Essays

Constitutional Values and Judge-Made Law

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Abstract

The Author contends that value-oriented constitutionalism marks a shifting of law making function from political bodies to the Courts. In fact judges act as legislators for the concrete case: they have to dispense justice according to law, but law is made up of constitutional values which can be implemented in multiple and, at times, opposite ways. Therefore, if we deeply involve judges in the making-law process, the risk of depriving the judiciary of its constitutional foundation is realised. The Author underlines the need to re-think the organization and the theoretical model of judicial power, according to its new function.

I. Values Based Constitution and Legal Formalism

Non-Euclidean geometries and the theory of relativity undermined formalism in the field of mathematics. Similarly, the express inclusion of ethical values in modern constitutions, which gave them the shape of binding principles prevailing over all other sources of law, destabilized the theoretical basis of formalism in legal science. This powerful comparison, devised by an American scholar,[1] helps us to immediately perceive how ethical values expressed in principles of written Constitutions have reshaped the traditional categories of legal positivism. It is in fact well-known in literature – due to fundamental studies such as those of Donald Dworkin,[2] Robert Alexy,[3] Luigi Mengoni[4] – that the principles of Constitutions may be described as 'open-content rules'. That is to say, the rules lack a deductive content from which can be drawn – through simple textual interpretation – rules fit for being placed as major premises of judicial syllogisms. Unlike rules, whose boundaries can be precisely defined, the principles of the constitution protect rights and values by means of

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[1] T.A. Aleinikoff, 'Constitutional Law in the Age of Balancing' 96 *Yale Law Journal*, 943 (1987).

[2] R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1978); Id, *Law's Empire* (Cambridge, Mass: Harvard University Press, 1986).

[3] R. Alexy, *Theorie der Grundrechte* (Frankfurt am Mein: Suhrkamp, 1986), 71.

[4] L. Mengoni, 'L'argomentazione orientata alle conseguenze', in G. Pugliese, M. Ascheri et al, *Scintillae juris. Scritti in memoria di Gino Gorla* (Milano: Giuffrè, 1996), 452; Id, 'Il diritto costituzionale come diritto per principi' *Ars interpretandi*, 95 (1996).

Optimierungsgebote/optimization imperatives,[5] which are to be fulfilled as may be best, thus bringing about conflicts with other constitutional rights or values demanding the same degree of accomplishment.

We can assume that constitutional principles express ethical values that differ only in terms of 'weight', but all enjoy the same degree of formal tutelage and so claim the most widespread protection. We cannot solve the conflicts between these values only applying the judicial syllogism and merely relying on the conformity/violation dichotomy.

On the contrary, judicial reasoning shall inevitably be open to evaluations and balancing tests which might not be subject to strict logical scrutiny. Therefore, in such cases, we can only verify whether these decisions are persuasive, fair, proportional and reasonable.

The 'reasonableness style' – probably the most representative style of legal reasoning today[6] – is hardly a straightforward or deductive one. Quite the contrary: it is problematic, yielding a circular way of reasoning.

The measurement of the degree of judicial discretion, or – rather similarly – the question of whether reasonableness can be qualified as a factual or an axiological judgment, depends on the overall relationship among values, and between values on one hand and the normative function on the other.

As is well-known, cognitive theories assume that values are able to self-reproduce and are independent of factual circumstances. They are based on *a priori* abstract hierarchies, thereby providing legal theories with the conceptual tools needed for endowing values with greater normative strength and a less erratic implementation. By contrast, non-cognitive theories deny that values have an enduring ability to shape the legal reality and a deductible normative content; they consider that only facts give legal reasoning the keys to infer concrete meanings from abstract values.[7]

[5] R. Alexy, n 3 above, 100: '*Prinzipien sind Optimierungsgebote relativ auf die rechtlichen und tatsächlichen Möglichkeiten*'.

[6] More evidence is given by the increasing number of works dedicated to reasonableness: as for Italian public-law, see G. Scaccia, *Gli strumenti della ragionevolezza nel giudizio costituzionale* (Milano: Giuffrè, 2000); A. Morrone, *Il custode della ragionevolezza* (Milano: Giuffrè, 2001); L. D'Andrea, *Ragionevolezza e legittimazione del sistema* (Milano: Giuffrè, 2003); as for legal philosophy, see L. D'Avack and F. Riccobono, *Equità e ragionevolezza nell'attuazione dei diritti* (Napoli: Guida, 2004); S. Zorzetto, *La ragionevolezza dei privati. Saggio di meta giurisprudenza esplicativa* (Milano: Giuffrè, 2008); as for private law, S. Troiano, *La "ragionevolezza" nel diritto dei contratti* (Padova: Cedam, 2005); as for criminal law applications, see V. Manes, *Il principio di offensività nel diritto penale. Canone di politica criminale, criterio ermeneutico, parametro di ragionevolezza* (Torino: Giappichelli, 2005).

[7] Although I agree with A. Longo, *I valori costituzionali come categoria dogmatica. Problemi e ipotesi* (Napoli: Jovene, 2007), that accepting only one of the aforementioned theories, and rejecting the other one, is far too complicated, one can consider as cognitivists A. Spadaro, *Contributo ad una teoria della Costituzione. Fra democrazia relativista e assolutismo etico* (Milano: Giuffrè, 1994); as non-cognitivists, G. Zagrebelsky, *Il diritto mite. Legge, diritti, giustizia* (Torino: Einaudi, 1992) or F. Rimoli, *Pluralismo e valori costituzionali. I paradossi dell'integrazione democratica* (Torino: Giappichelli, 1999).

If one depicts the Constitution as an 'anarchic system of values',[8] in which arguments all have the same weight and there is little room for *a priori* hierarchies, a greater emphasis on the interpreter's voice and on the appreciation of facts is unavoidable. Within these 'anarchical' theories, the uncertainty of judicial decisions is not at all unexpected, but the high degree of flexibility of legal interpretation makes it easier for courts to provide the protection of rights required by civil society.

On the other hand, theories seeking to deny the judges' role in reshaping the hierarchy of values prove to be less adaptable to pluralism, in comparison to those referred to as 'metaphysically sceptical theories'.[9]

Between these two extreme perspectives, some scholars – though from very different positions and political leanings – affirm that values-oriented theories do not allow judges to transform the scale of values recognized by the constitution and believe that the constitution allows only some limited flexibility. In fact these authors assume either that constitutional provisions define clear hierarchies, specific to each subject-matter,[10] or that the criteria for balancing and ordering values have to be found without altering the equilibrium of the democratic State.[11]

So the original intent of constitutional framers makes it possible to place a clear boundary to interpretation of constitutional texts.[12] This gives the constitution a certain degree of adaptability, rather than rendering it a closed off universe of abstract rules.

Moving from the positions described above, I now wish to test the truth of Carl Schmitt's prophecy, given in his famous Ebrach speech fifty years ago, that the tyranny of constitutional values would eventually cause the State of legislation (*Legislationsstaat*) to become a State of jurisdiction (*Jurisdiktionsstaat*).[13] I also wish to verify whether, as he argued, the break of axiological unity in our

[8] J. Luther, 'Ragionevolezza (delle leggi)' *Digesto delle discipline pubblicistiche* (Torino: Utet, 1997), XII, 357.

[9] G. Scaccia, 'Motivi teorici e significati pratici della generalizzazione del canone di ragionevolezza nella giurisprudenza costituzionale', in M. La Torre and A. Spadaro eds, *La ragionevolezza nel diritto* (Torino: Giappichelli, 2002), 387, 409.

[10] A. Baldassarre, 'Fonti normative, legalità e legittimità: l'unità della ragionevolezza' *Queste istituzioni*, 60 (1991); Id, 'Esistono norme giuridiche sopra-costituzionali?', in P.G. Alpa, G. Benedetti et al, *Le ragioni del diritto: scritti in onore di Luigi Mengoni* (Milano: Giuffrè, 1995), 1686; Id, 'Miseria del positivismo giuridico', in G. Cocco, S. Rodotà et al, *Studi in onore di Gianni Ferrara* (Torino: Giappichelli, 2005), 201.

[11] S. Fois, ' "Ragionevolezza" e "valori": interrogazioni progressive verso le concezioni sulla forma di Stato e sul diritto', in A.S. Agrò et al, *Il principio di ragionevolezza nella giurisprudenza della Corte costituzionale. Riferimenti comparativistici* (Milano: Giuffrè, 1994), 103-118.

[12] M. Luciani, 'La libertà di informazione nella giurisprudenza costituzionale italiana' *Politica del diritto*, 605 (1989); Id, 'Corte costituzionale e unità nel nome di valori', in R. Romboli ed, *La giustizia costituzionale a una svolta* (Torino: Giappichelli, 1991), 170; Id, 'Lo spazio della ragionevolezza nel giudizio costituzionale', in A.S. Agrò et al, n 11 above, 245; Id, 'L'interprete della Costituzione di fronte al rapporto fatto-valore. Il testo costituzionale nella sua dimensione diacronica' *Diritto e Società*, 1 (2009).

[13] C. Schmitt, *Die Tyrannei der Werte* (Stuttgart: Kohlhammer, 1967).

multicultural democracies actually did bring about an entirely alternative form of legality, arising not from parliamentary Will but from judicial decisions: an apocryphal super-legality, as defined by the famous scholar.[14]

I shall contend that, although Schmitt's prophecy has not completely come true, as the apocalyptical effects he feared are still quite far from being achieved, it is indeed true that the value-oriented 'new' constitutionalism marks a shift of the law-making function in our civil law systems from political bodies to courts and reduces the gap between law production and law application.

Throughout history, civil law systems have been based on the principle of the primacy of collective public decisions over individual decisions in terms of rationality and moral authority. In the current situation, it is for concrete, individual decisions (both judicial decisions and contracts) to claim a primacy of a completely new kind over collective ones.

II. Crisis of Legislation and Rise of Judge-Made Law

From a general perspective, it is true indeed that when we deem that superior human values shall be constitutionally protected, we implicitly devalue the strength of legislation as a source of rationality and order. Conceiving human rights as eternal postulates of any society, unchangeable principles of any system of government, leads us to postulate a universally recognised 'meta-legality' which we might call a 'cosmopolitan legality', which appears logically prior to the very exercise of legislative power. Yet it is true that such a tendency[15] to go beyond the boundaries of political sovereignty leads to undervaluing written law, considered as a cultural and historically rooted product of a provisional political Will.

Furthermore, in multi-level integrated constitutional systems (such as the European Union or the Council of Europe) law must have a more flexible content as it is required to adapt itself to the different cultures, legal traditions and historical heredities of the various nations.[16] General principles open to broad interpretations by the courts are more likely to be enacted than fully structured pieces of legislation which leave no room for judicial discretion. This is the reason why judges gain considerable law-making powers, as they interpret extremely vague principles.

To sum up, the structural principles of the formal *Rechtsstaat* (legality, rule of law, separation of powers) were entrusted to legislation and political

[14] C. Schmitt, 'Die legale Weltrevolution' *Der Staat*, 335 (1978): '*Apokryfen Superlegalität*'.

[15] The 'universalistic illusion', as it is called by F. Ciaramelli, *Legislazione e giurisdizione* (Torino: Giappichelli, 2007), 96.

[16] As already mentioned in G. Scaccia, 'Controllo di ragionevolezza delle leggi e applicazione della Costituzione', in A.S. Agrò et al, *La ragionevolezza nella ricerca scientifica ed il suo ruolo specifico nel sapere giuridico* (Roma: Aracne, 2007), 286.

bodies. On the contrary, the core values of the constitutional State founded upon a multi-level architecture of governance (proportionality of administrative action and legal regulation; subsidiarity as a general rule for the State's relationships with territorial autonomies; human dignity), are likely to be better implemented by judges and non-political bodies.

In the traditional liberal State, the effectiveness of constitutional implementation matched its legitimacy perfectly, as the State's main legitimizing objective – the production of certainty – was achieved *through* written legal rules.

In the contemporary constitutional State, aiming for the more complete protection of individual rights and the full realization of ethical values, this coincidence is no longer obvious. Indeed, such individual rights or values receive their strongest protection at the expense of certainty. Not *through*, but sometimes *against* written law, then.

Within this perspective, formal positivistic rationality leaves space to material rationality, which could be better referred to as 'reasonableness'. Courts take to mean law according to the peculiar circumstances of each case, which may even be bizarre and unpredictable; and law is likely to be considered reasonable only if it is flexible enough to be adapted to any case. Somewhat paradoxically, the ambiguity and vagueness of normative texts become qualities, rather than shortcomings of a juridical rule. This is the reason why the Italian Constitutional Court has struck down, on occasion, certain legal rules as unconstitutional because they needed an automatic, wholly non-discretionary application (eg 'automatic penalties'). Such provisions would prevent judges from adjusting abstract regulations to the various situations of life,[17] making it impossible for courts to avoid inequities, at least in some circumstances.

While positivists have a formal idea of law and legality, we could state that the supporters of value-oriented theories argue for a more extensive protection of individual rights, beyond, and to some extent against, what is provided in formal written legislation.

The rationality of legislative procedures fails to provide guidance for good practices in politics, whereas rationality in legislative choices becomes more and

[17] See for instance Corte Costituzionale 2 February 1990 no 44, *Foro italiano*, I, 353 (1990), where, in cases of adoption, the Court allows a reduction of the maximum age difference between adoptee and adopting family; such a difference may be less than eighteen years if this is reasonable to ensure the constitutional value of the unity of families. Furthermore, in Corte di Cassazione 24 July 1996 no 303, *Giustizia civile Massimario*, 59 (1996) on the converse issue of the maximum age between adopter and adoptee, the Court expressly declares that it is not the rule that is questioned, but rather its inflexibility, which would appear to exclude any reasonable exception even when an exception would be in the superior interest of the adoptee and the adopting family, and is the only way of sustaining the adoption. Likewise, see the case law on absolute presumptions, which were deemed unconstitutional (Judgments 144 of 2005; 41, 283 and 401 of 1999; 195 and 239 of 1998; 1 of 1997); and the judgments on rigid mechanisms for determining sanctions, where judges are not allowed to impose a sanction that is adequate to the circumstances (Judgments 367 of 2004; 253 of 2003; 2 of 1999; 220 of 1995; 107 of 1994; and 297 of 1993).

more difficult to achieve, because of the increasing ethical and religious pluralism of our societies. These two phenomena further contribute to increase the production of law by judges.

At this stage, it is worth highlighting that law somehow aspires to a mimetic function: to permeate politics with its rationality. The very same *iter legis* is devised so as to purify proceedings from emotions and irrationality. Today, however, such a function seems to be vanishing: quite to the contrary, it is law that sometimes appears to adapt itself to the logic of politics.[18] Modern political communication snaps events into fragments. Any thoughtful approach is prevented by the preference for the *infotainment* style pursued by media; and facts and reflections hardly go together well. A similar logic appears to be increasingly dominant in legislative processes, too.

A piece of legislation, that is supposed to firmly regulate enduring relationships, often turns into a *slogan*, giving us breaking, quickly-forgotten news instead of durable facts; loud announcements of upcoming regulations, that are meant to be temporary, and revisable. Even at the highest level (in Italy even at the constitutional level, sadly), legislation follows *ad interim* standards, as it does not offer stability and certainty. With endless imagination, techniques aimed to elude the procedural provisions of the constitution have been shaped and perfected, a clear example being the dissolution of the notions of 'article' and 'paragraph' in recent budget laws, and the open frustration of the principle of genuine parliamentary discussion.[19]

Legislation does not seek to 'predict the future'/*Vorgriff zur Zukunft*.[20]

On the contrary the entering into force of a single legislative act is only the first step in a more complex and comprehensive process. Law does not emerge in any one moment: there is no single, specific place from which law is born.[21] The legislator is often aware of its limits and entrusts courts with a particular delegation, thus recognising that they have the power to selectively protect those interests which, in traditional political-parliamentary circuits, would otherwise be mistreated. As a consequence, Montesquieu's old formulation needs now to be amended, as judicial discretion is no more a side effect of the imperfection of legal rules, but an indispensable tool to integrate intrinsically defective legislation.

A similar effect comes out in judicial proceedings, where collective interests have come to be represented before courts through public bodies or private

[18] See G. Teubner, *La cultura del diritto nell'epoca della globalizzazione. L'emergere delle costituzioni civili*, Italian translation by R. Prandini (Roma: Armando Editore, 2005), 69, 132.

[19] I refer to practices such as legislation by means of delegated decrees, and adjusting delegated decrees for wide-ranging reforms; the modification or suppression of law-decrees before their entry into force; the intrinsic lack of homogeneity for articles with hundreds of paragraphs; the use of maxi-amendments coupled with the '*question of confidence*' that cuts standing committees off from parliamentary work and strongly limits parliamentary discussion.

[20] G. Husserl, *Recht und Zeit. Fünf rechtsphilosophische Essays* (Frankfurt am Mein: Klostermann, 1955), 55.

[21] E. Denninger, 'Il luogo della legge' *Nomos*, 15 (1997).

associations, thus emphasizing the courts' role as settlers of conflicts.

Nowadays, the crisis of legislation and the rise of judge-made law in many modern democracies, however, are principally due to the loss of cultural homogeneity in understanding ethical values.

According to the rationalist thought that emerged from the Enlightenment philosophy, legislation was able to convey the rational principles of justice through the action of democratically elected assemblies. Political representation was supposed to cover every single sphere of social action and to express the wishes of society as a whole. Legislation was considered fit to formulate a comprehensive synthesis of all relevant values.

Legislation has never been actually a faithful mirror of principles unanimously shared by society, hence ready to be implemented without any judicial involvement, as the prominent scholar Emilio Betti pointed out.[22] On the contrary, interpretation by judges and lawyers has always been (more or less) necessary to fill the gap between 'law in the books' and 'law in action'.

Nevertheless, Betti himself referred to a substantially homogeneous society with a common anthropology[23] in which the most important values were generally shared. Therefore, on the premise of a common cultural background, judicial interpretation ended up consisting of a mere bridging of normal legislative gaps and was far from being a true law-making activity. The high level of social cohesion gave legality peculiar strength and stability.

Today, this has proven to be untrue. Pluralistic societies show broad consensus on the procedural rules of democracy and the formal principles protecting liberties; but there is a persistent clash over the content of the substantive principles to be implemented, even the most important ones.[24]

Axiological unanimity has ceased to be a pre-political postulate in our individualistic societies, deeply fragmented by strong ethical and anthropological disagreement.[25] Collective bargaining cannot produce any steady cultural mediation into which legislation can sink its pre-political root, nor is legislation alone able to achieve this mediation. Nonetheless, constitutional values impose their 'pedagogical' power and legal force on politics as they are 'optimization

[22] E. Betti, *Interpretazione della legge e degli atti giuridici: teoria generale e dogmatica* (Milano: Giuffrè, 1949); Id, *Teoria generale della interpretazione* (Milano: Giuffrè, 1955).

[23] C. Schmitt, *Der Begriff des Politischen* (Berlin: Duncker & Humblot, 1932), Italian translation by G. Miglio, in P. Schiera ed, *Le categorie del politico* (Bologna: il Mulino, 2006).

[24] See J.H. Ely, *Democracy and Distrust. A Theory of Judicial Review* (Cambridge, Mass: Harvard University Press, 1980); F.I. Michelman, 'Law's Republic' 97 *Yale Law Journal*, 1493 (1988); Id, 'Bringing the Law to Life' 74 *Cornell Law Review*, 257 (1989); C.R. Sunstein, 'Interests Groups in American Public Law' 38 *Stanford Law Review*, 59 (1985); J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und desdemokratischenRechtsstaats* (Frankfurt am Mein: Suhrkamp, 1992), 516; on reasonable disagreement as a measure for constitutional control of legislation, R.H. Fallon, 'Implementing the Constitution' 111 *Harvard Law Review*, 56 (1997).

[25] F. Volpi, *Il nichilismo* (Roma-Bari: Laterza, 2009), 154.

imperatives', constantly claiming the best implementation. They are indeed 'unsaturated principles',[26] always requiring implementation which remains, in fact, not fully achievable.[27] Each value thereby fosters an increasing demand for legality (ie for law to be consistent with values) and boosts the need for regulation, while politics is unable to find a generally accepted compromise between the different constitutional values. As a result, that inadequacy raises the level of disappointment and distrust towards legislation.

In more ethically sensitive areas, where stable regulations are needed, legislation often leaves broad room for interpretation. This gives the judges discretion to select the most suitable norm to apply in individual cases, thus adapting law to the changing society.[28] When we move from the 'must be' to the 'must do' sphere[29] without the political intermediation of legislation, it is up to the judge to choose between two different options, each possibly representing a different *Weltanschauung*.[30] Different interests and forces, harmoniously coexisting within the same abstract values, claim actual and immediate implementation with reference to said values.

Then the conflict explodes before the court, which is required to arbitrate directly between abstraction and reality.

The experience deriving from that conflict gives foundation to legal reasoning more than dogmatic theories do.[31] The normative force of any value is to be measured case by case by balancing it against other values, and judge-made rules are created by cases, and following the cases.[32]

The process of weighing a value and comparing it with others entails remarkable discretion. This is implied in the very activity of grasping the content of a value. As Nicolai Hartmann points out:[33]

[26] J. Habermas, n 23 above, 516.

[27] N. Hartmann, *Introduzione all'ontologia critica* (Napoli: Guida, 1972), 149, Italian translation by R. Cantoni.

[28] H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (Leipzing: Deuticke, 1934), Italian translation by R. Treves, *Lineamenti di dottrina pura del diritto* (Torino: Einaudi, 2000), 118.

[29] A. Falzea, 'Efficacia giuridica' *Enciclopedia del diritto* (Milano: Giuffrè, 1965), XIV, 432.

[30] A. Longo, n 7 above, 116-128

[31] N. Irti, *Nichilismo giuridico* (Roma-Bari: Laterza, 2004), 5-9, suggests that any chance of a dogmatic order in legal science is lost, due to the lack of a conceptual scale preceding the object of the science itself.

[32] As argued by P. Perlingieri, 'Equilibrio normativo e principio di proporzionalità nei contratti', in Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 459. See also L. Mengoni, 'L'argomentazione orientata alle conseguenze' n 4 above, 452; Id, 'Il diritto costituzionale come diritto per principi' n 4 above, 95; F. Modugno, 'Principi e norme. La funzione imitatrice dei principi e i principi supremi o fondamentali', in F. Modugno ed, *Esperienze giuridiche del '900* (Milano: Giuffrè, 2002), 100; A. Ruggeri, 'Giurisprudenza costituzionale e valori' *Diritto pubblico*, 1 (1998); Id, 'Ragionevolezza e valori, attraverso il prisma della giurisprudenza costituzionale' *Diritto e società*, 567 (2000).

[33] N. Hartmann, n 26 above, 149.

> 'It is neither a "knowledge" in the proper sense, nor an objective grasping where the grasped object remains far-away from the grasper. It is more like to be grasped. The approach is not contemplative, it is emotional, and what comes from the contact has an emotional explanation. It is to take a stand on something through an emotional move'.

Values are open to the widest interpretative manipulation and, due to the lack of an abstract normative hierarchy in the Constitution, their ranking is the result of emotional intuitions, rather than Cartesian demonstrations.[34]

Denying an objective hierarchy leads to the *need* for a subjective one;[35] judges, not being able to free themselves from the obligation to decide the case under discussion, act as legislators in individual cases.

The toughest struggle, which Schmitt had envisaged as involving ideologies, interests and lobbies, is now between legislator and judges, both constitutional judges (who have been vested with the legitimacy and the techniques for dealing with these foundational values) as well as ordinary ones.

Then, values can be practical guides for judges in the construction of law, an aim that justifies the circumvention of the literal interpretation of legal texts; a way to achieve a certain level of protection for rights that are not recognized by a written law.

III. Judges Acting as Legislators: The Paradigmatic Example of the Human Dignity

The legal implications of *human dignity* as a supreme value provide a good example of the above illustrated effects.

The Italian Constitution does not place as much emphasis on the concept

[34] J. Finnis et al, 'Practical Principles, Moral Truth and Ultimate Ends' 32 *The American Journal of Jurisprudence*, 99, 110 (1987) contend that supreme values are '*reasons with no further reasons*', and cannot refer to any other criteria to be measured (dissent is expressed on this specific point by F. Di Blasi, 'I valori fondamentali nella teoria neoclassica della legge naturale' *Rivista internazionale di filosofia del diritto*, 209-245 (1999)).

Although they do not deny that some 'basic goods' or values are objective, they also recognize that those goods or values are in some cases incommensurable. For a useful difference between *incommensurability* and *incomparability*, see T. Endicott, 'Proportionality and Incommensurability', in G. Huscroft et al eds, *Proportionality and the Rule of Law* (Cambridge: Cambridge University Press, 2014), 321 who defines the former as 'the impossibility of measuring two considerations in the same scales'; the latter as 'the impossibility of finding rational grounds for choosing between two alternatives'.

[35] See J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), translated into Italian by F. Di Blasi, *Legge naturale e diritti naturali* (Torino: Giappichelli, 1996).

In T. Endicott, n 33 above, 332, 'the judges' power to balance the unbalanceable is not arbitrary (in the pejorative sense of arbitrariness that is relevant to the rule of law), where it is necessary, for good legal purposes, that judges should have that power'; so much so that 'The only viable argument in favour of proportionality reasoning in human rights adjudication is an argument of necessity'.

as other constitutions (Germany,[36] Spain,[37] Portugal,[38] Switzerland,[39] Sweden,[40] Finland,[41] South Africa)[42], or important international Treaties[43] do. Nonetheless, there is general agreement among scholars[44] that human dignity represents the most fundamental value, the premise of all liberties. The Italian Constitutional Court defined it as the supreme,[45] inviolable value, permeating the legal system as a whole.[46] This value is consistent with both Kantian rationalism and Catholic humanism. In practice, it has given rise to two opposite interpretations, one in favour of the right to a decent death, the other against it.

In the well-known case of a man whose daughter spent seventeen years in a vegetative state due to a car accident, and who asked for authorisation to interrupt her artificial nutrition in his capacity as her legal guardian, two diametrically opposed conceptions of human dignity emerged. The Court of Appeal of Milan maintained an absolute, or objective, idea of dignity as an attribute of the right to life, a predicate of it, and thus inconsistent with the annihilation of life. On the contrary, the *Corte di Cassazione* (the Supreme Court for civil and criminal matters) upheld a subjective conception of dignity as individual perception, gaining the conclusion that a 'de-humanized' life is

[36] Art 1, para 1.
[37] Art 10, para 1.
[38] Art 1.
[39] Art 7.
[40] Art 2.
[41] Art 1, para 2.
[42] Art 1.
[43] See the Preamble of the Charter of the United Nations signed in San Francisco on 26 June 1945; the United Nations Educational, Scientific and Cultural Organization (UNESCO) Constitution adopted in London on 16 November 1945; the Universal Declaration of Human Rights adopted and proclaimed by the General Assembly of the United Nations on 10 December 1948 (Preamble, Arts 1, 22, 23); the Preamble of the International Covenant on Civil and Political Rights adopted by the General Assembly of United Nations on 19 December 1966; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment signed in New York on 10 December 1984; the Covenant on the Rights of the Child signed on 18 November 1989; the Preamble of the United Nations' Vienna Declaration adopted on 25 June 1993; the Oviedo Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine), signed on 4 April 1997 (Art 1).
[44] *Ex plurimis*: C. Amirante, *La dignità dell'uomo nella Legge Fondamentale di Bonn e nella Costituzione italiana* (Milano: Giuffrè, 1971); F. Bartolomei, *La dignità umana come concetto e valore costituzionale* (Torino: Giappichelli, 1987), 15; P.F. Grossi, 'Dignità umana e libertà nella Carta dei diritti fondamentali dell'Unione europea', in M. Siclari ed, *Contributi allo studio della Carta dei diritti fondamentali dell'Unione europea* (Torino: Giappichelli, 2003), 43; F. Sacco, 'Note sulla dignità umana nel "diritto costituzionale europeo" ', in S. Panunzio ed, *I diritti fondamentali e le Corti in Europa* (Napoli: Jovene, 2005); A. Pirozzoli, *Il valore costituzionale della dignità. Un'introduzione* (Roma: Aracne, 2007), 67; M. Di Ciommo, *Dignità umana e Stato costituzionale* (Firenze: Passigli editori, 2010).
[45] Corte costituzionale 31 January 1991 no 44, *Giurisprudenza costituzionale*, 294 (1991).
[46] Corte costituzionale 17 July 2000 no 293, *Giurisprudenza italiana*, 668 (2001); see Consiglio di Stato 9 November 2005, opinion no 3389, available at https://tinyurl.com/y9uxehh8 (last visited 15 June 2017).

only a 'pure biological process',[47] that can no longer be considered a decent life. Therefore, it can be suppressed *in the name of* human dignity, by simply withholding the medical assistance required to preserve life.

As we can see, the judicial interpretation of human dignity encompassed the entire range of alternatives, from the protection of the right to live to the right to legal authorisation of a lethal act. This is hardly surprising, actually: judicial application of human dignity in Germany and France as a communitarian (not only individual) value, to be protected even *against* someone who gave his or her consent to be employed in *undignified* activities,[48] made it clear that such a fundamental value can alter the balance of powers between constitutional and ordinary courts, and also between legislator and judges.[49]

A case discussed before the Regional Administrative Tribunal (TAR) of Tuscany in 2000 is an example in point. The case concerned a request for an authorization to build a house with special exercise and sanitary facilities to be used by a wholly and permanently disabled person. The authorization was refused by the administrative authority on the grounds that no provision in law, and in municipal building regulations in particular, allowed such construction. When the Court considered the case, it found indeed that no legislative norms allowed such structures. Thus, the motivation given by the administrative municipal authority was (to quote literally) 'logically perfect'. However, the Court argued, on the basis of a systematic interpretation of the law protecting disabled people (statutory law 5 February 1992 no 104), and in light of its art 1 especially (according to which the Italian Republic warrants full respect of the disabled and their freedom and 'autonomy' and acts to remove obstacles that prevent them from achieving the 'highest level of autonomy'), that it was possible to conclude that the administrative act in question was illegal, though formally perfect. Indeed, it was unable to satisfy the high thresholds of adequacy

[47] Corte di Cassazione 16 October 2007 no 21748, *Foro italiano*, I, 125 (2008). See commentaries in F. Gazzoni, 'Sancho Panza in Cassazione (come si riscrive la norma sull'eutanasia, in spregio al principio di divisione dei poteri)' *Il diritto di famiglia e delle persone*, 107 (2008); G. Anzini, 'Consenso ai trattamenti medici e "scelte di fine vita" ' *Danno e Responsabilità*, 957 (2008); F. Viganò, 'Riflessioni sul caso di Eluana Englaro' *Diritto penale e processo*, 1039 (2008); A. Proto Pisani, 'Il caso E.: brevi riflessioni dalla prospettiva del processo civile' *Il Foro italiano*, 987 (2009); P. Becchi, 'L'imperialismo giudiziario. Note controcorrente sul caso Englaro' *Rivista internazionale di filosofia del diritto*, 379-391 (2009), it is noteworthy that in 2008 Becchi edited an Italian translation of Schmitt's '*Tyranny of values*', referred to above. As for constitutional lawyers, see S. Spinelli, 'Re giudice o re legislatore? Sul conflitto di attribuzioni tra potere legislativo e giurisdizionale a margine dell'ordinanza 3334 del 2008 della Corte costituzionale' *Il diritto di famiglia e delle persone*, 1488 (2009).

[48] In Germany, for the exhibition of female bodies in 'peepshows', see BVerwG, 15 December 1981 *NJW*, 664 (1982); in France, for the well-known case of 'dwarves-throwing', see Cons. État, Ass., 27 October 1995, *Ville d'Aix-en-Provence*, in *D.*, 1996, jur., 177.

[49] On that specific point see G. Resta, 'La disponibilità dei diritti fondamentali e i limiti della dignità (note a margine della Carta dei diritti)' *Rivista di diritto civile*, 801, 845, fn 107 (2002).

and justice applicable in the protection of human dignity. Therefore, the Administrative Court stated that in such a specific case,

> 'it appears reasonable and (perhaps even) appropriate to understand all relevant rules in such a way as to not forbid the kind of intervention required by the claimants'.

In the above mentioned case, human dignity plays the role of a corrective criterion for interpretation, similar to equity. The example makes it clear that the implementation of constitutional values, which are nothing more than the translation in written legal rules of principles of natural law, could foster interpretations falling beyond the scope and text of legislative acts (at least apparently). Thus bypassing the judges' duty to be subjected to written legislation and distorting the proper significance of the Italian constitutional control of legislation, which is reserved to one court alone: the Constitutional Court.

Summing up what has been explored up until now, we can conclude that in ethically pluralistic societies, value-made law finds its rationality in the practice of lawyers and in judicial decisions especially, thus casting into doubt one of the very pillars of any civil law legal system: the commonly accepted supremacy of general and abstract collective deliberations over individual decisions (judgments as well as contracts). Indeed, the practical rationality of the legal system is likely to be increasingly sought in individual cases, rather than in the system considered as a whole. Hence the value of justice, traditionally intended as an objective principle referred to the entire legal system, could become a subjective parameter, which impinges not only on the degree of social acceptance of legal rules, as in the past, but on their very aptitude to bind. Their validity, in a word, as laws are likely to be unfit to strike a reasonable balance between the interests at stake for each possible case – even the most unpredictable and extravagant – and they can be censored before the constitutional Court as 'unreasonable' or 'disproportionate', and therefore voidable.

IV. How to Reduce the Politicization of the Judiciary Branch?

Judges have a clearly defined mission: doing *justice* according to *law*. However, constitutional law gives a normative form to values, which can lead to multiple and even opposite results, when practically implemented. Therefore, the stark alternatives available to judges appear to be the following: either to strictly respect formal legality and apply unjust rules, or to stretch legislative boundaries in light of Constitutional law, European law and European Convention on Human Rights law to prevent the application of rules thought to be unjust.[50]

[50] Today, courts are bound by the duty to seek a consistent interpretation of the legislation on which they wish to submit a question to the Constitutional Court, in relation to both

Sometimes endorsing interpretations going far beyond the literal wording of the law (*littera legis*).

This dilemma is hardly a hermeneutical one. It asks an ethical question. For constitutional lawyers, a question of legitimacy. For it is clear that if we deeply involve judges in the law-making process, the risk of depriving the judiciary of its constitutional foundation arises, at least in civil law-based legal systems.

On the one hand, Montesquieu's doctrines of cognitive interpretation and the ethical neutrality of the interpreter are outdated, especially after Hans Kelsen's fundamental works,[51] and can be considered valuable merely as rhetorical affirmations. The bureaucrat-judge who simply applies legal texts and cannot create legal rules no longer exists. The opposite is often the case, as the judge, instead of acting as '*bouche de la loi*', acts as a '*maître à penser*'[52] who interprets with broad discretion the ethical-political meanings of written laws in competition with the legislative Will determined by representatives.

On the other hand, fostering open, case-oriented, creative interpretation to enhance the judicial protection of human rights would also have difficult constitutional implications. Judicial legitimacy in fact would rely on *justice*, more than on *law*. This theory[53] wouldn't be in accordance with the Italian Constitution, that presupposes a different role of the judge and the forms of constitutional review of legislation.

As for the former, art 101, para 2, Constitution, states that 'Judges are subject only to the law', meaning that they are *not subject to* (therefore they are *independent from*) all other constitutional power and, at the same time, that they are not allowed to go beyond the application of written laws by endorsing overly creative interpretations, thus giving birth to legal rules.

As for the latter, Italian judges cannot refuse to apply laws even if they infringe constitutional principles, but may only ask the Constitutional Court to be released from the obligation of applying unlawful laws.

It is fair to say that the ethical neutrality of lawyers and judges is no more than a romantic illusion. Contemporary value-based constitutionalism, in fact,

constitutional (Judgment 356 of 1996) and Community law (Judgment 190 of 2000). If such a duty is not fulfilled, the question before the Constitutional Court is rejected as inadmissible. But at the same time, this duty casts a shadow on the strength of legislation to compel judicial choices. For a clear comparison, see the European Court of Justice's decision in C-106/89 *Marleasing* v *Comercial Internacional de Alimentacion Sa* (European Court of Justice Sixth Chamber 13 November 1990) available at www.eur-lex.europa.eu.

[51] H. Kelsen, n 27 above, 117-121

[52] G. Bongiovanni and G. Palombella, 'Frank. I. Michelman e il significato della democrazia costituzionale', in F.I. Michelman, *La democrazia e il potere giudiziario* (Bari: Dedalo, 2004), Italian translation of F.I. Michelman, *Brennan and Democracy* (Princeton: Princeton University Press, 1999), 10.

[53] American realism, even in its moderate version, such as that expressed by A. Barak, *The Judge in a democracy* (Princeton: Princeton University Press, 2006).

needs to be rethought, together with a re-definition of the theory of judicial power, in line with the new function that it is called upon to perform. It is indeed doubtful that, as Ernst Forsthoff said,

> 'one will succeed in rendering the bureaucrat-judge a prophet only by placing the crown of the creator on his head'.[54]

How, then, to make it possible for judges to 'wear the crown' without their being charged with lacking the legitimacy to compete with the legislator in the rule-making process? How to prevent judges from proposing legal policies in conflict with those of the legislator? How to minimalize, at last, the *politicization* of the *apolitical* judiciary branch?

A reasonable way of reducing this permanent tension is more likely to be found by reasoning on the constraints deriving from the multinational integrated system of protection of rights, which Italy is part of, than by proposing constitutional amendments aimed at reducing the independence of the judiciary from political bodies or even at politicizing the judiciary, by means of the popular election of judges.

The legitimacy of the courts (and of judgments) is a form of instrumentally rational legitimacy. A given judgment is correct, Carl Schmitt noted, 'if it can be assumed that another judge would have decided the same way', meaning for 'another judge' not only courts, but in general 'the empirical type of the modern, legally learned lawyer'.[55] To reduce as much as possible the indeterminacy of judgments, then, decisions must be standardized and interpretations of law homogenized. When the decision is checked and scrutinized by a number of independent legal experts, it proves to be deeply rooted in the legal practice of a given communitarian context, and not be caused by political prejudice and partisanship.

This is precisely the long-term effect of the integration of the Italian courts in the multilevel system of protection of fundamental rights. Thanks to that integration, the time has come to admit frankly that the constitutional principle stating the subjection of judge 'only to law' (meaning only to written laws) has been implicitly, though profoundly, redefined. At present, judges are not only subject to written laws drafted by representative legislators, but also to judge-made law coming from the European Court of Human Rights and the European Court of Justice. Pursuant to art 117, para 1, Constitution,[56] these legal rules, literally created by those Courts, prevail over internal legislative acts and must be applied and implemented as such by Italian judges, even though with a

[54] E. Forsthoff, *Rechtsstaat im Wandel* (Stuttgart: Kohlhammer, 1964), Italian translation by C. Amirante ed, *Stato di diritto in trasformazione* (Milano: Giuffrè, 1973), 243.

[55] C. Schmitt, *Gesetz und Urteil* (München: Beck Verlag, 1969), 71.

[56] 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations'.

margin of appreciation in fulfilling their obligations. They have to deal with the legal reasoning and the different interpretations proposed by the named international Courts, if they do not want to see their decisions challenged.

As a result, this very dialogue and confrontation between judges, while freeing Italian judges to some extent from the limit of the written legal rules, allows them to interpret laws in the light of the binding decisions of the 'higher Courts'. At the same time, it restrains the single-judge's creativity in construing the rights at stake, by forcing him to take into account the well-established supranational (European Union (EU) and European Court of Human Rights (ECHR)) case-law. In this way, the rational legitimacy of the judgment is strengthened and protected from charges against the judges of political motivation or bias.