shall make no law abridging “the freedom of speech.” The moral reading proposes that we all – judges, lawyers, citizens – interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice. The First Amendment, for example, recognizes a moral principle – that it is wrong for government to censor or control what individual citizens say or publish – and incorporates it into American law. So when some novel or controversial constitutional issue arises – about whether, for instance, the First Amendment permits laws against pornography – people who form an opinion must decide how an abstract moral principle is best understood. They must decide whether the true ground of the moral principle that condemns censorship, in the form in which this principle has been incorporated into American law, extends to the case of pornography.

Presidents Ronald Reagan and George Bush were both intense in their outrage at the Supreme Court’s “usurpation” of the people’s privileges. They said they were determined to appoint judges who would respect rather than defy the people’s will. In particular, they (and the platform on which they ran for the presidency) denounced the Court’s 1973 *Roe v. Wade* decision protecting abortion rights, and promised that their appointees would reverse it. But when the opportunity to do so came, three of the justices Reagan and Bush had appointed between them voted, surprisingly, not only to retain that decision in force, but to provide a legal basis for it that much more explicitly adopted and relied on a moral reading of the Constitution. The expectations of politicians who appoint judges are often defeated in that way, because the politicians fail to appreciate how thoroughly the moral reading, which they say they deplore, is actually embedded in constitutional practice. Its
role remains hidden when a judge’s own convictions support the legislation whose
constitutionality is in doubt – when a justice thinks it morally permissible for the majority
to criminalize abortion, for example. But the ubiquity of the moral reading becomes evident
when some judge’s convictions of principle – identified, tested, and perhaps altered by
experience and argument – bend in an opposite direction, because then enforcing the
Constitution must mean, for that judge, telling the majority that it cannot have what it
wants.

Senate hearings considering Supreme Court nominations tend toward the same confusion.
These events are now thoroughly researched and widely reported by the press, and they are
often televised. They offer a superb opportunity for the public to participate in the
constitutional process. But the mismatch between actual practice and conventional theory
cheats the occasion of much of its potential value. (The hearings provoked by President
Bush’s nomination of Judge Clarence Thomas to the Supreme Court, are a clear example.)
Nominees and legislators all pretend that hard constitutional cases can be decided in a
morally neutral way, by just keeping faith with the “text” of the document, so that it would
be inappropriate to ask the nominee any questions about his or her own political morality.
(It is ironic that Justice Thomas, in the years before his nomination, gave more explicit
support to the moral reading than almost any other well-known constitutional lawyer has;
he insisted that conservatives should embrace that interpretive strategy and harness it to a
conservative morality.) Any endorsement of the moral reading – any sign of weakness for
the view that constitutional clauses are moral principles that must be applied through the
exercise of moral judgment – would be suicidal for the nominee and embarrassing for his
questioners. In recent years, only the hearings that culminated in the defeat of Robert Bork
seriously explored issues of constitutional principle, and they did so only because Judge
Bork’s opinions about constitutional law were so obviously the product of a radical political
morality that his convictions could not be ignored. In the confirmation proceedings of the
present Justices Anthony Kennedy, David Souter, Thomas, Ruth Bader Ginsburg, and
Stephen Breyer, however, the old fiction was once again given shameful pride of place.

Dworkin (Worcester, Massachusetts, U.S.A., December 11, 1931 – London, February 14,
2013), was an American philosopher and scholar of constitutional law. He was Frank Henry
Sommer Professor of Law and Philosophy at New York University and Professor of
Jurisprudence at University College London, and had taught previously at Yale Law
School and the University of Oxford. An influential contributor to both philosophy of law
and political philosophy, Dworkin received the «2007 Holberg International Memorial
Prize» in the Humanities for „his pioneering scholarly work” of „worldwide
impact.” According to a survey in The Journal of Legal Studies, Dworkin was the second
most-cited American legal scholar of the twentieth century.

His theory of law as integrity, in which judges interpret the law in terms of consistent and
communal moral principles, especially justice and fairness, is among the most influential
contemporary theories about the nature of law. Dworkin advocated a „moral reading” of
the United States Constitution, and an interpretivist approach to law and morality. He was
a frequent commentator on contemporary political and legal issues, particularly those
concerning the Supreme Court of the United States, often in the pages of The New York
Review of Books.
3.3. Methodological neo-constitutionalism

Some variants of neo-constitutionalism, particularly those which present themselves (also) as an ideology, presuppose a methodological position which I shall define ‘methodological neo-constitutionalism’. The reference is clearly to authors such as Alexy and Dworkin.

Such a definition makes explicit reference to, and is in contrast with, methodological or conceptual positivism, which supports the position that it is always possible to identify and describe the law as it is and, therefore, to distinguish it from the law as it should be. This position has at least two corollaries: the hypothesis of the social sources of law, and that which sees no necessary connection between law and morals. In my opinion the positivist position has at least one condition: the acceptance of the crucial semantic distinction between is and ought as a way of distinguishing between describing and evaluating-prescribing. It does not have, however, as a condition in the moral debate the non-cognitivist meta-ethical position; or at least not necessarily, although in fact many positivist theorists are non-cognitivists and the majority of positivism’s critics are cognitivists.

Methodological neo-constitutionalism sustains on the contrary – at least with regards to situations of constitutionalised law, where constitutional principles and fundamental rights are hypothesised as representing a bridge between law and morals – the position of a necessary identifying and/or justificatory connection between law and morals.

4. SOME CRITICAL OBSERVATIONS

In part three I will attempt to identify certain weaknesses in the ideological and methodological approaches of neo-constitutionalism. Such criticisms will not be aimed at theoretical neo-constitutionalism as I believe this approach handles more effectively the structure and workings of contemporary legal systems in comparison to the solutions proposed by traditional legal positivism. On the other hand, theoretical neo-constitutionalism, if it accepts the view of the solely contingent connection between law and morals, it is no way incompatible with methodological positivism. Indeed, one could say that it is its legitimate offspring. In the light of today’s (partial) changes in the models of the State and of law developed in the 19th and early 20th centuries, the neo-constitutionalist theory of law is nothing other than today’s version of legal positivism.36


Republicanism is the old/new kid on the political theory block. It is as old as Aristotle, Cicero, Machiavelli, Milton, Harrington, Montesquieu, Rousseau, Madison and Adams, and yet as new as the revival spearheaded by the intellectual historian Quentin Skinner and
the philosopher Philip Pettit. We need to distinguish „old” and „new” republicanism partly because liberalism largely displaced it in the 19th and 20th centuries in Anglophone nations and partly because contemporary republicanism is liberal in that it accepts moral individualism, value pluralism, and an instrumental view of political life. There are two strands of old republicanism: one represented by Aristotle's concern for the good life to be realized in and through participation in self-governing communities, the other a neo-Roman tradition that emphasizes freedom (or independence) from the arbitrary will of an „alien power” under the rule of law. If Michael Sandel and Charles Taylor represent contemporary neo-Athenian interpretations of republicanism, Skinner and Pettit represent neo-Roman contemporary interpretations. This splendid anthology of ten original essays concentrates solely on the latter, with special emphasis on the thought of Skinner and Pettit. Pettit's republicanism consists of two theses. The first, as already noted, is that there can be unfreedom without actual interference. The bare possibility of interference is enough. To this Pettit adds a second thesis: interference as such need not compromise freedom. Interference isn't domination when it isn't arbitrary, and it isn't arbitrary provided it tracks our „avowed interests”. This is typically assured by living in a political community governed by the rule of law. So a state can levy taxes, impose coercive laws, and even imprison without diminishing one's freedom. Provided that the state seeks ends and employs means derived from the common, recognizable interests of its citizens, the most that can be said is that citizens are nonfree if, say, they are imprisoned for violating just laws, not that they are unfree. Skinner accepts the first thesis, but not the second. Both theses have their critics.

This is the first full-length presentation of a republican alternative to the liberal and communitarian theories that have dominated political philosophy in recent years. The latest addition to the acclaimed Oxford Political Theory series, Pettit's eloquent and compelling account opens with an examination of the traditional republican conception of freedom as non-domination, contrasting this with established negative and positive views of liberty. The first part of the book traces the rise and decline of this conception, displays its many attractions, and makes a case for why it should still be regarded as a central political ideal. The second part of the book looks at what the implementation of the ideal would require with regard to substantive policy-making, constitutional and democratic design, regulatory control and the relation between state and civil society. Prominent in this account is a novel concept of democracy, under which government is exposed to systematic contestation, and a vision of state-societal relations founded upon civility and trust. Pettit's powerful and insightful new work offers not only a unified, theoretical overview of the many strands of republican ideas, but also a new and sophisticated perspective on studies in related fields including the history of ideas, jurisprudence, and criminology. This very interesting book is a systematic attempt to use a traditional view of liberty as the basis for modern, pluralistic states. Like many, Pettit begins with Berlin's famous, though ambiguous, distinction between positive and negative liberty. He wants a formulation of liberty that captures some of the intuitive attractions of liberty in its negative, non-interference, form. He wants also to avoid some of the defects of liberty as non-interference in which liberty is „Freedom of the pike is death for the minnows (BERLIN, ISAIAH: Two Concepts of Liberty, in BERLIN, ISAIAH: Four Essays on Liberty, 1969, Oxford University Press, Oxford).” Pettit's solution is the concept of liberty as non-domination. This is a traditional view associated with the republican tradition that begins in the city states of Renaissance Italy, particularly with Machiavelli, is transmitted in the Anglophone world by 17th century republican theorists like Harrington, and reaches its importance in the 18th...
century with the writings of dissident British Whig intellectuals, Montesquieu, and Americans like Paine and Madison. In this version of liberty, there is strong emphasis on individual rights and freedoms, but in contrast to the libertarian ideal of liberty as non-interference, the state is authorized, indeed, encouraged to promote government and policies that prevent domination of individuals by others.

The republican notion of 'domination' is similar to the Marxist notion of 'exploitation' in that the traditional republicans saw that slaves, servants or subjects, who felt obligated to ingratiate themselves with those of “power”, were well aware of the control being exercised by those individuals. As well, the Marxist theory that slaves were exploited because they were forced to work for someone without receiving full compensation for their labor and the products of their labor were forcibly appropriated by someone else, were equally aware of the exploitation. In both scenarios, although these individuals were fully aware of being in the control of others, they were not “free” to choose otherwise.

According to Pettit, citizens lack political freedom as long as governmental authorities have the standing power to interfere with a citizen’s liberty at their unfettered discretion and without having to pay heed to the interests of the governed. This is conceptual. As with the case of the United States style judicial review, citizens are protected against such domination to the extent that they are empowered to force authorities to justify their decisions in terms of the public good and to decide in the ways that make every effort to pay heed to the legitimate interests of all governed. Since the ability to appeal to a court endowed with the power of constitutional review appears to be a potent mechanism of civic empowerment in the face of potentially arbitrary governmental decision making, the ideal of freedom as non-domination conflicts with the institution of judicial review. To achieve non-domination it would be necessary reject any form of legal constitutionalism characterized by entrenched constitutions and judicial review. Therefore, I believe, constitutionalism would not become inimical of liberty.

The republicanism conception of freedom as non-domination is considered to be the basis for which the state will identify the architecture it should display and the agenda it should further. In other words, in my opinion I understand that the state should do everything possible to establish a social order in which individual citizens can enjoy independence and escape subjection to the arbitrary power of others. It should act in pursuit of its agenda without infringing on people’s freedom as non-domination. It will allow for the coercive interventions of the state (i.e., imposing laws and taxes), but will not take away from the people’s freedom as long as they are subject to the checks that would make them non-arbitrary and non-dominating. This relates to the rule of law where citizens respect the law for its own sake and make a point of taking part in public life in order to ensure their own needs and concerns are heard, whereby the laws will be just, instead of serving particular interests and private concentrations of power.

I agree with the republicans’ idea that freedom cannot exist with domination, but it can exist with interference as there is the potential that people may not actually suffer interference from those who dominate them. Pettit believes that we are free to the extent that we do not find ourselves under the domination of others, subject to their will and exposed to the vicissitudes of their desires. From this perspective, freedom consists in the absence of conditions which are thought to diminish our possibilities of action. I agree that this idea of freedom is substantially different to that of freedom as non-interference, because freedom of non-interference assumes that there is an outside control present when there is active interference as in the case of coercion or manipulation. The liberal notion of freedom cannot be reduced to the notion of non-interference, because in such instances as
4.1. Ideological neo-constitutionalism

Ideological neo-constitutionalism is open to all those criticisms which Bobbio\textsuperscript{37} and other writers such as Nino\textsuperscript{38} expressed against ideological positivism. Here I will limit my criticisms only to what appears to me as a dangerous consequence of such an ideology: the reduction of certainty of the law which derives from the ‘balancing’ of constitutional principles and the ‘moral’ interpretation of the constitution.

As is well known, Dworkin, one of the leading exponents of neo-constitutionalist ideology, supports the view according to which a legal system formed both by rules and by fundamental principles, rooted in an objective set of moral norms, is, or can tend to be, totally determined (the famous proposal of the one right answer). In this way, I believe, Dworkin fails to distinguish both between an \textit{ex ante} and \textit{ex post} determinacy, and between the theoretical problem of knowing the legal consequences of actions and the practical problem of justifying legal decisions.

From a theoretical point of view, which is the one adopted here, and leaving to one side the question of \textit{ex post} determinacy, the sole question of interest is that of \textit{ex ante} determinacy: what is the effect of the configuration of principles in an \textit{ex ante} determinacy/indeterminacy? From this point of view, Dworkin’s answer is unacceptable, given that the configuration of principles, which are a \textit{species} of the norms \textit{genus}, cannot totally eliminate the structural, linguistic and subjective causes of the partial indeterminacy of law. However, we can ask whether they can be reduced.

I believe that this indeterminacy could possibly be reduced if at least the following conditions were fixed: 1) were there to exist objective, known morals followed by judges (or, which is the same, there existed positive, known morals followed by judges); 2) were judges always to follow Dworkin’s (or Alexy’s) prescriptions and to construct an integrated system of law and morals, internally.

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tax codes, no matter how meritorious in other respects, they do affect people’s freedom in just the same way as the interference as a criminal.

I had the pleasure to meet and to discuss with Philip Pettit during the two days long “11\textsuperscript{th} Pavia Graduate Conference in Political Philosophy” in the Faculty of Political Sciences of the University of Pavia (Italy) on September 12, 2013.


\textsuperscript{38} NINO, CARLOS SANTIAGO: \textit{Introducción al análisis del derecho}, 1983, Ariel, Barcelona, 27-28. Such a characterization of the ultimate kernel of any form of natural law makes debatable the recent and widespread attitude to speak of and delineate hybrid forms of “inclusive”, rather than “soft” or “critical” positivism; that is to say forms of alleged positivism which, as it is with natural law, take into account (the possibility of) morals as a source of law.
consistent in such a way that, with the aid of principles, they could choose for every case the right or correct solution, or at least the best. On these conditions the issuing of principles on the part of the legislator, or the configuration of principles on the part of judges and legal doctrine, could reduce the *ex ante* indeterminacy of law.

However, in reality these conditions do not exist. The situation is as it is not for controversial meta-ethical reasons, which affirm the inexistence of objective morals, but for factual reasons. In fact: a) even supposing that they exist, objective morals are not known or accepted by all judges; b) positive morals accepted by all judges do not exist in our society (our societies are increasingly characterised by ethical pluralism); c) judges’ decisions are temporal inconsistent and judges do not construct a consistent system of law and morals to resolve cases; d) judges do not always reason and decide rationally (whatever meaning we wish to give this word, even the weakest).

In real and non-ideal conditions, the configuration of principles can help judges to find always an *ex post* justification for their decisions; this configuration appears though not to reduce but increase the *ex ante* indeterminacy of law. In my opinion this is for three main reasons:

1) one of the most common characteristics of norms which are configured as principles is their greater vagueness with regards to other norms and, therefore, this characteristic increases rather than reduces *ex ante* indeterminacy;
2) consequently, the issuing and configuration of principles in absence of a common set of morals increases the discretion at the disposal of a judge, who can decide cases by making reference to their own subjective conceptions of justice and also this clearly increases *ex ante* indeterminacy;
3) the peculiar way of applying norms configured as principles, namely balancing principles case by case, without a stable and general hierarchy between principles, increases the discretion of judges and the *ex ante* indeterminacy of law.

At this stage in the discussion I do not want to suggest that there are no good reasons for issuing principles, or configuring them or balancing them. I believe there are valid reasons for doing so.

I do not believe, however, that in the present situation, issuing or configuring principles, or balancing them case by case are activities which directly pursue (as Dworkin appears to believe) the value of certainty in law. These activities, in my opinion, follow other objectives which can be, according to differing points of view, equally or even more worthy of praise: for instance, the updating of law to respond to social change, ‘wholesale’ decision-making, the offering of general criteria to lower-level bodies, establishing goals for social reform, delegating the power to determine the content of law, that is to say, in general, the hetero- and/or self-attribution to judges of a part of normative power, etc..

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39 Mainly confined to public domestic law, such a one-sided political reading of constitutionalism is exemplified by MATTEUCCI, NICOLA: Positivismo giuridico e costituzionalismo, in *Rivista trimestrale di diritto e procedura civile*, Vol. 17. (1963), 985-1100.
4.2. Methodological neo-constitutionalism and constitutional methodology

In opposition to methodological neo-constitutionalism (which considers constitutional principles as a bridge between law and morals), I will limit my comments to reiterating the validity of the justificatory non-connection between law and morals.

The neo-constitutionalist thesis is that any legal decision, and in particular judicial decisions, is justified if it derives, in the last instance, from a moral norm.

I interpret here this thesis as an answer to a normative problem (‘Which norm must found or justify judicial decision-making?’), and in any case the thesis itself takes on a normative nature (‘A moral norm must found or justify judicial decision-making’).

Clearly the argument of justificatory connection could be interpreted in another way: either as an answer to an empirical problem (‘Which norms in fact, in a determined context, found or justify judicial decision-making?’), or as an answer to a theoretical question (‘In an explanatory model of judiciary motivation, which norms found or justify judicial decision-making?’). I believe that, if we

40 See SEARLE, JOHN: Making the Social World: The Structure of Human Civilization, 2010, Oxford University Press, Oxford. This book is useful to readers familiar with Searle’s work in the philosophy of language and the philosophy of mind, but unacquainted with, and curious to learn about, the ‘philosophy of society’ that he has been busy building since the mid-nineties. It collects a selection of some of the papers presented during the “Spring School and the International Conference Making the Social World” that took place on 7-9 June 2011 at the Università Vita-Salute San Raffaele, Milan, Italy. (I attended this very interesting event).

Such readers are offered a lengthy exposition (Chapters 1, 3, 5) of an updated version of the account of institutional facts that was the main theme of Searle’s The Construction of Social Reality (1995), as well as shorter discussions of what Searle perceives as the implications of his account of institutions on issues pertaining to rational action, free will, political power, and human rights (Chapters 6, 7, 8). The book will also be useful to readers who have developed an interest in Searle’s account of institutional reality while lacking sufficient exposure to his philosophies of mind and language, since it includes brief overviews (Chapters 2, 4) of his extensive work in these fields, which he presents as providing the foundations of his account of society. Readers already familiar with Searle’s major works on mind, language, and society will probably be mainly interested in considering whether the account of institutional facts he currently adopts differs significantly from the one he had originally proposed, and, if so, whether it places him in a better position than before to attain his stated goals.

Common to Searle’s old and new accounts is a conception of institutional facts according to which such a fact (a) cannot exist unless a community collectively accepts it as existing; (b) requires the assignment to an entity of a „status function“ (that is, of a function that an entity can only have by virtue of collective recognition, and not merely by virtue of whatever properties it might have prior to such recognition); and (c) characteristically generates, once in existence, „deontic powers“ (in particular, rights and obligations) within the community whose behaviour brings it to existence.

One difference between Searle’s old and new accounts is that the generation of „deontic
interpreted the argument from a descriptivist perspective, this reply would be false (in contemporary legal systems, judicial decisions are motivated according to legal rather than moral norms). If we interpreted the question from a theoretical standpoint, this answer would I believe be a tautology: by definition every final justification, in the practical domain, is assumed to be made up by a moral norm, 

powers” is now taken to be a universal consequence, and not merely, as was previously the case, a nearly universal consequence, of an institutional fact's creation. But the main difference between the old and new accounts has to do with the way in which Searle proposes to combine theses (a) and (b) above in providing an explanation of an institutional fact's creation. On the old account, the creation of institutional facts was invariably supposed to be the immediate result of the collective acceptance, within a community, of linguistically expressible „constitutive rules” that specify conditions under which status functions of various sorts are assignable to entities of various sorts. On the new account, the collective acceptance of such constitutive rules remains one but is not the only source from which institutional reality is supposed to spring; the other supposed source is the collective acceptance of speech acts of declaration, whereby entities come to possess status functions just by being represented as having those functions, even in the absence of antecedently available constitutive rules regulating those functions' assignment. 

Searle, however, believes that there must be a single fundamental principle underlying the creation of all institutional facts, and so does not rest content with these two seemingly disparate sources. In an attempt to theoretically unify them, he recalls his assumption that, in order to be institutionally effective, constitutive rules have to be linguistically expressible, and reinterprets linguistically expressed constitutive rules that are institutionally effective as themselves speech acts of declaration of a special kind, namely as „standing declarations” (13, 96-7). He therefore concludes that all of institutional reality derives from the collective acceptance of declarational speech acts (whether „standing” or not „standing”) that concern the assignment of status functions to entities (and he accordingly calls the acts in question „status function declarations”). Searle clearly regards his proposal to provide a unified account of institutions by tracing their origins to declarational speech acts as the book's most significant contribution: 

Now, the problems previously raised suggest that, even in this considerably weakened form, Searle's position would be unsatisfactory. But independently of that, the fact that the position Searle is finally led to embrace is so weakened should itself have given him pause, in view of his strongly voiced opinion, presented as the guiding methodological principle of his enterprise, that it is „implausible to suppose that we would use a series of logically independent mechanisms for creating institutional facts”. If that is implausible, then embracing the weakened position is itself implausible, since embracing it amounts to accepting that, apart from the declarational mechanism allegedly responsible for the creation of non-linguistic institutions, there must be one or more independent (and so far unspecified) mechanisms responsible for the creation of linguistic ones. It would seem, then, that anyone who takes the extent of institutional reality to be the same as Searle takes it be, and who is committed to discovering the „single mechanism” underlying its creation that Searle has been searching in this book, must begin a new search. 

therefore also the final justification of a judicial decision is made up by a moral norm (despite there being intermediate justifications which could be defined as legal).

If we concentrate therefore solely on the normative question, we have to ask which type of moral norm would be the one which should found or justify, in the last instance, a judicial decision (assuming the latter as a paradigmatic case of legal decision-making).

I envisage at least four possible solutions:

1. one is dealing with a true and objective moral norm (in the sense in which it corresponds to moral ‘facts’);
2. one is dealing with a rational and objective moral norm (in the sense to which it would be accepted by part of a rational audience);
3. one is dealing with a subjectively chosen moral norm;
4. one is dealing with an inter-subjectively accepted moral norm.

The first two solutions are objectivist, the last two, subjectivist. In the first solution, the moral norm is subject-independent, whilst in the others it is subject-dependent, albeit in differing forms. The first two solutions make reference to critical morals, the third to individual morals, the fourth to positive morals.

If we take the judge’s point of view, according to the proponents of the necessary and justificatory connection between law and morals, he should reach the solution to the question via a moral norm, on which his decision would be based. One is forced to ask however ‘moral’ in which sense?

The first solution presents extremely serious ontological (duplication of the world) and epistemological problems. The latter above all would mean that the judge would choose a norm which he believes to be moral. Consequently, the first solution is reducible to the third.\(^\text{41}\)

The second solution does not present the same ontological problems as the first but does present serious epistemological ones: principally not because of the impossibility of a judge’s finding the moral norm on which to base his decision according to the procedural or substantial rules of a moral theory (despite their being epistemological problems within each theory: it is not a coincidence that procedural theories often do not offer rational ‘moral codes’), but because there are varying and divergent moral theories from which the judge must choose. Therefore, the second solution is also reducible to the third.

An acceptance of the third solution would be equivalent to proposing the complete freedom for judges in the way in which they found and justify their decisions. Statutes and constitutional law would become, from the judge’s point of view, superfluous: the justificatory step which consists in founding a decision in the law is either useless (since the law conforms to the moral norm) or is forbidden (since the law is contrary to the moral norm). The certainty of the law would be exclusively dependant on the moral conscience of each judge: given that judges should base their decisions on universal moral norms, they should therefore use in

\[^{41}\text{A similar contention occurs in PACE: op. cit. 41-42.}\]
a consistent way these norms on which to base their future decisions.\(^{42}\) Temporal consistency in the decision-making of each judge (even accepting that it is possible: a judge can always review his own moral system if he believes the has committed errors in the past) does not appear sufficient to guarantee the necessary degree of predictability of both the legal consequences which stem from legal actions and the resolution of conflicts (which, according to conventional wisdom, represent two of the most important objectives of legal institutions).

However, this solution (and the first and second solutions which are reducible to it) could have a smaller scope. Instead of affirming that the last instance justification of judicial decision-making should be based on a moral norm, it could be interpreted in the following, more limited manner: on every occasion in which a judge has to make a choice amongst competing solutions – interpretive or in fact – which are all valid from a legal point of view, he has to choose that option which is justified by a moral norm (and not by a methodological principle, personal interest, a norm deriving from positive morals, a criteria shared by legal culture, etc.), at least in the last instance.

Even with its reduced scope, this ‘moralist’ thesis of neo-constitutionalism poses some problems: if a judge’s choices are justified by his moral beliefs (and not by a methodological principle, personal interest, a norm deriving from positive morals, a criteria shared by legal culture, etc.), nothing stops such beliefs from being morally unacceptable, or in contrast to the moral values shared by the community, or contrary to the criteria accepted by legal culture, etc. What then would be the reason which pushes judges to justify their decisions in this way? Since, *ceteris paribus*, the justification of a judicial decision based on a moral norm chosen by the judge signifies a heightened degree of legal indeterminacy in comparison to other types of justification (relative and not absolute), I can see no reasons for attributing a general preference to a ‘moral’ justification rather other possible types.

The fourth choice (the judge as ‘sociologist’ of positive morals) also generates epistemological problems for the judge, albeit less serious than in the previous solutions. Judges, in fact, do not generally have the instruments necessary for identifying a country’s norms of positive morals. In addition, if the epistemological problems are excessively serious, here too the fourth solution would be reducible to the third.

Even supposing that judges can at times overcome epistemological problems,

\(^{42}\) *Cf.*, e.g., RAZ: *op. cit.* where the contention is maintained that legal rights can be accounted for on the base of the so-called «Sources Thesis», i.e. the thesis according to which: „the existence and the contents of the law can be determined without resorting to any moral arguments” (p. 10). To be sure, Raz appears sceptical on the very notion 'fundamental human rights' can be taken to term. Thus, after having mentioned and characterized some different types of rights, in a somewhat detached way, he adds: „People who believe in fundamental human rights usually believe that these rights do not derive from social practices which recognize and implement them even where such practices exist. They further believe that people have such rights even in societies in which the rights are neither recognized nor respected” (p. 2).
two types of problems remain:

(a) the first is that there is no moral homogeneity in a society in the form of widely shared moral norms (this is usually the case in contemporary societies);

(b) the second is that such widely shared moral norms are already incorporated in rules or legal principles.

In the first case, the fourth solution is reducible to the third (the judge has to choose the moral norm he prefers). In the second case – apparently often hypothesised by neo-constitutionalists – the moral justification is co-extensive to the legal justification and becomes totally useless.

In cases where justification based on a moral norm is possible and not useless, the fourth solution implies that the judge will decide and justify his decision by basing it, in the last instance, on a norm derived from positive morals. Despite the fact that this solution in no way guarantees the moral correctness of the legal justification (positive morals, in fact, could well be in contrast with critical morals, and we are not in a position to know), it does appear wise to adopt it in many occasions in which those procedures which allow for the conversion of shared moral norms into law do not work, or do not work well (dictatorships, domination by small groups, manipulation of consensus, etc.). This solution would assign judges a ‘democratic’ role enabling them to compensate for weaknesses in the democratic workings and to ‘transform’ positive morals into law.

In situations, however, in which the democratic workings related to the formation of law in fact work satisfactorily, this solution favours a particular version (addressed to judges and not only to legislators, as proposed mainly by the advocates of the enforcement of morals) of the position according to which the law must make positive morals binding. From my moral point of view, which in a certain sense could be defined as liberal, this position is open to the widely known objections forwarded by Hart in his debate with Lord Devlin and with Ronald Dworkin.


45 SHAPIRO, SCOTT J.: The “Hart-Dworkin” Debate: A Short Guide for the Perplexed, in
But firstly, as for the epistemological debate between Hart and his rival Dworkin, as well known, see HART, HERBERT L. A.: The Concept of Law, 1994, Clarendon Press, Oxford, (1961 first edition; 1994 second edition). Published posthumously, the second edition of The Concept of Law contains one important addition to the first edition, a substantial Postscript, in which Hart reflects upon some of the central concerns that have been expressed about the book since its publication in 1961. The Postscript is especially noteworthy because it contains Hart's only sustained response to the objections pressed by his foremost critic, Ronald Dworkin, who succeeded him to the Chair of Jurisprudence at Oxford in 1969. The Postscript, edited by Penelope A. Bulloch and Joseph Raz, focuses on a range of issues covering both Hart's substantive view and his methodological commitments. In particular, Hart endorses Inclusive Legal Positivism, asserts that his is a methodology of descriptive jurisprudence which he contrasts with Dworkin's normative jurisprudence or interpretivism, while denying that his theory of law has a semantic underpinning.

The Concept of Law was published in 1961; Hart long wanted to add a postscript responding to reactions to his work, but the postscript was unfinished when he died. The editors of the book published the most finished parts of the postscript but the drafts were not meant to be final.

In the Postscript, Hart notes that he wants to focus in detail on the criticisms of his view advanced by Ronald Dworkin and in a second section addresses a number of other critics; the second section was too undeveloped at the time of Hart's death for the editors to include in the book; thus the postscript wholly focuses on Dworkin's views. The reader's purpose in studying the guide may not rely on the details of the Dworkin-Hart dispute; discussions of these debates have been reviewed in the secondary literature. Cf. COLEMAN: op. cit. The essays in this collection address each of these issues in a sustained way. The book contains discussions of Hart's semantic commitments, his rejection of a normative jurisprudence as well as the extent to which he can embrace Inclusive Legal Positivism in a way that is consistent with his other stated positions. The book's contributors include the leading advocates of alternative schools of Positivist jurisprudence, important contributors to the methodological disputes in jurisprudence and noted experts on the relationship of philosophy of language to jurisprudence.

It has been argued that Hart had redefined the domain of jurisprudence and moreover established it as a philosophical inquiry of the „nature‟ or „concept‟ of law. He is considered the „world's foremost legal philosopher in the twentieth century‟. Many of Hart's former students became important legal, moral, and political philosophers, including Brian Barry, John Finnis, John Gardner, Kent Greenawalt, Neil MacCormick, William Twining, Chin Liew Ten, Joseph Raz and Ronald Dworkin. Hart also had a strong influence on the young John Rawls in the 1950s, when Rawls was a visiting scholar at Oxford shortly after finishing his PhD. See also DAN, PRIEL: H.L.A. Hart and the Invention of Legal Philosophy, in Problema,
5. THE JUSTIFICATION: PRINCIPLE OF PROPORTIONALITY V. PRINCIPLE OF REASONABLENESS

The «principle of proportionality» refers without a doubt to evaluative instances that are situated beyond the domain of both the text of the norms under constitutional control, and the text of the constitution itself. This reference to a meta-positive instance is shown, at least, in the following two items: first, in the grounds for justifying the principle itself. Why is proportionality or reasonableness a constitutional principle? How are we to justify this constitutional requirement? Except at the cost of circularity, this question cannot be answered from the perspective of the constitution in question. Second, it becomes apparent in each of the sub-principles that frame the principle, since all of them refer to ends – although from perspectives that do not entirely coincide – whose determination cannot be reduced to an internal analysis of the norms.46

A second feature of the dynamics of the “culture of rights” in which we are immersed is the «principle of reasonableness». In the 19th century, the dominant trend concerning the description of legal interpretation was “legal formalism.” This, in a very short synthesis, could be described as a theory which attempts to reduce the adjudication of law to deductive logic. In the 20th century, however, it was soon perceived that in order to establish the facts in each of the cases a judge must resolve and determine the applicable norms, requiring a decision to be made between various alternatives that are, prima facie, formally correct.47

In effect, legal operators are compelled, on the one hand, to reconstruct the facts in a case, and this implies choosing: a) the legally relevant facts within a framework of facts, b) the legal means of evidence, and c) the most convincing evidence. On the other hand, judges and lawyers48 are faced with the need to: a)

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choose the applicable norms, b) choose the method or methods of interpretation with which they will apply the norms, and c) choose the results towards which these methods of interpretation lead.

These factual and normative choices raise the obvious question about the right criteria according to which they should be decided. While legal theories in the past century\(^49\) oscillated between, on the one hand, the practical conflation between discretion and unreasonableness, and, on the other hand, the practical negation of discretion or reasonableness, comparative constitutional analysis has come gradually to answer this question with the principle of reasonableness, as a counterpart to arbitrariness, expressly proscribed by some constitutions, as is the case, for example, of article 9.3. of the Spanish Constitution.

The justification and content of the principle of reasonableness raises questions analogous to those posed by the principles of proportionality: why reasonableness, and not the lack of reasonableness? How does one justify the use of this principle? Furthermore, which are the reasons that justify the establishment of facts and the determination of norms, and what are the grounds for these reasons? They cannot originate in the norms themselves because, once again, this would be circular. In other words, because the problem that must be dealt with consists of determining that which is not already determined by the norms themselves, the solution cannot lie in them but in something outside them, although connected with them.

5.1. Between constitutional interpretation and «textualism»

Constitutional interpretation, or constitutional construction, the term more often used by the Founders, is the process by which meanings are assigned to words in a constitution, to enable legal decisions to be made that are justified by it. Some scholars distinguish between „interpretation“ – assigning meanings based on the meanings in other usages of the terms by those the writers and their readers had probably read, and „construction“ – inferring the meaning from a broader set of evidence, such as the structure of the complete document from which one can discern the function of various parts, discussion by the drafters or ratifiers during debate leading to adoption („legislative history”), the background of controversies in which the terms were used that indicate the concerns and expectations of the drafters and ratifiers, alternative wordings and their meanings accepted or rejected at different points in development, and indications of meanings that can be inferred from what is not said, among other methods of analysis.

There is also a question of whether the meanings should be taken from the public meanings shared among the literate populace, the private meanings used among the drafters and ratifiers that might not have been widely shared, or the public legal meanings of terms that were best known by more advanced legal scholars of the time. Most of the U.S. Constitution appears to have been written to

be understood by ordinary people of that era, although people then were much more literate in the law than people are now. However, many of its words and phrases are fairly deep legal terms that were only well understood by a few of the legally educated Founders, even though the general population probably had a rudimentary understanding of them.

«Textualism or Originalism», as defended by Justice Antonin Scalia\(^{50}\) of the

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\(^{50}\) Antonin Gregory Scalia (Trenton, New Jersey, March 11, 1936). His father, Salvatore Eugene Scalia, was a Sicilian immigrant, graduate student and clerk at the time of his son's birth, who later became a professor of Romance languages at Brooklyn College. His mother, Catherine Scalia (née Panaro), was born in Trenton to Italian immigrant parents, and worked as an elementary school teacher. Scalia began his legal career at Jones, Day, Cockley and Reavis in Cleveland, Ohio, where he worked from 1961 to 1967. He was highly regarded at Jones Day and would most likely have made partner, but later stated he had long intended to teach. He became a Professor of Law at the University of Virginia in 1967, moving his family to Charlottesville, Virginia. After four years in Charlottesville, in 1971, Scalia entered public service. President Richard Nixon appointed him as the general counsel for the Office of Telecommunications Policy, where one of his principal assignments was to formulate federal policy for the growth of cable television. From 1972 to 1974, he was the chairman of the Administrative Conference of the United States, a small independent agency that sought to improve the functioning of the federal bureaucracy. In mid-1974, Nixon nominated him as Assistant Attorney General for the Office of Legal Counsel. After Nixon's resignation, the nomination was continued by President Gerald Ford, and Scalia was confirmed by the Senate on August 22, 1974.

In the aftermath of Watergate, the Ford administration was engaged in a number of conflicts with Congress. Scalia repeatedly testified before congressional committees, defending Ford administration assertions of executive privilege in refusing to turn over documents. Within the administration, Scalia advocated a presidential veto for a bill to amend the Freedom of Information Act, greatly increasing its scope. Scalia's view prevailed and Ford vetoed the bill, but Congress overrode it. In early 1976, Scalia argued his only case before the Supreme Court, *Alfred Dunhill of London, Inc. v. Republic of Cuba*. Scalia, on behalf of the U.S. government, argued in support of Dunhill, and that position was successful. Following Ford's defeat by President Jimmy Carter, Scalia worked for several months at the American Enterprise Institute. He then returned to academia, taking up residence at the University of Chicago Law School from 1977 to 1982, though he spent one year as a visiting professor at Stanford Law School. In 1981, he became the first faculty adviser for the University of Chicago's chapter of the newly founded Federalist Society.

When Ronald Reagan was elected President in November 1980, Scalia hoped for a major position in the new administration. He was interviewed for the position of Solicitor General of the United States, but the position went to Rex E. Lee, to Scalia's great disappointment. Scalia was offered a seat on the Chicago-based United States Court of Appeals for the Seventh Circuit in early 1982, but declined it, hoping to be appointed to the highly influential United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). Later that year, Reagan offered Scalia a seat on the D.C. Circuit, which Scalia accepted. He was confirmed by the United States Senate on August 5, 1982, and was sworn in on August 17, 1982.

On the D.C. Circuit, Scalia built a conservative record, while winning applause in legal
U.S. Supreme Court, is a normative doctrine of method according to which the judicial interpretation of statutes and of the Constitution should aim at establishing the original meaning of the text. Textualism in the strict sense is unpopular not only among most judges but also among philosophers and theologians. In philosophy, textualism was denounced as hopelessly naive by authors such as Martin Heidegger, Hans-Georg Gadamer, and their American followers. In theology, textualism is not a viable option for believers who want both to accept as true the text of their holy book and to endorse the results of modern science and historical scholarship. I argue that textualism is the only valid methodology of interpretation both in philosophy and in theology. For the judicial interpretation and application of statutes and constitutions, however, textualism cannot be more than one methodological topos among many. We also have to accept other topoi, such as the topos that the system of statutes and treatises should form a consistent whole, and these other topoi cannot be considered as part and parcel of textualism in the strict sense. It follows that the difference between a tenable sophisticated version of textualism as a methodology of judicial interpretation and the so-called doctrine of the “Living Constitution” is one of degree and emphasis only. Justice Scalia’s simple version of textualism is a political ideology rather than a valid methodology of judicial interpretation.51

Scalia and Garner contend that textual originalism was the dominant American method of judicial interpretation until the middle of the twentieth century.52 The only evidence they provide, however, consists of quotations from circles for powerful, witty legal writing, which was often critical of the Supreme Court precedents he felt bound as a lower-court judge to follow. Justice Scalia has called himself in print a “faint-hearted originalist.” It seems he means the adjective at least as sincerely as he means the noun.

51 In SCALIA, ANTONIN: A Matter of Interpretation, 1997, Princeton University Press, Princeton, the Judge describes his adherence to textualism. Textualism means interpreting the text of written law without going beyond the intent of those legislators who made the law. He writes that judges have no authority to pursue „broader purposes.” He describes this as not „strict constructionism.” Strict constructionism, he writes, is „a degraded form of textualism that brings the whole philosophy [of textualism] into disrepute.” A strict constructionist might rule that use of a gun in a crime includes trading the gun for cocaine rather than as a weapon. Scalia takes a common sense approach to language rather than a strict interpretation. If it is said that someone uses a cane it is suggested that he walks with a cane rather than his having „hung his grandfather's antique cane as a decoration in the hallway.” In textual interpretation, writes Scalia, „context is everything”.

52 In SCALIA, ANTONIN – BARNER, BRIAN: Reading Law: The Interpretation of Legal Texts, 2012, West Publishing Company, College & School Division, the two authors say that judges like to say that all they do when they interpret a constitutional or statutory provision is apply, to the facts of the particular case, law that has been given to them. They do not make law: that is the job of legislators, and for the authors and ratifiers of constitutions. They are not Apollo; they are his oracle. They are passive interpreters. Their role is semantic.

The passive view of the judicial role is aggressively defended in this new book by Justice
judges and jurists, such as William Blackstone, John Marshall, and Oliver Wendell Holmes, who wrote before 1950. Yet none of those illuminati, while respectful of statutory and constitutional text, as any responsible lawyer would be, was a textual originalist. All were, famously, “loose constructionists”.

It is possible to glean from judges who actually are loose constructionists the occasional paean to textualism, but it is naïve to think that judges believe everything they say, especially when speaking ex cathedra (that is, in their judicial opinions). Judges tend to deny the creative – the legislative – dimension of judging, important as it is in our system, because they do not want to give the impression that they are competing with legislators, or engaged in anything but the politically unthreatening activity of objective, literal-minded interpretation, using arcane tools of legal analysis. The fact that loose constructionists sometimes publicly endorse textualism is evidence only that judges are, for strategic reasons, often not candid.

A problem that undermines their entire approach is the authors’ lack of a consistent commitment to textual originalism. They endorse fifty-seven “canons of construction,” or interpretive principles, and in their variety and frequent ambiguity these “canons” provide them with all the room needed to generate the outcome that favors Justice Scalia’s strongly felt views on such matters as abortion, homosexuality, illegal immigration, states’ rights, the death penalty, and guns. Yet in further obeisance to the dictionary Scalia and Garner commend a court for having ordered the acquittal of a person who had fired a gun inside a building and

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Antonin Scalia and the legal lexicographer Bryan Garner. They advocate what is best described as textual originalism, because they want judges to “look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters’ extra-textually derived purposes and the desirability of the fair reading’s anticipated consequences.” This austere interpretive method leads to a heavy emphasis on dictionary meanings, in disregard of a wise warning issued by Judge Frank Easterbrook, who though himself a self-declared textualist advises that “the choice among meanings [of words in statutes] must have a footing more solid than a dictionary – which is a museum of words, an historical catalog rather than a means to decode the work of legislatures.”

Scalia and Garner reject (before they later accept) Easterbrook’s warning. Does an ordinance that says that “no person may bring a vehicle into the park” apply to an ambulance that enters the park to save a person’s life? For Scalia and Garner, the answer is yes. After all, an ambulance is a vehicle – any dictionary will tell you that. If the authors of the ordinance wanted to make an exception for ambulances, they should have said so. And perverse results are a small price to pay for the objectivity that textual originalism offers (new dictionaries for new texts, old dictionaries for old ones). But Scalia and Garner later retreat in the ambulance case, and their retreat is consistent with a pattern of equivocation exhibited throughout their book.


been charged with the crime of shooting “from any location into any occupied structure.” They say that the court correctly decided the case (Commonwealth v. McCoy) on the basis of the dictionary definition of “into.” They misread the court’s opinion. The opinion calls the entire expression “from any location into any occupied structure” ambiguous: while “into” implies that the shooter was outside, “from any location” implies that he could be anywhere, and therefore inside. The court went on to decide the case on other grounds. There is a common thread to the cases that Scalia and Garner discuss. Judges discuss the meanings of words and sometimes look for those meanings in dictionaries. But judges who consult dictionaries also consider the range of commonsensical but non-textual clues to meaning that come naturally to readers trying to solve an interpretive puzzle. How many readers of Scalia and Garner’s massive tome will do what I have done — read the opinions cited in their footnotes and discover that in discussing the opinions they give distorted impressions of how judges actually interpret legal texts?

Scalia and Garner defend the canon of construction that counsels judges to avoid interpreting a statute in a way that will render it unconstitutional, declaring that this canon is good “judicial policy.” Judicial policy is the antithesis of textual originalism. They note that “many established principles of interpretation are less plausibly based on a reasonable assessment of meaning than on grounds of policy adopted by the courts” — and they applaud those principles, too. They approve the principle that statutes dealing with the same subject should “if possible be interpreted harmoniously,” a principle they deem “based upon a realistic assessment of what the legislature ought to have meant,” which in turn derives from the “sound principles…that the body of the law should make sense, and…that it is the responsibility of the courts, within the permissible meanings of the text, to make it so”. In other words, judges should be realistic, should impose right reason on legislators, should in short clean up after the legislators. Another interpretive principle that Scalia and Garner approve is the presumption against the implied repeal of state statutes by federal statutes. They base this “on an assumption of what Congress, in our federal system, would or should normally desire.” What Congress would desire? What Congress should desire? Is this textualism, too?

6. THE SEARCH FOR A SOLUTION: «BALANCING CONSTITUTIONAL RIGHTS»

A few years ago, Robert Alexy explained that a normative system is not a legal

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57 Robert Alexy (September 9, 1945 in Oldenburg, Germany) is a jurist and a legal
system unless it formulates a “claim of correctness”. This occurs when governmental authorities act with the assumption that what they are doing is correct, regardless of whether it is actually entirely so. According to Alexy, when this assumption is not formulated, and when those who govern only take a personal or a class advantage with their power, practice of the law does not amount to a legal system.

Yet it seems evident that not just any content allocated to that which is assumed as correct will attain legality for a normative system. For this reason, Alexy complements his thesis on correctness with a reference to ius-fundamental principles. The correctness of the assumption of a government’s actions is basically expressed through its reference to fundamental rights.

What does this mean? When does a State recognize, identify, protect, and promote rights? When does it put forth its “politics of rights” as imposed by its constitution? Or, in other words, how can human rights be consistently conceptualized, indexed, justified, and interpreted? In the preceding account, each philosopher. He studied law and philosophy at the University of Göttingen. He received his PhD in 1976 with the dissertation *A Theory of Legal Argumentation*, and he achieved his Habilitation in 1984 with a *Theory of Constitutional Rights*. Alexy is a professor at the University of Kiel and in 2002 he was appointed to the Academy of Sciences and Humanities at the University of Göttingen. In 2010 he was awarded the Order of Merit of the Federal Republic of Germany. Alexy's definition of law looks like a mix of Kelsen's normativism (which was an influential version of legal positivism) and Radbruch's legal naturalism (Alexy, 2002), but Alexy's theory of argumentation (Alexy, 1983) puts him very close to legal interpretivism. His *A Theory of Legal Argumentation* presents some questions: what is to be understood by 'rational legal argument'? To what extent can legal reasoning be rational? Is the demand for rationality in legal affairs justified? And what are the criteria of rationality in legal reasoning? The answer to these questions is not only of interest to legal theorists and philosophers of law. They are pressing issues for practising lawyers, and a matter of concern for every citizen active in the public arena. Not only the standing of academic law as a scientific discipline, but also the legitimacy of judicial decisions depends on the possibility of rational legal argumentation.

A theory of legal reasoning which tries to answer these questions pre-supposes a theory of general practical reasoning. This theory is the subject matter of the first two parts of the book. The result is a theory of general practical discourse which rests on insights of both Anglo-Saxon and German philosophy. It forms the basis of the theory of rational legal discourse, which is developed in the third part of this book.

of the problems being dealt with has directly involved these questions. The answer to such questions necessarily requires appealing to instances beyond the legal texts where rights are recognized, as I have attempted to demonstrate here in general terms.

It could be thought, together with Norberto Bobbio,\textsuperscript{59} that the suggested element is a consensus, in which the basis of human rights could be found and the place where semantic indecisiveness could be resolved when interpreting them.\textsuperscript{60} Yet there is an argument which destroys all the appeal of this alternative: human rights discourse has been presented historically as the limit to what is “able to be settled by agreement,” or to paraphrase the German Constitutional Court, the “limit of limits” that consensus (including democratic consensus) can legitimately impose upon the freedom of human actions. In other words, if the meaning of rights depends on consensus, these rights are devoid of meaning. The solution, thus, must be found elsewhere.\textsuperscript{61}

\textsuperscript{59} BOBBIO, NORBERTO: El fundamento de los derechos humanos, in DÍAZ, RAMÓN SORIANO – CABRERA, CARLOS ALARCÓN – MOLINA, JUAN MORA (ed.): \textit{Diccionario crítico de los derechos humanos}, 2000, Universidad Internacional de Andalucía, Sede Iberoamericana de la Rábida.

\textsuperscript{60} Just an empirical collation will suffice to show the lack of coincidence among the catalogues of fundamental rights acknowledged in domestic law of different countries and/or in regional and international declarations, charters and covenants. Similarly, as, e.g., BOBBIO (1958): \textit{op. cit.}, and ROSS (1958): \textit{op. cit.} 258-267 emphasize, just an inspection will suffice to show the lack of coincidence among the lists of which natural and/or moral rights different exponents of natural law maintain to deserve protection. Needless any exemplification of these two statements. Nevertheless, it might be worth reminding the complex network of political disagreements and ideological tensions standing behind the approval of the 1948 Universal Declaration of Human Rights, or, more recently, the political disagreements and the ideological tensions standing behind the approval of 2000 Nizza Charter. With regard to the 1948 Declaration, cf. eg., CASSESE (1994): \textit{op. cit.} 21-49, and with regard to 2000 Nizza Charter, cf., e.g., MANZELLA, ANDREA – MELOGRANI, PIERO – PACIOTTI, ELENA – ROGOTÁ, STEFANO: \textit{Riscrivere i diritti in Europa}, 2001, il Mulino, Bologna.

\textsuperscript{61} In a rather different perspective, Bobbio’s threefold distinction on legal positivism (see above § 3), has already been referred to when dealing with (the actual form of) constitutionalism by TROPER (1988): \textit{op. cit.} and PRIETO SANCHÍS, LUIS: \textit{Constitucionalismo y positivismo}, 1997, Fontamara, México, and when dealing with neo-constitutionalism by CoManducchi: \textit{op. cit.} (in print). Though not in a completely coincident way, Troper, Prieto Sanchís and Comanducci, each of them, draws a symmetrically parallel distinction to the one suggested by Bobbio in order to confront and to underline the terms of the contrast between legal positivism and (neo)constitutionalism insofar as either of them is conceived of, respectively, as a methodology, an ideology or a theory of law. On the contrary, what is suggested above in the text is that the threefold way to conceive of legal positivism is compatible with, and can provide a satisfactory understanding of neo-constitutionalism; that is to say it is meant not to show that legal positivism and neo-constitutionalism contrast with each other; but, the other way round, that neo-constitutionalism can be given a positivist reading.
The question, however, is where? What has been presented here so far supports the proposal of a possible answer that lies in the following: all current legal systems formulate not one but two assumptions. On the one hand, the claim to correctness as postulated by Alexy, and on the other hand, a claim to moral objectivity, found implicitly in the defense of principles. Without one or the other, the discourse of rights turns into self-reference and, for this reason, becomes groundless and unintelligible.

A reply could be given by an Alexis's scholar: Carlos Bernal Pulido. In the global legal world, it is becoming increasingly recognized that every modern legal system is made up of two basic kinds of norms: rules and principles. These are applied by means of two different procedures: subsumption and balancing. While

See also LUZZATI, CLAUDIO: Princìpi e principi. La genericità nel diritto, 2012, Giappichelli, Torino. The author, trying to criticize the Alexy's and Bernal Pulido's opinions, makes an effort to explain that lack of specification is a phenomenon that should not be confused with vagueness. Whereas vagueness is a problem of borderline cases and whenever it occurs we are intrinsically uncertain whether a sentence is true or not, lack of specificity is a quite different phenomenon. If a sentence is specific to a very low degree it is highly probable that it will be true; however such a sentence is unable to distinguish between different cases: it is like a lump of putty which hits the bull’s eye flattening out all over it. Legal principles deal with lack of specificity, even if not all unspecific norms can be defined as principles. In fact, according to the author’s view, what makes of a principle a principle is mainly the use of such a norm to justify other standards. Cf. LUZZATI, CLAUDIO: Vagueness (of Legal Language), in The Encyclopedia of Language and Linguistics, 1993, Pergamon Press, Oxford – New York – Seul –Tokio, Vol. 4. 2086-2091; LUZZATI, CLAUDIO: Il formalismo dei diritti, in Etica & Politica / Ethics & Politics, Vol. 15. No. 1. (2013), 52-86.

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Every modern legal system is made up of two basic kinds of norms: rules and principles. These are applied by means of two different procedures: subsumption and balancing. While rules apply by means of subsumption, balancing is the means of applying principles. Balancing has therefore become an essential methodological criterion for adjudication, especially of constitutional rights. However, balancing is at the heart of many theoretical and practical discussions. One of the most important questions is whether balancing is a rational procedure for applying norms. The aim of Bernal Pulido's books is to consider whether this is the case. To achieve this aim, his works reflect on why the rationality of balancing is in doubt, and to what extent balancing can be rational, and how this can be possible. The weight formula proposed by Robert Alexy is analysed as a model which, in spite of its limits, solves the philosophical and constitutional problems about the rationality of balancing to the greatest extent possible. Cf. BERNAL-PULIDO, CARLOS: The Drama of Law as a Collective Play, in This Century, Issue 2. (2013a), 8-15.
rules apply by means of subsumption, balancing is the means of applying principles. Balancing has therefore become an essential methodological criterion for adjudication, especially of constitutional rights.64

The concept of balancing is at the heart of many theoretical and practical discussions. One of the most important questions is whether balancing is a rational procedure for applying norms or a mere rhetorical device, one that is useful for justifying any judicial decision whatever. This is a juridico-philosophical question. It has a major bearing on a second question, which is relevant from the point of view of constitutional law: the question of the legitimacy of the judge as balancer. More than one renowned author has stated that balancing is nothing more than an arbitrary and rash Solomonic settlement, that the judge therefore does not have sufficient constitutional standing to apply principles from this standpoint, and that when he does so, he unduly restricts and even usurps other powers enshrined in the constitution.65

According to the critics, balancing is irrational for several reasons. Following Bernal Pulido’s opinion, the most prominent of these critics refer to the lack of precision, the incommensurability, and the lack of predictability of balancing.

The first objection claims that balancing is no more than a rhetorical formula or a technique for exercising power that lacks a clear concept and precise legal structure. The objection states that there are no objective legal criteria which could be binding on the judge for balancing and useful for controlling judicial decisions where balancing is brought into play. From this point of view, balancing is a formal and empty structure, based only on the subjective, ideological and empirical appraisals of the judge. The scales for balancing are subjective appraisals by the judge. Therefore, balancing cannot lead to a single correct answer.66

The second objection states that balancing is irrational because it entails a comparison of two measures which, due to their radical differences, cannot be compared. Incommensurability arises in balancing, for there is no organisation into a hierarchy or a common measure that makes it possible for the weight of the relevant principles to be determined. In the field of principles, there is no “unit of measure”, nor there a “common currency for making possible a comparison” between principles.67

The final criticism maintains that balancing is irrational because its result cannot be predicted. Every result of balancing is individual. It depends on the circumstances of the case, not on general criteria. Judicial decisions that stem from balancing therefore conform to an ad hoc case law, which tends to magnify the justice of the single case while sacrificing certainty, coherence and the generality of law.\textsuperscript{68} There is a link between these three objections. The result of balancing cannot be predicted owing to its lack of precision, and the main reason for the lack of precision is the fact that there is no a common measure that makes it possible to determine the weight of the relevant principles.

7. MY PERSONAL CONCLUSIONS

Balancing continues to provoke controversy among judges and legal scholars. Critics believe that it gives judges too much discretion and amounts to a usurpation of the legislative function. They contend that balancing is an ambiguous and arbitrary methodology for measuring unequal interests against each other, which results in unpredictable decision making. While proponents, such as U.S. Supreme Court Justice Sandra Day O'Connor, argue that balancing is „the sounder approach – the approach more consistent with our role as judges to decide each case on its individual merits – is to apply a test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular interest asserted by the State before us is compelling.”

How can balancing ever be dissociated from lawmaking, when it comes to constitutional adjudication? A basic task of constitutional judges is to resolve legal disputes between two parties pleading a constitutional norm or value against the other. Most judges are disinclined to build constitutional hierarchies of norms. Instead, they usually proclaim that no right is absolute, which then propels them into a balancing mode. In balancing situations, it is context that varies, and it is the judge’s evaluation of the circumstances, facts, and policy considerations that determines the outcome of a case.

In \textit{Theory of Constitutional Rights}, Robert Alexy contends that rules “contain fixed points in the field of the factually and legally possible,” therefore; a rule is a norm that is either “fulfilled or not.” However, principles are norms that “require that something be realized to the greatest extent possible given the legal and factual possibilities”. This distinction makes a difference in adjudication, because a conflict between two rules may be resolved by giving primacy to, invalidating, or establishing an “appropriate exception” to one rule in relation to the other. Whereas, a conflict between two principles can only be managed through balancing – where the judge finds that one principle outweighs the other, given a particular set of circumstances. Alexy believes that conflicts of rules are played

out at the level of validity, where “competitions between principles are played out in the dimension of weight.”

Bernal Pulido explains that critics believe balancing is irrational for multiple reasons. However, the most widely noted are a lack of precision, incommensurability and lack of predictability. For those who claim constitutional rights and competing principles are incommensurable, Alexy maintains that the triadic scale (light, moderate, serious) he developed provides a solution.

Even though Alexy provides a rationalization for balancing as a procedure, he does acknowledge that the question of what relative weight judges should give to opposed principles, in any given dispute, falls outside of his theory. However, from my point of view, Alexy’s procedure does, nonetheless, allow for the understanding that balancing does generate a particular form of argumentation and places the judge under an obligation to justify his/her decisions in terms of certain constraints. Thus, to the extent that judges actually search for solutions absent of harm and actually look to comply with the law of balancing, balancing is less susceptible to the accusation that it proceeds without rational criteria and is no more than a means to bundle a court’s unconstrained policy choices.

Grègoire Webber notes John Finnis’ opinion that without an identified

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69 Webber, Grégoire: The Negotiable Constitution. On the Limitation of Rights, 2010, Cambridge University Press, Cambridge. In matters of rights, constitutions tend to avoid settling controversies. With few exceptions, rights are formulated in open-ended language, seeking consensus on an abstraction without purporting to resolve the many moral-political questions implicated by rights. The resulting view has been that rights extend everywhere but are everywhere infringed by legislation seeking to resolve the very moral-political questions the constitution seeks to avoid. The Negotiable Constitution challenges this view. Arguing that underspecified rights call for greater specification, Grégoire C. N. Webber draws on limitation clauses common to most bills of rights to develop a new understanding of the relationship between rights and legislation. The legislature is situated as a key constitutional actor tasked with completing the specification of constitutional rights. In turn, because the constitutional project is incomplete with regards to rights, it is open to being re-negotiated by legislation struggling with the very moral-political questions left underdetermined at the constitutional level.

70 Finnis, John: Human Rights and Common Good: Collected Essays Volume III, 2011, Oxford University Press, Oxford. This volume collects twenty-two published and unpublished chapters on a variety of topics related directly to human rights, justice, and the common good. The first nine date from 1970 through to 2007. They begin with a study — in dialectic with Dworkin's earlier lecture on the same themes — of the bearing of contemporary legal and political theory on the incorporation of a declaration of rights and freedoms in British law. There follow chapters on place of rights, and of duties to oneself, in Kant's moral and legal theory and some contemporary interpreters of Kant; on the application classical conceptions of distributive justice to modern problems; on the emergence of the ideal of government limited by, inter alia, respect for human rights, and contemporary distortions of the ideal that are proposed by Rawls, Dworkin, and followers of theirs (not least in relation to marriage); on the place of civic virtues and respect for diverse persons in constitutional order; and two chapters on the great question of migration rights and the legitimacy of national boundaries preventing free and equal migration. Part
common measure, the principle of proportionality cannot direct reason to an answer. It can only assist reason in choosing between two incommensurables. Bernal Pulido shows us how Alexy’s weight formula,\(^{71}\) developed as a complement to the rule of balancing, not only allows for the determining the concrete weight of

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Two groups three chapters on the justice of punishment, concluding with the mature statement of retribution’s place as punishment's formative justifying aim, in engagement especially with Nietzsche's 'genealogy of morals'. Part Three surveys just way theory in its historic development and current shape. Parts Four, Five, and Six each group three chapters: on autonomy, justice, and euthanasia; on autonomy, justice, and human reproduction; and on marriage in its relation to justice and the common good.

71 The “weight formula” is thus proposed as a developed complement to the rule of balancing, which Alexy states on the basis of a classical formulation of the third limb of the proportionality principle, or proportionality in the narrow sense, in German constitutional law. However, it seems to Bernal Pulido that the weight formula, as described by Alexy, calls for a new law of balancing. The aim of the weight formula is to establish “a conditional relation of precedence between the principles in the light of the circumstances of the case”. The key observation is that the relation of precedence is not determined by means of merely comparing the importance of the principles in the case at hand (“the degree of non-satisfaction of, or detriment to, one principle” and “the importance of satisfying the other”), but by means of a wider operation which includes reference to their abstract weight and to the reliability of the empirical assumptions relating to the importance of the principles. That is, the weight formula is a reformulation of the basic insight behind the original law of balancing which is more sophisticated in analytical terms in that it renders explicit the need to consider two more variables, namely, abstract weight and reliability of the empirical assumptions.

This formula seeks to reflect the main normative and empirical variables that are relevant for balancing. It is accordingly a very complex model, one that gives rise to the objection that application would seem not to be obviously straightforward. However, it should be said that the model is complex because the application of principles is a highly complex procedure. Moreover, the weight formula is not an algorithmic procedure that can guarantee the only correct answer in all cases. Quite the contrary, for it has diverse rationality limits that give the judge room to exercise discretion. His ideology and appraisals play an important role here. Nevertheless, this fact does not reduce the rationality and usefulness of the formula. The weight formula is a clear procedure even when its limits are borne in mind. It offers for balancing, a clear concept and a precise legal structure, that are free of all contradiction. In this structure, the triadic scale is the common measure for determining the weight of the relevant principles. The weight formula is also a determinate structure that clarifies the different, relevant balancing variables. It therefore enables the result of balancing to be correctly justified in the law. Through this formula, justification can be stated in conceptually clear and consistent terms, with complete and saturated premises, and with logic and the burdens of argumentation respected. The weight formula gives expression to every element that the judge ought to take into account and every decision that should be justified. In legal practice, these judicial decisions make up a network of precedents that allow principles to be applied in a consistent and coherent manner, with the result that balancing is predictable. Finally, the weight formula is a very good example of how practical problems in constitutional law can be solved with the help of juridico-philosophical considerations. Cf. ALEXY (2002): op. cit. 122-158.
principles in light of the circumstances of a case, but also their abstract weight and empirical assumptions relating to the importance of those principles. Bernal Pulido also reminds us of John Rawls’ view when referring to the meaning of relevant positions of principles- the more connected with the moral capacities of the person of position of a principle is, the more importance should be attributed to the principle.

David Beatty asserts in *Ultimate Rule of Law,* that by carefully studying the

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72 RAWLS, JOHN: *A Theory of Justice,* 1971, Harvard University Press. This is a work of political philosophy and ethic, originally published in 1971 and revised in both 1975 (for the translated editions) and 1999. In *A Theory of Justice,* Rawls attempts to solve the problem of distributive justice (the socially just distribution of goods in a society) by utilising a variant of the familiar device of the social contract. The resultant theory is known as “Justice as Fairness”, from which Rawls derives his two principles of justice: the liberty principle and the difference principle. In *A Theory of Justice,* Rawls argues for a principled reconciliation of liberty and equality. Central to this effort is an account of the circumstances of justice, inspired by David Hume, and a fair choice situation for parties facing such circumstances, similar to some of Immanuel Kant's views. Principles of justice are sought to guide the conduct of the parties. These parties are recognized to face moderate scarcity, and they are neither naturally altruistic nor purely egoistic. They have ends which they seek to advance, but prefer to advance them through cooperation with others on mutually acceptable terms. Rawls offers a model of a fair choice situation (the original position with its veil of ignorance) within which parties would hypothetically choose mutually acceptable principles of justice. Under such constraints, Rawls believes that parties would find his favoured principles of justice to be especially attractive, winning out over varied alternatives, including utilitarian and right-libertarian accounts.

73 BEATTY, DAVIS: *The Ultimate Rule of Law,* 2004, Oxford University Press, New York. “Proportionality” analysis is becoming a term of art in constitutional law. If we have not heard of it, that is because the concept has received far more elaboration and evaluation outside of the United States. One of the leading proponents of proportionality analysis in constitutional law is the Canadian legal scholar, David M. Beatty. For the last decade, Beatty has pursued a vision of comparative constitutional study as revealing “timeless” or “universal” ideals of proportionality and rationality in constitutional adjudication around the world. In his latest book, *The Ultimate Rule of Law,* he advances the argument that constitutional courts around the world are, and should be, turning away from a focus on „interpretation” and instead concentrate on applying the principle of proportionality to measure the constitutionality of challenged government actions.

As Beatty shows, in Canada, Germany, the European Court of Human Rights, India, Ireland, South Africa, and on occasion even in the United States, courts or tribunals invoke the basic concept of proportionality not only to review the propriety of sanctions, but also to measure the legality of a wide range of government conduct through some form of means-ends analyses. In a number of countries, proportionality analysis is treated as a general principle of public law, applicable not only to constitutional law, but also to administrative and even to international law questions. Although means-end analyses are found in a wide swathe of constitutional doctrine in many tribunals, a distinguishing feature of proportionality analysis is its eschewal of doctrinal sub-categories, its commitment to returning to foundational questions of constitutional purpose in structuring analyses of challenges to government action, and its requirement that the government come forward
facts of the case, judges are able to determine proportionality objectively. Although, Beatty sees balancing as “subjective” based on a calculation of costs and benefits – a process of cataloging and quantifying factors and a comparison of incommensurable –, at times he uses balancing “vocabulary” when describing his principle of proportionality. He maintains that “proportionality is an essential, unavoidable part of every constitutional text and a universal criterion of constitutionality”. As Webber noted, Beatty contends that “proportionality request judges to assess the legitimacy of whatever law or regulation or rulings is before them from the perspective of those who reap its greatest benefits and those who stand to lose the most.” Thus a balancing perspective.

The U.S. Supreme Court uses a balancing approach most often to decide cases where constitutionally protected individual rights conflict with governmental with justifications for statutes that infringe on protected rights.

Beatty is primarily concerned with versions of proportionality analysis which, like the Canadian or German approaches, consider not only rationality and availability of other alternatives, but proportionality in the „strict sense“ of some degree of fit between the harm that some endure, or the intrusions some suffer, in order to create a legitimate benefit for others. Beatty is quite persuasive as to the pervasiveness of the phenomena of such proportionality analysis, both the Canadian version and others used by the European Court of Human Rights, the Indian Supreme Court, the German Federal Constitutional Court, and a number of other influential constitutional tribunals. He provides examples in three major areas of constitutional law – religious liberty, gender and racial equality, and positive welfare rights – to illustrate courts' concerns for the proportionality of government actions that impose special burdens on some and, increasingly, for the proportionality, or fairness, of government efforts to provide assistance or opportunities.

But Beatty's ambitions are not merely descriptive. First, in the course of description Beatty develops what one might call a „best practices“ approach to proportionality analysis. For Beatty, the best version of proportionality analysis is one that relies on pragmatic, empirically contextualized reasoning. It seeks to view legal issues through the perspectives of those most benefitted and most burdened by challenged action, while generally accepting a wide range of legitimate government ends. These are the tools of proportionality analysis, „properly enforced“ (p. 166). Adherence to these practices, he argues, means that proportionality analysis meets criteria for neutrality and objectivity in constitutional adjudication.

Second, Beatty argues that such proportionality analysis, rather than interpretation of constitutional texts, should be seen as the fundamental tool of normatively responsible judicial review in self-governing democratic polities. Much of the hard work of constitutional adjudication, he argues, turns on the question of government justification of its actions, an inquiry best guided by the norms of proportionality analysis. Moreover, proportionality analysis would yield a more determinate and impartial form of constitutionalism than a focus on interpretation of constitutional provisions under any of the leading schools of interpretation. Rather than focusing on interpreting a constitution within its historic traditions, or considering questions of institutional role or deference, constitutional judges should carefully scrutinize the facts to determine whether, in light of the governmental purposes intended to be served, the challenged act or action appropriately accommodates the interests of those most affected or concerned. In so arguing, Beatty dispenses not only with „interpretation“ but (at times) with „rights“ (p. 171). Justification of challenged government action becomes the focus of analysis.
interests. One landmark constitutional case decided in this manner, was ROE v. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 47 (1973), which legalized abortion. In reaching its decision, the Court found that in the first trimester of pregnancy, a woman's right to privacy outweighed the State's interest in protecting health, but in the later stages of pregnancy, the State's interest gradually outweighed the woman's.

From my perspective, a balancing court can give some measure of coherence to adjudication by developing stable procedures for arriving at decisions. To the extent that it is successful, these procedures could take on some of the systematizing functions of precedent more broadly. A court could declare that rights are absolute, or that one right must always prevail over other constitutional values, including other rights provisions. Creating such hierarchies would almost constitutionalize winners and losers. In so far as judges gave reasons for having conferring a higher status on one value relative to another, they have in fact balanced.

Balancing makes clear that each party is pleading a constitutionally legitimate norm or value and that the court holds each of these interests in equally high esteem. Determining which value shall prevail in any given case is not a mechanical exercise, but is a difficult judicial task involving complex policy considerations. However, in my opinion, Alexy’s triadic scale and weight formula are proven effective tools that allow for an objective constitutional adjudication.

When properly executed, balancing requires courts to acknowledge and defend – honestly and openly – the policy choices that they make when they make constitutional choices. Most certainly, is not a magic wand for judges to wave to make all of the political dilemmas of rights review disappear. Indeed, waving such a wand would expose rights adjudication for what it is: constitutionally-based lawmaking. Nonetheless, I believe balancing offers the best position currently available for judges seeking to rationalize and defend rights review, given certain strategic considerations, the structure of modern rights provisions, and the precepts of contemporary constitutionalism.

It is my opinion that balancing helps judges manage disputes that take a particular form, but does not dictate correct answers to legal problems. It provides a set of relatively stable, off-the-shelf, solutions to a set of generic dilemmas faced by the constitutional judge. Therefore, I do see balancing as an appropriate criterion for constitutional argumentation.¹⁴

¹⁴ I wrote all these final conclusions in occasion of the course “Constitutional Argumentation”, to the bosom of “Master Global Rule of Law and Constitutional Democracy”, issued by the Faculty of Law of the University of Genoa (Italy), A.A. 2012/2013. I had the pleasure to meet and to discuss with Carlos Bernal Pulido, teacher of the course mentioned, when he explained his theories in this University on April 24, 2014. But the present essay is chiefly dedicated to Ronald Dworkin (December 11, 1931 – February 14, 2013), in memoriam.
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