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Legal Decision vs Security State in the social need for political sovereignty of the globalised constitutional state

di Francesco Petrillo¹

Sommario

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Abstract

Legal positivism of modernity, built on the will of the legislature, is today an interesting issue, considering its differences with logical legal positivism, because it is based on a political decision. Being constructed on a willed decision, it is intertwined with the need for constant recourse to the courts of justice to settle pre- or post- legal questions, regarding radical anthropological or existential problems of one individual or of the whole society. The studies on legal decision-making help us also to better understand recent security legislation, in some countries - including European countries - against terrorism, without any opposition from national and supranational political and legal systems.

¹ Il presente lavoro è stato sottoposto a referaggio secondo la *double blind peer review*.

1. Legal Decisionism and Legal Hermeneutics. Indications as to a possible debate.

Carl Schmitt has stated clearly that legal decisionism is closely linked to legal positivism though not with the formal logicism that has emerged from research by his antagonist, Hans Kelsen (Schmitt, 1972: 265). Legal hermeneutics, on the one hand, as a sceptical interpretation of legal interpretation, has a clearly stated approach, closely aligned to classical, positivistic legal science, hinged on the will of the legislature, rather than analytical-logical legal positivism which distances itself from the will of the legislature (Betti, 1990: 846 ss.; 1971: 312 ss.).

Carl Schmitt's political and legal decisionism is however, a far cry from Emilio Betti's legal- gnosiological decisionism. The only common element shared by the two approaches to the study of law is the awareness of being a part of the legal-positivistic tradition, built upon the will of the legislature, and the foundation of philosophical history. In the face of closed codifications and formalised systems there is no other choice than that of <<denying a systematic, legal science in its own sense [... and recognising that] every argument in the science of law is none other than a potential basis for decisions, awaiting a case of conflict>> (Schmitt, 1972: 265 ss.). The transformation of an idea of law into an idea of legality (Schmitt, 2005) creates, as a congenital situation to the legal system, a continual quantity of conflicts of interest and therefore concrete disorder that requires sovereign decision-making so it may be brought to a conclusion. In this perspective, nineteenth-century legal positivism must find, through legal-political decisionism, its natural conclusion in the possible integration of positivistic and decisionistic thought, in order to guarantee the survival of the system. Only the decision-making aspect allows for the moderation of the <<hypocrisy>> of law – just as claimed in the normativist perspective – to the will of the political legislature and

therefore to a moderation of extreme logicism in which, for Schmitt, legal positivism falls into absolute normativism.

Legal-gnosiological decisionism, born of Gentile's and Croce's historical materialism- upon which is conceptually built Betti's legal hermeneutics- rather than dialectical materialism, attempts in reality to incise the unhealed wound of the positivism of the modern tradition. It attempts to overcome the dualism: the will of the legislature (which decides generally and abstractly)/will of the judge (who decides concretely and in particular), bringing into discussion the spatial and temporal limitations of positive law and attempting to explain the a-spatial or meta spatial of a-temporal or intemporal dimension (Hartmann, 1963; 1970; 1975) of the will of the legislature and the judge. This is an attempt to single out, from its premises, in actual legal ordinance, a sense of the gnosiological-decisional power of the judge's judgment or of jurists in general, not only when established by law which legal-political decisionism requires for <<professional state judges and lawyers organised within a legal framework of this type>> (Schmitt, 1972: 265 ss.), allowing legal positivism to conserve the diachronicity and diatopicity of law.

In Schmitt's decisionism, the power of political decisions, while unmasking the ideology of axiomatic-deductive logic, which derives from normativism, permits legal positivism to safeguard its inescapable, historical content, that which determines legal organisation as a concrete historical fact (Capograssi, 1959), based, according to Schmitt's political theory of sovereignty, on the sovereign decision to put an end to a pre-social state of exception and also to post-social, pre-legal and post-legal states. This is because sovereign power is not the result of the contract on which the state bases itself but on the possibility, the presumption of the guarantee of a legal organisation that exists thanks to the state. Schmitt has stated clearly that political-legal power comes from the

sovereign power of general consensus, but *it is the sovereign (power) that this power is to guarantee*.

Although Betti's legal hermeneutics contain traces of Schmitt's decisionism, especially in the arguments criticising normativism, relevant differences remain between their approaches to the legality, and are of a structural and a functional type.

- 1) The decisional aspect of legality will never derive from the hermeneutic-legal approach of political-theoretical presumptions. It will never be political authority which establishes the basis of the right to decide, this latter, if anything, will be useful for establishing the need and the aim.
- 2) Betti's legal-hermeneutics decision (Petrillo, 2005), in relation to Schmitt's political decision, will never make moves towards legislative-political construction because it is, in a sense, anti-modern since its approach to law excludes the need for law. This latter presents itself solely as a further eventuality for reflection on law, not as a conceptual synthesis (Schmitt's legal decisionism), nor as a reductionist mode of expression (normativism).
- 3) The operative dynamic of the decision, in the relationship between legal decisionism and legal hermeneutics, makes clear that while the former tends to emphasise the capacity of law to stabilise political disorder, the latter claims that it is able to guarantee the stability of the political system within the ethical tolerance possible in the judgment of the jurist.

2. Legal Decision-making and De-statehood

Although any discussion on the Constitution (Omaggio, 2015) may find its *ubi consistam* in the arguments on the legal organisation of a state, it should be emphasised that, maybe paradoxically, particular interest lies, regarding constitutional

interpretation, in the inter-relationships and connections between legal interpretation and denationalisation and de-statehood, which have characterised the contemporary world since the end of the Second World War.

Particular relevance is always apportioned, in any thematic study on constitutional interpretation, to the conceptual difference between state and nation (Fioravanti, 1979; 1991: 325-350), especially in order to adequately describe the conceptual diversity between internationalisation and interstatehood (Bergholz and Peczenick, 1999).

Internationalisation does not regard the matter of the state (Petrillo, 2014). It stems from legal-naturalistic concepts, or rather, legal rationalistic concepts, from modernity and not from contemporaneity. These latter concern the relationships between states, regulated by a supranational law, originating and developing from interstatehood (Schmitt, 2005) and not from internationalisation (Campbell, Tomkins A. and Tomkins E., 2011).

However, since the concepts of state and statehood are in crisis, just as the concept of sovereignty, in contemporary times, is in crisis (AA.VV., 1996; AA.VV. 2000; Butler and Chakravorty Spivak, 2009) - from these same bases - taking into account the diversity between the concept of nation as state and the concept for state as nation, attention should be given to how the operative law between states is more and more defined in the conceptualisation of a de-national law rather than a supranational or international law.

A de-national law may be just a de-state/ or de-statalised law, that is, a law that through its substantial rather than formal nature (Catelani, 1998; 2014), does not stem from the illuminist-positivistic concept of law but rather is identifiable through *its provision for a series of protections, to be evaluated case by case and concerning individual and collective legal decisions* (Dworkin, 1985). This law is

the only one to be applied in relationships between citizens belonging to different legal systems, though circulating in various states when these persons, precisely because of the matters governing interpersonal, legal relationships, cannot ask for, with the exception of agreements between states unable to resolve legal problems of a generally theoretical type – the application of the laws of the states to which they belong. This is the only applicable law by the international Courts of justice, which, on account of their structure and nature, must set themselves apart from single states and in most cases must – otherwise they would have no reason to exist – face judgments that cannot be resolved, taking simple recourse to the laws of the states from which they come from. States which have jointly conferred to the courts, the power to settle controversies between their citizens and citizens of other states (Hirschl, 2011). Constitutional interpretation currently succumbs to the influx of interpretation of the law stemming from globalised de-statehood:

- 1) as much because this could concern the rights of individuals amongst themselves, excluding the laws of their own states;
- 2) as much because it could affect public law, particularly inherent to judgments concerning the internal organisation of these states, these states in relation to one another and the relationships between the states and all public and private subjects, citizens and foreigners in continual relationship with their territorial administration.

The decisions in such matters require a model of interpretation of law well beyond mere interpretation of the law, in which the judges fulfil an exclusive role in interpretative activity and the subject of this interpretation, in-temporal

and circumscribed spatially, cannot be excluded, at least in the first instance, from legal norms.

In the absence – at least in the aforementioned legal situations – of statehood and the consequences of law, an interpretation whose exclusive aim is to interpret would seem to be manifestly insufficient.

An interpretation of rights certainly requires competence and knowledge different from interpretation of the law.

If the analytical-logical interpretation is argumentative and feasible for law, as it is based on legal codes and documents for its reasoning, it is certain that it will not succeed – without including irresolvable problems in its reasoning when it measures itself against current legal realities – in taking into adequate account de-statehood, de-positivised, axiological and deontological legal value-principles essential to legal interpretation that is not dependent on legal statutes.

This is commonly found in the constant comparison with the most recent Italian and foreign constitutional jurisprudence (AA.VV., 2016; Arajärvi, 2007; Bergholz and Peczenic, 1999; Bogdan, 2010; Carlson, 2013).

The problem of values interpretation (AA.VV., 2007) cannot be simply resolved by saying that the values to interpret might have their own colloca-tion within interpretation of the law since it is of normative derivation, especially considering the fact that temporally, these come before norms, otherwise the norms would have no reason to establish them. Nor can it be resolved by saying that the constitutional norm is different from other legal norms, as for example the Highway Code, *Codice della strada* (Pino, 2010: 127-142).

Following these views constitutional interpretation has seemed for a long time to oscillate between two different possibilities:

- a) either the constitutional provision is a legal norm and the Constitution should be interpreted like any other legal document (Guastini, 2004, 2011);
- b) or the constitutional provision is not only a legal norm and may be considered a possible extension of a pronouncement of values to be interpreted. The constitutional Charter consequently cannot be interpreted like any legal document.

This has been observed, from a hermeneutic-legal point of view (Betti, 1979; 1990, 1991), but the question is not asked. Constitutional interpretation can be of a normative type, but might also require a non-normative type approach. It may be necessary to have a method capable of taking into consideration as much the normative dispositions as the factual values.

Recent neo-constitutionalist theories, though fashionable, ignore the prickliest thorn in constitutional interpretation and especially *compliant constitutional interpretations*, in other words, one which emerges as a rebuttal. They do not take into account, maybe because of a strong Anglo-Saxon influence, that Italian doctrine of the 1950s had already faced such problems which in some ways were new to our legal culture.

It has always been clear in continental, theoretical-legal perspectives, how little weight *axiological* constitutional dispositions have – when they express value, even *pre* or *extra* legal - but rather the values are axiological when they are understood in themselves. The latter, just because they are axiological, are not normatively connotable. Legal norms fail to express themselves fully, having always to restrict themselves, considering their extensions and their possible deployment in practical reality.

To insert values within a constitutional interpretative judgment therefore, one has to force

through the need for their normative connotation almost like a *contradictio in terminis*, not considered for the exclusive end of justifying value interpretation as normative interpretation. This because values precede norms, in the sense that they pre-exist and their being included, often, in a vague manner in constitutional norms, explains why norms cannot connote them since they do not contain them. They cannot be abstracted and generalised in order to interpret them, but rather they have to be interpreted, overlooking their normative connotations and their abstraction and generalisation since they can have their particular concrete dimension. The problems posed by the polemic between Herbert Hart and Ronald Dworkin (Hart, 1965; Dworkin, 1982; 2009; La Torre, 2003; Ferrajoli, 2007) were already resolved at the end of the 1950s by Italian legal doctrine (Caiani, 1954; 1955:163-169), following fairly precise theoretical guidelines:

- a. 1.) Values cannot be normatively connoted because their capacity of extension and expression is such that they elude the connotative capacity of the legal norm. They regard a generality of cases, in themselves, wider than that of the legal norm. For this reason it is contradictory, for post-normative theory, to think that the inevitable will happen, that is, that the norms connoting constitutional values can be axiological and evaluative, when:
 - 1. a legal norm cannot be, for normative theories, evaluative;
 - 2. a legal norm, cannot be, for the same theories, axiological, because axiological is perhaps the value that it seek to connote.

b. 1.) Values cannot be abstracted from norms since, preceding norms themselves, they can also deal with particular and concrete cases, which elude normative abstractedness. One particular value, not in all circumstances, must depend on or submit to a general value. A case by case assessment is always necessary, which is impossible for normative connotation given its general and abstract nature.

The hermeneutic-legal decision is however considered, in relation to the decision following an interpretation of the law, within the phenomenological perspective of an interpretation of law, capable of ignoring normative premises connoted with the aim of deciding legally. The problem becomes not so much that of right decisions according to the law, since one cannot always make reference to laws, nor that of decisions according to justice, which is not of this world, as not only jurists know... but rather – as our constitutional legislature has included and ruled¹ – that of the right method with which to proceed to a decision (d'Alessandro, 1991: pp. 5-17), not the method for seeking the truth, rather the search for the truth of the method.

The hermeneutic-legal theory proposes itself as an *ad hoc* method for constitutional judgment. Being as it is filled with interpretative criteria from Roman law, from medieval *hermeneutica juris*, as well as from German romantic hermeneutic philosophy – aimed at discerning human sciences from the activity of non-scientific man – it offers interpreta-

tive and argumentative perspectives based on axiological and deontological premise which the superior Courts of justice and particularly the Constitutional courts can no longer overlook². Which methodology for the interpretation of law, used in place of a merely analytical- logical or argumentative-logical analysis of the law, opens an enormous door in a thick, seemingly impenetrable wall and possibly harmonising *Common Law* and *Civil Law*. It slowly wears thin the demarcation between comparison and interpretation, according to the teachings of Tullio Ascarelli (Ascarelli, 1952; 1959). It overcomes, *in nuce*, the merest consideration of the polemic between Herbert Hart and Ronald Dworkin.

The hermeneutic canon allows an interpreter to reject an exclusive approach to the normative document and to concentrate specifically on an analysis of the legal activity, to go beyond the parameters between rule and document and to occupy themselves, at the same time, with the completed legal act, the act during its execution, as well as the consequences of its effects in a broad and comprehensive way.

The application of hermeneutical canons, which ally themselves methodologically with normative dispositions, allows for the guarantee of a way to proceed exhaustively in judgment, substituting the abstract logical procedure of indictment or subsumption, which, in the absence of spatial/legal system limitations and an in-temporality of law –which is in fact missing, since the reference to a precise legal system, limited by its confines – guarantees any definable judgment as being legal

¹ The first clause of art. 111 of the Italian Constitutional charter, introduced by art. 1 of law cost. n. 23 November 1999, n. 2, very precisely, raising it to the rank of constitutional principle of our legal system, adhering in practice to the basic need for a hermeneutic-legal type of general theory, the change of interest perspective between a trial based on law, aiming to guarantee the myth of distributed, ideal justice and a trial based on law, aiming to

guarantee the means rather than the ends, the correctness of the interpretative method rather than the achievement of justice.

² Cfr., on the question, the sentence of the Italian Constitutional Court of 12 March 2010, n. 93, on the issue of due process ex art. 111, the first comma of our Constitutional Charter. Such a sentence is a clear application of the hermeneutic-legal methodology by our Constitutional Court.

and not only political. The decision of such a judgment is, in fact, legal:

1. because it is not just considered as an act of cognitive interpretation, but also as an act of will, where the decision on the normative document moves from a merely gnoseological approach;
2. because it is not built exclusively as an act of will but also as an act of knowledge, where the political decision is characterised, instead, for being an act of will capable of being excluded from cognitive analysis; in fact for having no need of one.

The hermeneutic method therefore allows for a legal judgment able to go beyond just a “reading” of the normative provision, and also to analyse the possible application of the principles of law, as well as going beyond the peremptory discretionality of the judge (Stolleis, 2007; Bartole, 2008), never completely aborted, in the history of the application of law (Nobili, 2009), if not by illuminist, jus-positivist, jus-normative mythology. And the hermeneutic canons of this method permit a judgment which is not so much internationalised as de-statalised; available for deciding the legal point of view regardless of delimited spatiality and of systemic in-temporality. Therefore, the presupposition of the hermeneutic canon is precisely the question of space-temporality, a question not so much philosophical as legal.

Pre-understanding and *circularity* make up the substantive and constituent substance of interpretative canons defining a judgment aimed at guaranteeing the right method, rather than a method for justice or a right decision, because the existence of criteria in proceeding towards a judgment

becomes a guarantee of the judgment itself, though in different perspectives depending on whether they are taken into consideration by private attorneys – triadic or dyadic circularity - (Mengoni, 1996; 1999:353 ss.) or public attorneys- triadic circularity - (Modugno, 2009).

There are evident differences between pre-understanding and circularity, such as premises of this methodology, originating for the interpretation of law (*quid juris*) and setting themselves up, only in a second instance, as a philosophy of law (*quid jus*) and the so-called neo-constitutionalist theories, born as theories of cognitive analysis of normative production and then put forward as interpretative methodologies.

In these latter cases, the evaluative instances prevail over the method merely as a means. Their proceeding is resolved in a teleology of justice, resulting in value judgments – for example for constitutional value (Barberis, 2011: 233) – so much so that there distancing from analytical jus-positivism lies precisely in the negation of the thesis of reparability between law and morals, founding legal positivism. In the circular and pre-understanding, hermeneutic method, it is natural and does not pose the question as a forcing of the inseparability of law and morals, as also between law and nature and law and history (Torben, 2007)

The one determining a final evaluation of a judgment is the collectivity of interpreting spirits, which in its turn is interpreted and reinterpreted and able to evaluate the existence of validity, not merely the legal content but rather the formality of the judgment. In this is the real sense of the scientific community of jurists: a sense that is not only dogmatic, nor just historical but rather legally validating that *interpretation in normative function*, which is legal interpretation. The discretionality of the interpreting subject, for example – in the end however recognised by neo-constitutionalist theories – has never been denied here.

And more. The possibility of its regulation and control is built on its non-negation.

The legal decision is always posed as a reinterpretation. The object speaks to us through the spirit of the subject which is already occupied by it. And while artistic, musical, theological and literary interpretation can, perhaps, do without it, the interpretation of law is forced to ask a further question, what is the object of legal interpretation? *Rectius*: is an object the object of legal interpretation?

It would seem evident, even to the most inattentive jurist that the object of legal interpretation is certainly the interpreted subject, since whoever interprets law decides on the activity, on the history, on the life of a man like himself, with whom he is in absolute circular continuity.

Legal interpretation is manifested as the construction of thought and the direction of the will of the interpreting subject, but also as the overall consideration of the activity undertaken by the interpreted subject.

In the absence of the existence of *circularity*, as with *pre-understanding*, not only must one deny the assess ability or the validity of the judgment, that is, the content of the judgment is to be considered non-legal or non-moral, but actually, the correctness of the procedural realisation of the judgment. One must declare not its content invalid but the judgment itself; not its decision but the interpretative procedure concluding in that same decision.

At this level of reasoning, we can fully understand, at the heart of constitutional interpretation, for example to give a hermeneutic meaning to the constitution, in constitutional hermeneutics (Petrillo, 2011: 202 ss.), the difference, intertwined with hermeneutic-legal methodology, between the possibility of full circularity (dyadic) – which interprets the law regardless of the normative document – and that of mediated or partial circularity (triadic) – which accepts the normative doc-

ument because of its constituents but not as a resolution or exclusive- such as the possible premises of legal reasoning.

3. The role of Constitutional Interpretation.

On the issue of de-statalised interpretation, this strongly affects constitutional interpretation because the study of constitutions has for a long time gone beyond the logic of edification of state legal systems. Constitutional judgment (Tronconi Reigada, 2013), not only concerns the norm/individual relationship but also the principle legal/individual relationship is shown – at least when it decides on the conformity of the law to the Constitution, providing an in-depth interpretation of the law itself, in unresolved sentences - as a teleological and axiological judgment.

It is not by chance that the tool of hermeneutical-legal theory *par excellence*, used in the heart of constitutional judgment is the tool of the fundamental principles of law. And it is not by chance that hermeneutics methodology, applied to the Constitution, clearly distinguishes itself for those argumentative methodologies which aim to single out the axiology and the teleology of norms, holding that the judgment is not axiological but it is the constitutional norms themselves which are axiological, as premises bound to legal reasoning.

The formal premises of legal reasoning, in hermeneutical methodology, are however, *pre-understanding* and *circularity* and explain the stypic relationship between the fundamental principles of law and human collectivity – as has been well stated (Cervati, 2010: 139-180) – suitable for showing the relevance of the institution of principles on the issue of constitutional interpretation.

Precisely for the activity of constitutional-legal interpreting, it has been proposed to give importance not to the logic of the text but to the text as an unfinished project able to acquire completeness only with interpretation, through an axiological and teleological perspective (Benedetti, 2006; 2010: 11-16).

Despite being on the side of legal-constitutionalist doctrine, linked to the positivist theory of modernity, it still tends to exclude founding importance of principles in favour of rules which are to be found in normative dispositions like, for example that in Art. 12 of the Preliminary dispositions or *Pre-laws* of the civil code (Pace, 2007: 83-113), and to use, consequently, the interpretative canons (literal, logical, systematic, historical) of traditional, legal dogmatism, but not to those hermeneutical canons applying to the subject, besides the subject of interpretation.

Even the jurisprudence of our Constitutional court considers by now part of its judgment the onto-deontological, gnos-deontological and axiological issues inherent in their reasoning, besides – as especially occurs in constitutional courts of *Common Law* – to give importance to a logical-argumentative interpretation capable of taking into account on the one hand proportionality to balancing out the interests at stake, and on the other hand reference to harmonising the set, or not set, parameters preventatively.

Consequently, since it seems rather haphazard – despite the ponderous theoretical tension of the theory of analytical-logical, legal interpretation (Guastini, 2004: 271) – excluding the recognition of a monopoly on interpretation by the Constitutional court, we must emphasise that such a risk is certainly eliminated, *in nuce*, by applying,

through recourse to principles, to constitutional judgment, not only in the triadic hermeneutic circle, but also in the dyadic.

From the first, the norm is never excluded so the interpreter will need to go back, before the decision, to the point of departure of the methodological procedure, or better to the Constitutional charter, the fundamental and validating subject of such an interpretation (Modugno, 2005: 58 ss.). In the second place, we get nearer, keeping together the relationship between dogmatic and hermeneutic and isolating a circularity – though not completely pure, since in any case it is necessary to go back to the document – in which the interpreting subject and object, but better to say the interpreted subject, have the same substance, at least from a teleological point of view (Mengoni, 1999: 353 ss.). Or taking as a point of departure, the latter teleological framework, developed in private law and taking the document as dispensable for example compared to the application of the civilistic categories of interpretation, such as hermeneutic canons and elevated to the rank of «norms of recognition» (Cervati, 2010: 159-169). The latter, bound by a double twist of cord with *pre-understanding* and circularity, for validating judgment they no longer have need of the text or normative document and can allow for a verification of their axiological and teleological existence. The merest consideration of the presence, in the action of judging, of the subject, adequately *pre-understanding*, is enough for the realisation of the circularity between subject and object and for the overall reconstruction of the fact. The judgment will be invalid if, applying the hermeneutic canons; it turns out to be reached in the absence of the critical *pre-understanding* of the interpreting subject and hermeneutic circularity between the interpreting subject and the interpreted subject.

Validation also coincides with verification of the existence of the incomplete project between the interpreting and interpreted subjects, to fill in with the interpretation, above all to discover whether the procedural course has effectively been concluded (Benedetti, 1995; 2014). The validity of the judgment lies in the realisation of this project. In the case of an incomplete project, one cannot maintain any decision as being reached hermeneutically valid.

Hermeneutic constitutional judgment – when it concerns an interpretation of law by the Constitutional court with declaration of illegitimacy – can come close therefore to a perfect reciprocation with pure hermeneutic-legal circularity, which in its maximum expansion, puts itself forward in an absolute or dyadic form of circularity. In this, the subject and the object of the interpretation – considering that the object is shown in the legal judgment for its being the subject carrying out the legal activity – coincide perfectly in that interpretative teleology characterised by the collective result of the constitutional sentence of mere interpretation.

In dyadic circularity, the teleological and axiological moment will prevail, in an interpretative context, over the public (law) or private (contractual declaration) normative document and the validation of the interpretation is characterised by the confirmation of the existence of critical, pre-understanding and hermeneutic circularity of the judgment.

Hermeneutic-legal theory, through its operative instruments, significant in institutions of *administrative discretionality*, *justice* and *fundamental principles of law*,

denying closed, deductive, axiomatic systems of *Civil Law* – once the three fundamental principles are in contrast like the exclusive sovereignty of the state, the forbidden gap-filling of laws, the prevalence of the law over any other legal rule – even though they are present in the various codes and special laws, exceptionally, has a peculiar relevance on the issue of constitutional interpretation.

Only a hermeneutic type of methodological approach completely manages to guarantee and validate the use of unwritten, axiological and teleological principles, pre-eminent in constitutional judgment. This is absolutely indispensable – the maximum evolution of our legal culture rooted in the so-called “crisis of law” (Ripert, 1949; Caiani, 1954; 1955; Betti, 1955) which was, in reality, the crisis of the concept of law in the 1950s – as much for the so-called interpretation of values, as for the constitutional interpretation for values, as for the constitutional interpretation for parameters, and that is, for the most reliable paths justifying the political-legal valence (not, we note, legal-political)³ of constitutional judgment, and becoming a subsidiary approach, if not indispensable, as much for the methodology according to interpretation of values, as for the interpretation of parameters. In both these typologies of interpretation, it becomes necessary not so much as to acknowledge the principle or learn it through generalisation and abstraction of the norms as rather to consider it axiologically and teleologically – taking into account, for example, of the basis of the legal system, the social and ethical contexts of a collectivity or of a people and the need for social

³ Cfr., e.g., Cass. civ., sez. III, 30 September 2011, n. 19985. It is interesting to note how the *Cassazione* admits the immediate relevance in our legal system, of the norms of the *European convention on human rights and fundamental liberties* and the obligation of

a state judge to apply directly the pactio norm, even though it does not comply with internal law, as long as it follows the constitutional principles of that same state.

order – and then apply it, again for example, after constructing a parameter and/or balance of the interests. In balancing interests and in the choice of parameter we build, between principle and norm, a pure circularity of a dyadic type. It becomes the principle and norm, not only as a disposition, as a relationship between regulating disposition and regulated fact, but also because balancing interests and interpreting parameters. By constructing a principle or a parameter, one builds a new, abstract typology- independent from those present in the current norm - essential for a judgment.

4. The Security State.

The article published in *Le Monde* on 23 December 2015 (Agamben, 2015) by Giorgio Agamben, closes and opens, at the same time, this intervention. Substance and the form of law (Catelani, 1998), do not in effect represent the defining and conceptual hendiadys of the relationship between law, sociology and politics.

So well known are the *themes* that one can be very synthetic:

The first is *legal rationality*; the substance of the law. The formulae for norms regarding the anti-terrorist emergency, in most cases, are not legal formulae. Consequently, how is it able to be legal when applied to a concrete case by judges? How can the legal form guarantee legal justice and not just political justice? We cannot look for, as Agamben explains so well, judicial truth by listening to gossip (Agamben, 2015)!

The second is *political rationality*. The form of law, the disposition of the law for example, cannot be issued solely in the perspective of the reason of state. Sovereign will cannot ignore individual and social rights; otherwise there would not be a democratic will, recognisable and recognised by individuals in the global world.

The third is *social rationality*. Not even a strong democracy can keep alive its formal rules if the universally accepted social rights are not upheld. The rules are, instead, modulated on social needs and the law must put all its tools at their disposal, not only new rules (dispositions and principles) but also interpretative corrections to old rules, interpretative methods for guaranteeing, if not the truth of the hermeneutic result, at least the regularity and the certainty that the method applies equally to all.

Political sovereignty (De Giovanni, 2015) is authority more than legality, and the authority is none other than the recognition of a constant relationship between the authoritativeness of whoever exercises it and the feeling of being guaranteed by those who hold to its worth (respect). A collective recognition of the legal method of applying law rather than the legal rule to be applied. In complex and multiracial societies it is certainly preferable to have judicial mediation-because it is a guarantee of certain method, rather than the certainty of the result of the method - in alternative to recourse to fear, aimed at avoiding every form of possible mediation between political power and its subjects, with the de-politicisation of the citizen and the transformation of respect into obedience, into authoritativeness into undisputed power.

Emergency legislation, introduced by President Hollande of the French Republic after the terror attack, had first, on November 25, asked parliament for *the depoliticisation of every person for whom there may be serious motives for believing their behaviour might be construed as a threat to public order* and then, after its passage through the Senate in the spring of 2016, corrected its thrust, addressing *the subject of security measures only for those in possession of double citizenship*. The National Assembly in April 2016 did not even accept the most restricted version, especially because the word security was

counter not to the word *liberty* or *brotherhood* but to the word *equality*.

Equality is perhaps the concept on which Agamben dealt with least, intending clearly to deal with the political problem before the legal problem, however it is that which dominated most of the speeches held in the National Assembly and the French Senate. Both of these institutions prevailed over the Hollande's government's 'fear'.

Justice is the legislature and the judge (Scialoja, 1932) and its legal strength is a political strength because it guarantees attention to the selfish part of every human being.

Political problems posed by the *security state* as a moment of political counter position to terrorism, find possible alternative solutions, more than by establishing new rules which tend to reduce the free space of the individual, they fix methodological criteria of judgment in order to guarantee for all trial rules able to balance the needs of the State with those of whom do not belong to the state or do not belong at all.

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Bibliography

AA.VV. (2016), *The Constitution of Sweden the fundamental laws and the riksdag act*, with an introduction by Magnus Isberg (Stockholm: Sveriges Riksdag).

AA.VV. (2000), *Diritti umani e sovranità*, (Torino: Giappichelli).

AA.VV. (1996), *Crisi e metamorfosi della sovranità. Atti del XIX congresso di filosofia giuridica e politica* (Milano: Giuffrè).

AA.VV. (2007), *Interpretazione costituzionale*, a cura di G. Azzariti (Torino: Giappichelli).

Agamben, G. (2015), *De l'Etat de droit à l'Etat de sécurité*, *Le Monde*, 23/27 -12 - 2015.

Arajärvi P. (2007), *The Finnish Perspective on the Last-Resort Support for Subsistence*, 7 *Constitutional Law, Scandinavian in Law*.

Ascarelli, T. (1952), *Studi di diritto comparato e in tema di interpretazione* (Milano: Giuffrè).

Ascarelli, T. (1959), *Problemi giuridici* (Milano: Giuffrè).

Barberis, M. (2011), *Giuristi e filosofi. Una storia della filosofia del diritto* (Bologna: Il Mulino).

Bartole, S. (2008), *Il potere giudiziario* (Bologna: Il Mulino).

Benedetti, G. (2014) *Oggettività esistenziale dell'interpretazione. Studi su ermeneutica e diritto* (Torino: Giappichelli).

Benedetti, G. (2010), *L'orizzonte del giurista interprete*, in in G. Crifò (a cura di) *Le idee fanno la loro strada. La Teoria generale dell'interpretazione di*

- Emilio Betti cinquant'anni dopo (Roma: Istituto di studi romani)
- Bergholz, G. and Peczenik, A. (1999), *Statutory Interpretation in Sweden, in the Philosophy of Law* (New York & London: Garland Publishing, Inc.).
- Betti, E. (1990, ristampa), *Teoria generale dell'interpretazione* (Milano: Giuffrè).
- Betti, E. (1971, postuma), *Interpretazione della legge e degli atti giuridici (Teoria generale e dogmatica)* (Milano: Giuffrè).
- Bile, F. (2008), *L'interpretazione costituzionale nella giustizia costituzionale italiana*, <http://www.cortecostituzionale.it> 10/11/2008.
- Bogdan M. (2010), *Swedish Legal System* (Stockholm: Norstedts Juridik AB).
- Butler, J. and Chakravorty Spivak, G. (2007), *Who Sings the Nation-state?: Language, Politics, Belonging* (Kolkata: Seagull Books).
- Caiani, L. (1954), *I giudizi di valore nell'interpretazione giuridica* (Padova: Cedam).
- Caiani, L. (1955), *La filosofia dei giuristi italiani* (Padova: Cedam).
- Campbell T., Tomkins A., Tomkins E. (2011), *The legal protection of Human Rights. Sceptical Essays* (Oxford: Published to Oxford Press Scholarship Online).
- Capograssi G. (1959), *Impressioni su Kelsen tradotto, in V, Opere di Giuseppe Capograssi*, (Milano: Giuffrè).
- Carlson L. (2013), *The fundamentals of Swedish law* (Stockholm: Studentlitteratur AB).
- Castignone, S., *La macchina del diritto. Il realismo giuridico in Svezia* (Milano: Edizioni di Comunità).
- Catelani, A. (1998), *Il diritto come struttura e come forma* (Torino: Giappichelli).
- Catelani, A. (2014), *Legalità costituzionale e interpretazione giuridica* <http://www.pensareil.diritto.it>
- Cervati, A.A. (2010), *L'insegnamento di Emilio Betti e lo studio del diritto costituzionale*, in G. Crifò (a cura di) *Le idee fanno la loro strada. La Teoria generale dell'interpretazione di Emilio Betti cinquant'anni dopo* (Roma: Istituto di studi romani).
- De Giovanni, B. (2015), *Elogio della sovranità politica* (Napoli: Editoriale scientifica).
- De Mauro, T. (2008), *Il linguaggio della costituzione*, in *Costituzione della Repubblica italiana* (Torino: UTET).
- d'Alessandro, L. (1991), *Regola giuridica e regola di verità*, introduzione a M. Foucault, *La verità e le forme giuridiche* (Napoli: Arte Tipografica).
- Dworkin, R. (1977) *Taking Rights Seriously*, (Harvard: Harvard University press).
- Ferrajoli, L., 2007, *Teoria del diritto e della democrazia*, vol. I, 453 ss (Roma-Bari: Laterza).
- Fioravanti, M. (1991), *Costituzione e stato di diritto*, 2 *Filosofia politica* 325-350.
- Fioravanti, M. (2009), *Costituzionalismo. Percorsi nella storia e tendenze attuali* (Roma-Bari: Laterza).
- Guastini, R. (2004), *L'interpretazione del documento normativo* (Milano: Giuffrè).

- Guastini, R. (2011), *Interpretare e argomentare* (Milano: Giuffrè).
- Hartmann, N. (1935), *Zur Grundlegung der Ontologie* (Berlin: de Gruyter).
- Hartmann, N. (1942), *Neue Wege der Ontologie*, in *Systematische Philosophie* (Stuttgart - Berlin: Kohlhammer).
- Hartmann, N. (1962), *Ethik*, (Berlin: de Gruyter).
- Hirschl, R. (2011), *The Nordic Counternarrative: Democracy, human development and judicial review* (Oxford - New York: Oxford University Press and New York University School of Law).
- Hruschka, J. (1976), *Strukturen Der Zurechnung* (Berlin: de Gruyter).
- Jori, M., 1976, *Il metodo giuridico tra scienza e politica* (Milano: Giuffrè).
- La Torre, M., (2003), *"Judex rex". Sull'ultimo Hart, 2 Ragion pratica*.
- Masaracchia, A. (2007), *La "costruzione" e l'impiego dei parametri non scritti nella giurisprudenza delle Corti Supreme Nordamericane, della Corte di Giustizia delle Comunità Europee e della Corte costituzionale italiana*, in G. Azzariti (a cura di), *Interpretazione costituzionale* (Torino: Giappichelli).
- Mengoni, L. (1996), *Ermeneutica e dogmatica giuridica. Saggi* (Milano: Giuffrè).
- Modugno, F. (2007), *Interpretazione per valori e interpretazione costituzionale*, in G. Azzariti (a cura di) *Interpretazione costituzionale* (Torino: Giappichelli).
- Nobili, M. (2009), *L'immoralità necessaria. Citazioni e percorsi nel mondo della giustizia* (Bologna: Il Mulino).
- Omaggio, V. (2015), *Saggi sullo stato costituzionale* (Torino: Giappichelli).
- Pace, A., *Interpretazione costituzionale e interpretazione per valori*, in G. Azzariti (a cura di), *Interpretazione costituzionale*, (Torino: Giappichelli).
- Pattaro, E., *Il realismo giuridico scandinavo. Axel Hägerström* (Bologna: CLUEB).
- Pino, G. (2010), *Diritto e interpretazione. Il ragionamento giuridico nello stato costituzionale* (Bologna: Il Mulino).
- Petrillo, F. *La decisione giuridica* (Torino: G. Giappichelli).
- Petrillo, F. *Interpretazione degli atti giuridici e correzione ermeneutica* (Torino: G. Giappichelli).
- Petrillo, F. *Europa senza statualità* (Chieti: Solfaneli).
- Riccobono, F., (1983), *Kelsen in Italia. Una ricerca bibliografica*, in C. Roeherssen et al. , *H. Kelsen nella cultura giuridica del novecento*, (Roma: Istituto della enciclopedia italiana).
- Riccobono, F., (2012), *Diritto e "vita sociale" in Emilio Betti*, 1 *Sociologia* 41-47.
- Romboli, R. (2008), *Qualcosa di nuovo: anzi di antico: la contesa sull'interpretazione conforme alla legge* in Carnevale P. e Colapietro C. (a cura di) *La giustizia costituzionale tra memorie e prospettive. A cinquant'anni dalla pubblicazione della prima sentenza della Corte costituzionale* (Torino: Giappichelli).

Sandström, M. (2007), *Swedish Model - Three aspects of Legal Methodology*, in *Liber Amicorum: Festschrift in Honour of Csaba Varga* (Budapest: Acad. hongroise des sciences).

Scialoja, V. (1932), *Del diritto positivo e dell'equità*, in vol. III, *Studi giuridici* (Roma: Anonima romana)

Schmitt, C. (1934), *Über die drei Arten des rechtswissenschaftlichen Denkens*, (Hamburg: Hanseatische Verlagsanstalt).

Schmitt, C. (1978), *Die legale Weltrevolution. Politischer Mehrwert als Prämie auf juristische legalität und Superlegalität*, *Der Staat*, n. 3, pp. 321-339

Stolleis, M. (2004), *Das Auge des Gesetzes. Geschichte einer Metapher*, (München: C. H. Beck).

Torben, S. (2007), *Guidance and constraint: The action-guiding capacity of theories of legal reasoning* (Uppsala: Iustus förlag).

Tronconi Reigada, A. (2013), *Interpretazione costituzionale. Una riflessione* (Padova: Cedam).

Valguarnera, F. (2012), *Una Costituzione finalmente utile? Sviluppi recenti della giustizia costituzionale svedese*, in V. Barsotti (a cura di), *La Costituzione come fonte direttamente applicabile dal giudice* (Santarcangelo di Romagna: Maggioli editore).