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The Legitimacy of the Judge in the Constitutional State

ABSTRACT

The starting point of this work is the assumption that constitutional state implies a change in the criteria for the legitimacy of the power with respect to the scheme of the rule of law. From the above, it tries to defend that the legitimacy of the control body must rest on the features that make it appear as a judicial body rather than in the elements that make it appear as an organ of a political nature. Although they are not mutually exclusive approaches, the priority of one or the other depends on the role attributed to the constitution, has consequences for the way in which the institution is organized and also affects the scope of the powers conferred. Additionally, legitimacy of the judge in constitutional state requires an adaptation of the concepts of subjection to law, independency and impartiality to the new framework affecting not only specific constitutional control bodies but also supreme or even ordinary judges, because all of them develop constitutional functions.

KEYWORDS

Constitutional state, judicial review, human rights and democracy, judge legitimacy, constitutional interpretation

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Introduction – 1. *Consitutional State differs from the Rule of Law* – 2. *The "constitution norm" and the role of the judge* – 3. *Models of legitimacy* – 4. *Subjection to the law, democracy and rights. From the bureaucrat to the constitutional judge.*

Introduction

The discussion on the legitimacy of the judge in the constitutional state is conditioned, of course, by the take of position regarding what "constitutional state" means, regarding how the Constitution operates as a legal rule and therefore regarding the role assigned to control bodies and judiciary in this context.

From this understanding, my reflection starts from the assumption of certain questionable positions. The first is that this form of political organization we call constitutional State differs from the rule of law in areas that are critical in relation to the choice of a model or other of control of the power and of constitutional adjudication. The second assumption means that the constitution has ended operating as "the Constitution norm", using the typology of Michel Troper (TROPER 2007). From this standpoint we can address the assessment of the various models of legitimacy that have been proposed and conclude that only those underlining the judicial nature of the "constitutional judge" are able to introduce criteria for the organization and for the decision of the control body and of the members of the judicial power in the constitutional state.

This paper is divided in four parts. The first is aimed to present de concept of constitutional state for the purposes of this pages. After, we will pay attention to the consequences of the understanding of Constitution as a norm. Some models of legitimacy of the control body will be exposed in the third part. Finally, we will analyze some of the consequences of the choice for one of these models on the relation between subjection to the law, democracy and rights in the activity of the constitutional judge.

1. *Consitutional State differs from the Rule of Law*

The question of the relationship of identity, continuity or break between the constitutional state and the rule of law has been widely discussed. The characteristics of this work prevent me from reproduce

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here the arguments in each direction, so I only will refer aspects that I consider important to understand to what extent the changes in the role of the Constitution, of the supervisory body, and of the judiciary are justified from the rule of law mindset and from the constitutionalist mindset. First, however, I must say a few words about what constitutional State means in this intervention.

The constitutional State that is here at stake is that linked to the "new constitutionalism" as a legal culture[1], and its main change, regarding the legal organization, is that constitutions acquire legal force. This situation occurs in continental Europe in the period between the First and the Second World War, as the result of a process culminating after the Second World War with the extension of constitutional control to the material dispositions present in the constitutions. In the post-totalitarian context, «States that had experienced more dramatically the tremendous trauma of having to face terrible tyrannies (Italy and Germany) [...] saw one of the most compelling elements of justification of constitutional justice in their little danger as an instrument of oppression» (BLANCO 2002, 20; trans. mine).

In the normative aspect, as Riccardo Guastini points out (GUASTINI 2001), this choice entails legally binding constitutions. The legal force of the Constitution is assured by their rigidity and for their jurisdictional guarantee. As a consequence, the Constitution gains influence in political relations. In addition, the jurisdictional guarantee has been developed in the way of the direct application of a great part of the constitutional text.

Also, in facts, control bodies have proceeded to the "over-interpretation" of the constitutional requirements, narrowing the margin of appreciation of the law maker. Finally, the principle of conforming interpretation has been developed. That implies, in a part, that the control body is not more only a negative legislator in the way of the Kelsenian model (KELSEN 1928); on the other hand, this principle assigns constitutional control functions to all constitutional judges. Therefore, they are enabled to decide, between the possible meanings of a legal text, which is the more compatible with the meaning before given to the constitutional text (TARELLO 1998, 316).

Especially the latter two consequences are striking from the mentality that inspires the rule of law, rooted in the subjection of the judge to the law as a guarantee of the democracy and certainty. Indeed, in the constitutionalism developed in the European continent since liberal-bourgeois revolutions, the ideals of democracy and certainty required that the Parliaments had the final word about what counts as law (FIORAVANTI 1999, 162). Therefore, judiciary was designed as a zero power[2]. On the contrary, in the scenario of the new constitutionalism as it has been presented, the task of remaking the law is assigned to the body of constitutional review (and the ordinary judge when he is who ultimately decides) and to this extent, «citizens are subjected to individual standards that are not deducted from democratic laws and general standards that have not been democratically adopted» (TROPER 2007, 8; trans. mine). This contrast leads to the idea that the new constitutionalism is "undemocratic", if democracy means the rule of the majority[3].

Furthermore, subjection to the law was considered feasible because it was based on the possibility of knowing with certainty its requirements. The anti-formalist criticism revealed the unreality of this assumption of the traditional legal method, which, of course, is absolutely unsuitable as the only instrument for determining what the Constitution requires (BARRANCO 2006).

[1] The use of the same word (constitutionalism) in relation to different realities is confusing. Constitutionalism means, at least, a political organization, a theory of law and a legal culture (COMANDUCCI 2002, 89; PINO 2011, 2).

[2] On the difference between the American constitutionalism and the French constitutionalism, BLANCO 2002; FIORAVANTI 1995.

[3] Certainly, democracy is maintained as a criterion of legitimacy, but either its meaning is amended or we must complete it with others. HABERMAS 2001, 770; TROPER 2007, 11 ff.

Thus, the constitutional State – which in certain respects could be considered the development of the idea of the subjection of power to Law, and, therefore, a consistent evolution of the rule of law (ANSUÁTEGUI 2014, 223 ff.) – however poses specific problems arising from the fact that they are judges, or, in any case, organs with jurisdictional characteristics, who decide on the validity of the rules and the acts by assessing its compliance with the requirements of constitutional norms (BARRANCO 2012, 17; ASÍS 2005, 119).

The new constitutionalism has been criticized on several fronts related to the way in which democracy works in it. Some have to do with the ability to decide for future generations (limited by the constitutional rigidity), others with the loss of importance of parliaments in favor of judges (RUIZ MIGUEL 2004, 66 ff.). Right now I am interested in reactions to constitutionalism pointing to the role that the judges assume.

Certainly, at the beginning there were differences between the systems of concentrated control and of fuzzy control. However, as we will see in the next part, the legitimacy problems have ended up being similar due to the manner in which the developments of the constitutions have been conducted.

2. *The "constitution norm" and the role of the judge*

The normative character of the Constitution is, as noted in the previous section, a defining feature of the constitutional State. Nevertheless, if we pay attention to the history of the constitutional state in Europe, we can clearly identify three types of constitution depending on the way the Constitution is considered legally binding. The model of the Constitution as a political tool, held during the nineteenth century until the interwar period; the model of the Constitution as a system of organization of the power, which explains the scheme of the constitutions of inter-wars; and the model of the Constitution as a norm. They should not be seen as incompatible but as interrelated options, however the predominance of one of them as a general scheme of understanding has far-reaching implications for the definition of the role of the judges in the constitutional state.

The shift from the rule of law to the constitutional state is marked by the consideration of the Constitution as a legal instrument, in addition to its political role. The function of the Constitution in this legal aspect determines the type of constitutionalism and, as a consequence, the scheme of relations between constitutional authorities.

In the so-called French model, with great influence on the European continent, the function of the Constitution was to design the scheme of organization of powers, establishing mechanism of checks. Within this framework, perfectly consistent with Hans Kelsen's conception, the body of constitutional review is depicted as a counterweight, and his performance is aimed at maintaining the institutional balance. In this way, «jurisdictional guarantee of the Constitution – judicial review – is an element of the technical means thant are designed to ensure the regular exercice of the state functions» (KELSEN 1928, 254; trans. mine). It is possible to synthesize this construction with the idea of "constitution machine", adapting the terminology of Troper (TROPER 1999).

As opposed to this model, the Constitution of American constitutionalism is presented as a "constitution norm". It is not only an institutional design, also it aims to establish prohibitions, obligations and permissions that bind public authorities and citizens, and thus, it assumes the role of modeling social relations (GUASTINI 1996, 171). So, constitutional norms are not only addressed to organs of the system, but also to citizens The functions of the control body are so different, since it is entrusted with the task of making the obligations under the Constitution are met, restoring the "constitutionality" (BARRANCO 2004, 108). Also, when Constitutions plays as a norm, its supremacy manifests as irradiation effect (ALEXY 1986, 507 ff.), making any judge a constitutional one.

The latest model described, the model of the "constitution norm", is more consistent with constitutionalism as it has been developed, in a part by the influence of the constitutionalist legal culture. For example, only if constitution is able to rule relations between citizens and power and between citizens, is acceptable its direct application.

If we pay attention to the characterization of constitutional control task in this model, we can see how from this perspective, the body of control of constitutionality appears primarily in his role of judge (ROUSSEAU 2008). As will be seen below, this characterization is very important in the reflection on its legitimacy.

3. *Models of legitimacy*

With these assumptions, the positions on the legitimacy of the judge in the constitutional state adopt different models. In a block we can put all those approaches that believe that the activity of the body of constitutional review is not so different from that of the legislator and justify that legitimacy should require a democratic origin; I propose to call this model democratic or Kelsenian.

One argument against this proposal is that by the time democracy at origin only seems feasible for the supervisory body, even though, as noted, any judge is finally a constitutional judge (ROUSSEAU 2007). In any case, democracy only solves the problem of the origin, but not of the exercise of the power. To bridge the tension between democracy and rights in the exercise of judicial review, these theories often attribute to the Constitutional Court the function of acting as a guarantor of democratic procedures (HABERMAS 1992, 238-286).

Jürgen Habermas is taken as an example of this model. It is necessary to note that the author assumes that the law is indeterminate. The indeterminacy of law is an issue to consider in the context of the legitimacy of judicial decisions, because in the scheme of division of powers consistent with a democratic system, it derives from the legitimacy of the current law (HABERMAS 1992, 238), which constitutes the framework, and is "not available" to the judge.

In the case of abstract review of constitutionality[4], this scheme of division of powers is at risk. Habermas proposes that Parliament itself were carrying out a review of its decision by a formula of self-control to restore it. In this regard, says this author: «It is worth considering whether the legislature could not also scrutinize its decisions, exercising a quasi judicial review of its own. This might be institutionalized, for example, in a parliamentary committee (also) staffed by legal experts» (HABERMAS 1992, 241).

Habermas is especially cautious regarding the activity of the Constitutional Court, so he proposes a more democratic legitimacy and a limitation of its functions to the Parliament. The aim of the intervention of the Constitutional Court is, according to this author, the guarantee of rights. For its part, the rights are considered conditions of public and private autonomy of citizens, so with this task the Court is placed at the service of democracy.

From this idea, one aspect greatly criticized, and he coincides with Ernst-Wolfgang Böckenförde (BÖCKENFÖRDE 1993), is that rights are an order of value (the same that largely has served as the basis for the "over-interpretation"). Habermas writes:

[4] In Habermas view, this is not the same in relation to constitutional complaints and to concrete judicial review – «for cases in which a lower court suspends its proceedings and petitions the Constitutional Court to rule on the constitutionality of a law that is relevant to the particular case», HABERMAS 1992, 240.

> «Insofar as a constitutional court adopts the doctrine of an objective order of values and bases its decision making on a kind of moral realism or moral conventionalism, the danger of irrational rulings increases, because functionalist arguments then gain the upper hand over normative ones» (HABERMAS 1992, 259).

The rights thus should not be interpreted as values but as the procedural conditions of democracy, allowing free formation of opinion and political will.

Indeed, the model shares with Kelsen's design important assumptions and, therefore, is not descriptive of the role assumed by supervisory bodies and judges in constitutionalism as it has been developed. Also Habermas disregards the change occurred in the scheme of division of powers with the articulation of the Constitutional State, and therefore it is justified to apply some of the considerations (on the other hand also critical of constitutionalism) that Anna Pintore carry out on the model of Kelsen[5]. Moreover, in the scheme of neo-constitutionalism principles are not only "created and recreated" in parliament, however,

> «as an alternative to Kelsen model, a model of rights theoretically full is presented, and rights enunciates present in constitution are self-sufficient to predetermine entirely normative content and guarantees to be provided to an effective protection of constitutional proclamations».

In this frame, there is a lack when law does not establish this content and guarantees, «but these rights "found" by theorist in the constitution seem very similar to the principles of reason» (PINTORE 2000, 142).

In this sense, we also can identify a second model named "judicialist model of the noble dream", using the terminology of Herbert Hart (HART 1977). These are approaches that emphasize the legal aspect of the control body and try to legitimize its actions since the idea of determining the Constitution. Since the requirements of the law are determined or determinable, discretional decisions of the judge (ordinary and constitutional) are not allowed. Originalism, Ronald Dworkin or Luigi Ferrajoli could be included in this approach.

Thus, the "guarantee-ism" of Ferrajoli, assumes that the legitimacy of judges rests on the cognitive nature of the activity carried out[6] and

> «this character of judicial activity would be sufficient to explain the non-consensual or representative of the legitimacy of judges to establish their independence from any representative majority rule that cannot make false true or false it which is true. So the elective nature of judges or dependence on the executive branch of the prosecution are in contradiction with the source of legitimacy of jurisdiction» (FERRAJOLI 1999, 72).

In this line in favor of the rational character of the law and therefore the priority of the rights of democracy, lies the criticism that the author makes to the "formal democracy" from the defense of a "substantive

[5] «Kelsen still moves within the horizon of nineteenth-century *Rechtsstaat*. The tension between rights and democracy is foreign to his perspective and his concern. He does not seem to realize that the constitution has been irreversibly transformed by the constitutionalist "paradigm" into the necessary point of confluence of values often ultimate and more often still controversial. As a theory, his suggestion to avoid referrals to justice, equality, equity, and generally controversial values in the constitutional document can be considered, suffering from semantic reductionism; in the plane of facts, it has been frustrated by the course of history from the time that the model of the long constitutions has been imposed», PINTORE 2000, 137 (trans. mine).

[6] «Unlike any other legal activity, the jurisdictional activity of a rule of law is a tendentiously cognitive, as well as practical and prescriptive activity; or more specifically, is an activity necessarily justified in a motivation in whole or in part cognitive», FERRAJOLI 1999, 71 (trans. mine).

democracy". In the context of Ferrajoli's theory, the idea of a substantial democracy means precisely the introduction of correction criteria of the majority decisions from the defense of rights.

Also in the works of Robert Alexy, the tension between the principle of the majority, which is a voluntarist principle, and the rights, as elements of rationality of the decision to allow linking legal reasoning and the general practical reasoning, is present[7]. The democratic constitutional state (which the author differentiates the democratic rule of law) is, opposite the rule of law, the framework in which the coexistence of democracy and human rights is possible. In the theory of this author «correction concept connects the concept of human rights with democracy» (ALEXY 2000, 39).

In an ideal model, human rights and democracy are not opposed: democracy is based on rights as a demand for autonomy and rights represent a correction requirement for democratic decision. In the real model, however, stress is inevitable and criticisms for democracy are, criticism of the idea of rights, in some cases (PINTORE 2000; 2001). In this context, therefore, the justification of the interpretative activity of the Constitutional Court is a problem.

With respect to fundamental rights, the place of the law to be «the most important factor holding for general legal argument», is taken by right provisions «very abstract, open and ideologized» (ALEXY 1986, 532). These features of the text, which do not constitute a final argument in the theory of this author, add to the difficulty of finding interpretive arguments from ascertaining the will of the "constitutional legislator" (ALEXY 1986, 533). In both cases, moreover, although the burden of argument is on their side, the rules of argumentation allow an interpretation that does not conform with the results. The precedents and material theories of rights are all elements that guide the process of constitutional argumentation, even when this refers to the interpretative decisions. Yet the failure of these elements makes it necessary to appeal to the general practical discourse. Alexy notes,

> «the uncertainty of results of the discourse on fundamental rights leads to the need for a decision on fundamental rights endowed with authority. If the parliamentary majority must not control themselves, what it means to be judge in his own cause, it is only the possibility of a Constitutional Court, whatever its shape. There is nothing unreasonable that a Constitutional Court not only argue but also to decide. In general, the view that only in the context of a legal system, practical reason, which links the argument and the decision rationally, can achieve its realization is valid. In light of this insight, it is reasonable to institutionalize a constitutional justice whose decisions can and need to be justified and criticized in a rational discourse of fundamental rights» (ALEXY 1986, 554; trans. mine).

This argument seems acceptable as it admits the possibility of balance between the two principles of legitimacy present in the Constitution: rights (the content does not appear finally closed at the time they are built) and democracy (which can hardly be now reduced to its minimum version of majority rule). I do not share, however, the connection established between law and moral in the whole theory, because it leads Alexy to deny the thesis of discretion (ALEXY 1992, 19). The decisions of the Constitutional Court or the legislature are valid, in my opinion, because they are decisions of competent bodies. Ultimately, the court decision is discretionary and is also discretionary their submission or not to the rules of rational practical discourse – except the weak demand for motivation in cases where the decision is legally controllable –, thus the interpretative decisions referred to Alexy are not determined by the law.

There is still a third model, we can call "judicialist of the discretion". It is useful for giving account of the approaches that consider the determination of the constitutional requirements as a fiction, so that

[7] «Who votes for a legislature controlled exclusively through the democratic process, is choosing democratic state of law. Who also defends a court constitutional control, is speaking in favour of the democratic constitutional state», ALEXY 2000, 37-38 (trans. mine).

consider the bodies of adjudication with discretion to interpret and apply. If the judge, ordinary and constitutional, is a power, we must reflect on the legitimacy of origin and exercise.

With respect to the legitimacy of origin, usually it is pointed towards democratization in the appointment of the subjects that make up the body. The legitimacy of exercise, on the one hand, has to do with the rationality of the contents – if these rational contents are considered part of the law, we are in the above model – and, on the other hand, refers to the procedure of decision-making.

A fundamental task – pending in the context of the constitutional state – is the construction of a theory to legitimize the possibility of interpretations of the Constitutional Court prevailing over the interpretation of the Parliament. The proposals that I have placed in the democratic model are based on the primacy of Parliament on the constitutional control body. The fundamental argument in this regard is the establishment of a "primacy" of democracy on the rights, which appear as conditions of. But this is not compatible with the actual organization.

The approaches of the "noble dream" – of Dworkin, Ferrajoli and Alexy – base the priority of the control body of constitutionality on the legislature in the pre-existence of parameters from which the control take place. However, it does not work when judicial discretion is a fact (SCHIAVELLO 2003, 45).

Finally, if the prevailing side of the control body, even in places of concentrated control, is of "court", namely, their judicial side, the conditions in which its work is considered legitimate must be the same required for the adjudication tasks.

4. *Subjection to the law, democracy and rights. From the bureaucrat to the constitutional judge*

The constitutional state, as has been characterized, is subjected to constant tension with the criterion of the majority. In fact, the supervisory bodies do not fit in its action to the democratic model, but the claim that the constitutional requirements are determined does not seem to serve as a basis for the primacy of constitutional judge over Parliament.

The legal positivism that characterized the dominant legal culture on the continent until the advent of constitutionalism set the judicial as zero power. Justice is placed hierarchically under the executive branch, and judicial decision is not so, but the result of mechanical subsumption of the facts in the factual generically described by the standard. It has already been stated here that democracy and certainty are located behind this building, justifying the strict submission of the judge to the legislature. Nevertheless, the Constitution contains cultural concepts often indeterminate, and imposes the realization of conflicting values, so, if it ever was, the law ceases to be an unquestioned normative premise. In this context, the judges are called to ultimately ensure compliance with the Constitution. For this and other reasons, the model of bureaucrat judge is not suitable for the ordinary justice or for the constitutional courts. This reconceptualization of the role of the judge is also seen in those who have been placed in the model of the "noble dream", as Dworkin and Ferrajoli. In this regard, the judge becomes one element in the chain of argument (ROUSSEAU 2008, 14) or the Constitutional Court is an instance of reflection in the political process[8].

The separation of functions between the Constitutional Court and the Parliament is not viable if it depends on to maintain that the constitutional requirements are determined, but it makes no sense to turn to the Constitutional Court a "Parliament in miniature". It remains only to inquire into the specific

[8] Implying that «arguments of the court found an echo in public opinion and political institutions, which leads to reflections and discussions, which result in convictions examined. When this process of reflection between the public, the legislature and the constitutional court is stabilized permanently, you can speak of a successful institutionalization of human rights in the democratic constitutional state», ALEXY 2000, 41.

characteristics of this type of constitutional organ that present it as a legitimate and feasible construction in our cultural environment, to deepen them. In this sense, it seems more profitable the third of the models presented in the previous section, and accordingly to accept the Constitutional Court as a "discretional judge". In this context, the decisions of the judges are legitimate because they are subjected to the rule of law, the principle of impartiality and the principle of independence.

These criteria not only must be present in the design of the organization called to do justice and in the decision-making process, but also have to do with the criteria that have to be used to decide.

As for the organization, independence is manifested in the characterization of the judges as a "power divided" (TARELLO 1988, 317), even if the institutional design is not always consistent with this idea. With regard to the judiciary, this goal must be present in the decision on the status of the governing body of justice and in deciding who their members are. And of course, the reflection should be extended to the body of constitutional review. For example, Dominique Rousseau, from the premise that the French Constitutional Council is a "court", criticizes the appointment of its nine members by the President of the Republic, President of the National Assembly and the President of the Senate, and also criticizes not set as a requirement for the candidates to be lawyers –although it should clarify that, in fact, most are (ROUSSEAU 2007, 33).

In terms of procedure, impartiality demands that the legal proceedings are *ex parte* and that the process is contradictory. A question closely related to independence is neutrality. The judge of the rule of law must be neutral and this requirement is understood as a consequence of the subjection to law. If the Constitution is legally binding, judges have to make effective its contents and, in a great part, this contents are values that must guide judicial decision. In this frame, in relation to complaints and to the concrete control of constitutionality, contradictory principles are a condition for impartiality and also a constraint to the judge.

As it has been noted if we look at the constitutional state, "subjection to law" requires judges abandon neutrality. The idea that judges should be neutral regarding their decisions leads in the end to deny jurisdiction to interpret the law. Indeed, the model incorporates the judge of the Napoleonic Code, prohibiting interpretation, if interpretation means more than just update the text of the law. Originalism is the counterpart at the constitutional level than the exegetical method for the civil law consolidated in the traditional legal method. The but of the judicial intervention is to update the will of the norm author. Nevertheless, if the mechanism of the constitutional control is activate is because there are at least two interpretations in the frame of the constitution, and a choice is required.

Thesis in favor of the neutrality and denying the competence of the judge to interpret entail also to formulate the thayerian theory of the constitutional review. This theory is based on the theory of judicial deference that leads the interpreter of the Constitution to accept the interpretive choice made by the legislature, if there are several possible. The objection against the originalist perspective is in a part relevant in relation to the thayerian theory.

Both theories are concerned on judicial neutrality, however, it is worth remembering that constitutional courts and judges are entrusted with the task of enforcing the substantive provisions of the Constitution, so neutrality understood as the absence of value judgments does, not seem possible or desirable. The ideal judge is not a neutral judge, but a judge committed to a theory of justice based on rights (BARRANCO 2012).

Finally, we must not forget that jurisdiction, ordinary and constitutional acts, when other powers fail to meet their obligations. In this context, it seems that they are not judges but the lawmaker, who is in the first instance called to secure and develop the constitution. It is an idea that is often forgotten when we say that constitutionalism is undemocratic, and perhaps we are in need of a further reflection on the role of the legislature in the constitutional state.

References

ALEXY R. 1986. *Teoría de los Derechos Fundamentales,* Madrid, Centro de Estudios Constitucionales, 1993 (or. ed. *Theorie der Grundrechte*, Frankfurt, Suhrkamp, 1986, sp. trans. by E. Garzón).

ALEXY R. 1992. *El concepto y la validez del Derecho*, Barcelona, Gedisa, 1997 (or. ed. *Begriff und Geltung des Rechts*, Freiburg, Alber, 1992, sp. trans. by J.M. Seña).

ALEXY R. 2000. *La institucionalización de los derechos humanos en el Estado constitucional democrático*, in «Derechos y Libertades», 8, 2000, 21 ff.

ANSUÁTEGUI F.J. 2014. *Razón y voluntad en el Estado de Derecho. Un enfoque filosófico-jurídico,* Madrid, Dykinson, 2014.

ASÍS R. DE 2005. *El juez y la motivación en Derecho,* Madrid, Dykinson 2005.

BARRANCO M.C. 2004. *Derecho y decisiones interpretativas,* Madrid, Marcial Pons, 2004.

BARRANCO M.C. 2006. *Sobre el "método jurídico tradicional" como ficción*, in ANSUÁTEGUI J. (ed.), *El Derecho en red. Estudios en Homenaje al profesor Mario G. Losano*, Madrid, Dykinson, 2006, 597 ff.

BARRANCO M.C. 2012. *Constitución, derechos humanos y Filosofía del Derecho,* in «Anuario de Filosofía del Derecho», 28, 2012, 13 ff.

BLANCO R. 2002. *La configuración del concepto de Constitución en las experiencias revolucionarias francesa y norteamericana,* in CARBONELL M. (ed.), *Teoría constitucional y derechos fundamentales,* México, Comisión Nacional de los Derechos Humanos, 2002, 15 ff.

BÖCKENFÖRDE E.W. 1993. *Sobre la situación de la dogmática de los derechos fundamentales tras 40 años de Ley Fundamental*, in ID., *Escritos sobre derechos fundmentales,* Baden-Baden, Nomos, 1993, 44 ff.

COMANDUCCI P. 2002. *Formas de Neo-constitucionalismo: un análisis metateórico,* in «Isonomía», 16, 2002, 89 ff.

FERRAJOLI L. 1999. *Jueces y Política*, in «Derechos y libertades», 7, 1999, 63 ff.

FIORAVANTI M. 1995. *Appunti di storia delle constituzioni moderne. Le libertà fondamentali,* Torino, Giappichelli, 1995.

FIORAVANTI M. 1999. *Constitución. De la Antigüedad a nuestros días,* Madrid, Trotta, 2001 (or. ed. *Costituzione,* Bologna, il Mulino, 1999, sp. trans. by M. Martínez Neira).

GUASTINI R. 1996. *Specificità dell'interpretazione costituzionale?,* in COMANDUCCI P., GUASTINI R. (eds.), *Analisi e Diritto 1996. Ricerche di giurisprudenza analitica,* Torino, Giappichelli, 1996.

GUASTINI R. 2001. *La "constitucionalización" del ordenamiento jurídico: El caso italiano¸* in ID., *Estudios de teoría constitucional*, México, Fontamara, 2001, 153 ff.

HABERMAS J. 1992. *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, Cambridge (Mass.), MIT Press, 1996 (or. ed. *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats,* Frankfurt, Suhrkamp, 1992, trans. by W. Rehg).

HABERMAS J. 2001. *Constitutional Democracy. A Paradoxical Union of Contradictory Principles,* in «Political Theory», 6, 2001, 766 ff.

HART H.L.A. 1977. *Una Mirada inglesa a la teoría del Derecho norteamericana: la pesadilla y el noble sueño*, in CASANOVAS P., MORESO J.J. (eds.), *El ámbito de lo jurídico*, Barcelona, Crítica, 1994, 327 ff. (or. ed. *American Jurisprudence trough English Eyes: The Nightmare and the Noble Dream,* in «Georgia Law Review», 11, 1977, 969 ff., trans. by J.J. Moreso and P.E. Navarro).

KELSEN H. 1928. *La garantía jurisdiccional de la Constitución (la Justicia constitucional),* in «Anuario Iberoamericano de Justicia Constitucional», 15, 2011, 249 ff. (or. ed. *La garantie jurisdictionnelle de la Constitution (La Justice constitutionnelle)*, in «Revue de Droit Public et de la Science Politique en France et à l'Étranger», 45, 1928, 197 ff., sp. trans. by R. Tamayo Salmorán).

PINO G. 2011. *Principi, ponderazione e la separazione tra diritto e morale. Sul neocostituzionalismo e i sui critici,* in «Giurisprudenza costituzionale», 56, 2011, 965 ff.

PINTORE A. 2000. *Democracia sin derechos. En torno al Kelsen democrático*, in «Doxa», 23, 2000, 119 ff. (sp. trans. by J.A. Pérez Lledó).

PINTORE A. 2001. *Derechos insaciables*, in FERRAJOLI L.(ed.), *Los fundamentos de los derechos fundamentales,* Trotta, Madrid, 2001, 243 ff. (or. ed. *Diritti insaziabili*, in FERRAJOLI L. (ed.), *Diritti fondamentali*, Roma-Bari, Laterza, 2001, 179 ff., sp. trans. by P. Andrés, A. de Cabo, M. Carbonell, L. Córdova, M. Criado y G. Pisarello).

ROUSSEAU D. 2007. *The Conseil Constitutionnel Confronted with Comparative Law and the Theory of Constitutional Justice (or Louis Favoreu's Untenable Paradoxes),* in «International Journal of Constitutional Law», 5, 2007, 28 ff.

ROUSSEAU D. 2008. *Constitutionnalisme et démocratie,* in «La vie les idées», 19/09/2008. Available at: http://www.laviedesidees.fr/Constitutionnalisme-et-democratie.html (accessed 14-3-2016).

RUIZ MIGUEL A. 2004. *Constitucionalismo y democracia,* in «Isonomía», 21, 2004, 53 ff.

SCHIAVELLO A. 2003. *Neocostituzionalismo o neocosittuzionalismi?*, in «Diritto e questioni pubbliche», 3, 2003, 37 ff.

TARELLO G. 1988. *La así llamada crisis de la justicia y los problemas de la Magistratura*, in ID., *Cultura jurídica y política del Derecho,* Fondo de Cultura Económica, México, 1995, 313 ff. (or. ed. *Cultura giuridica e politica del Diritto,* Bologna, il Mulino, 1988, sp. trans. by I. Rosas).

TROPER M. 1999. *La máquina y la norma,* in «Doxa», 22, 1999, 31 ff.

TROPER M. 2007. *Le pouvoir judiciaire et la démocratie,* in «European Journal of Legal Studies», 1, 2007, 316 ff. Available at: http://www.ejls.eu/2/32FR.pdf (accessed 12-10-2015).