

# EAST-WEST STUDIES

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JOURNAL OF SOCIAL SCIENCES  
OF TALLINN UNIVERSITY  
SCHOOL OF GOVERNANCE,  
LAW AND SOCIETY

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EWS Number 15 (2025/2026)

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# FRIENDS OR FIENDS? EUROPE AND WAR

Massimo La Torre

## ABSTRACT

This essay explores the historical and conceptual relationship between Europe and war, arguing that violence and armed conflict have played a constitutive role in European political and cultural identity. Drawing on mythology, philosophy, nationalism, colonialism, and modern history, it examines how war shaped the European State, imperial expansion, and national integration. The essay also reflects on the post-war project of European integration as a response to fascism and militarism, while highlighting the persistence of colonial and geopolitical conflicts after 1945. Finally, it considers the war in Ukraine as a possible new “constitutional moment” for the European Union, raising questions about Europe’s contemporary political identity and its enduring connection to war.

**Keywords:** Europe, war, political philosophy, nationalism, colonialism, European integration, violence, fascism, constitutional moment

## I.

It might plausibly be argued that there is a close relationship between Europe as a continent and political and cultural space and the phenomenon of war. Some analytical philosophers might even ask whether it is a “conceptual” relationship. Some clever jurists could *then* come and argue that “the nature of Europe” is war, just as the “nature” of law is coercion. It is known that in Greek mythology, Europa was a young woman kidnapped by a mighty and warlike bull into which the divine Zeus had transformed himself. Europa’s adult life was thus marked by an act of violence, a kidnapping, an act of war. Rome was founded by two brothers of whom one kills the other. And then, to give the city children, there was the kidnapping of the Sabine women, also a military operation. From this violence, the future Romans came to be. In the intense and intelligent essay on fascism *Paura della libertà*, “Fear of Freedom”<sup>1</sup>, Carlo Levi identifies the “nature” of European politics in the State, and this figure and practice goes back to the mystery of the bloody sacrifice to the God of the Romans. The city was born from the blood of the conquered, something that we already find in truth in the Bible, when it is in Cain, the murderer par excellence, his forehead marked for his crime, that is traced back the founder of the city.

On the other hand, the first great literary work and the founding poem of European culture, the *Iliad*, is a song about war. Here we celebrate the fatal wrath of the swift-footed Achilles, for whose burial dozens of Trojan prisoners are slain. Ilion is defeated and destroyed, its women raped, then killed or made slaves, and the latter eventually, as in the case of Cassandra, the daughter of Priam and concubine by force of Agamemnon,

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<sup>1</sup> See C Levi, *Fear of Freedom* (Adolphe Gourevitch tr) (New York: Columbia University Press 2008)

share the tragic fate of their masters. The wrath of Achilles begins because Agamemnon demands that which belongs to him as King of Achaeans: Hippodameia, also called Briseis, daughter of Briseus, a maiden whose possession the blond Achilles wished only for him. This is just another example of war, massacres, and extreme violence toward women. Hector's child, Astyanax, is slaughtered by Neoptolemus, Achilles' son. Here rule war and submission, and virtue is understood as a force that manifests itself in battle. Heraclitus does not hesitate to proclaim "polemos", war, the father of all that is on earth.

In Plato's ideal structure of social hierarchy, though at the top of it we find "philosophers", to whom the glorious status of kings is lavishly granted, the second-best class is the one of "warriors". The brave professionals of violence are given "power", the executive force of "authority" held by the sapient. "Potestas in bello, auctoritas in philosophia" – so might we rephrase this thesis. At the bottom of society there are the simple folk, the working class, whose fundamental task is toiling to nurture the two superior castes of philosophers and warriors, or guardians. This scheme is then reproduced in Nietzsche's *Antichrist*, where again the warriors assume a pivotal function in the ideal model of society. And such model is later reiterated by Leo Strauss, where Plato's warriors are now replaced by more civilized "gentlemen", but with somehow analogous consequences<sup>2</sup>. Behind this later frame of mind there is, like in Nietzsche's work, a nihilistic despair regarding values. European values – so believe Strauss and his neo-conservative pupils among whom we may remember Paul Wolfowitz – are based on nothing; there is no possible truth in them. War, conflict and violence are the real bedrock of our pretended principles. But this truth is only for Straussian philosophers to sustain; for warriors, gentlemen, and simple folk, we should predicate a normative objectivity whose reality, however, is that of a lie. A noble lie, possibly, that would be instrumental in maintaining war as the prerogative of Western civilization, whose clash with other cultural worlds is theorized as one of its essential contemporary features and missions<sup>3</sup>.

But the relationship between Europe and war is demonstrable empirically and historically, more than symbolically or intellectually. If you go through the annals of Earth's history, it is true that war can be found everywhere from its origin. Anthropologist Pierre Clastres argued that the so-called primitive societies, such as the Tupi Guarani in the Amazon forest after the discovery of America, owe to war their resistance to starting the story of division into classes and social hierarchies. In this case, war is the factor that prevents the rise of the state, not what constitutes it as Kropotkin and, more recently, David Graeber argued. For Clastres, the violence between tribes, their war, keeps them free of servitude, demanding a permanent mobilization of the chief in terms of economic and physical energy, and possible immolation. He must be absent, because he is always busy fighting outside the village. Clastres' thesis is a kind of theory of the political as determining the dividing line between friend and foe (in the wake perhaps of Carl Schmitt), though in reverse. In the concept of the "political" of the German jurist, politics, paradigmatically the State's hierarchical domination<sup>4</sup>, as the command of a sovereign in essence always absolute, is made possible by war, the opposition between a friend, *Freund*, and an enemy, *Feind*, as a matter of life and death. For Clastres that same "political" (the Duce, the State) is made impossible by the same war dynamics between, *enemy*, and *friend*.

<sup>2</sup> See L Strauss, *Liberalism Ancient and Modern* (Chicago: University of Chicago Press 1968). In this perspective, "liberalism" is gentlemen's political regime

<sup>3</sup> See SP Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster 1996)

<sup>4</sup> See P Clastres, *Archéologie de la violence: La guerre dans les sociétés primitives* (Paris: Editions de l'Aube 2022), but especially P Clastres, *La société contre L'Etat: Recherches d'anthropologie politique* (Paris: Minuit 2011)

Violence – says the French anthropologist – turned outward would immunize the inside of the community with regard to the authority that embodies and operates that violence. However, if we look at the history of the last two thousand years, we cannot fail to see that Europe is the terrain of permanent military clashes; yet this has not saved it from the “political”, the State. War here is a repeated event, an “eternal return” almost, while in Asia, in China for example, war has been absent for centuries. And it is thus that the image of Europe in European political essays, as a land of warriors and battlegrounds, is thematized.

The European is more virile and bellicose, and strong and good in war, than the Oriental. Machiavelli says it, Montesquieu repeats it. Italy becomes drowsy and decadent, says Machiavelli, because it lacks the military virtues that are well exercised by its French cousins. War is adventure, the desire to do, to surpass oneself, to put oneself in play, even a capacity for sacrifice, what European fascism of the Twentieth century, especially German, called “idealism”, contrasting it with the “materialism” of those for whom the shedding of blood was only horror. *Nichts Neues im Westen*, “All Quiet in the Western Front”, the magnificent pacifist novel by Erich Maria Remarque, is branded by the German nationalist right as “materialistic”, and the film from this trait is banned in the cinemas of the dying Weimar Republic. That ban is another blow to the republic and a victory for emerging fascism. The cultural battle in 1920s Europe is about the interpretation and narrative of the Great War. The sacrifice of lives has been immense and fundamentally useless. But in every city and village, Italian, French and German, a monument is built to the fallen that exudes national pride and exaltation of war. In British churches, the walls are covered with the names of hundreds of fallen youth. The flags of the regiments are hung on the vaults of the church, and do not suggest the failure of violence, but exalt its “idealism”, that is to say, the background of absolute irrationality and obedience to authority that made this kind of mechanical violence possible. This is the Europe of the 1920s. And, though inconceivable then, everything would start again in 1939, this time even bigger.

The modern nation in Europe was forged in war. It begins with revolutionary France in Valmy, in 1793, when an army of beggars and populace defeats the well-trained armies and white uniforms of the aristocratic armies. Goethe, who was present on the aristocratic side, will immediately say that he had seen a “new story” be born. The French nation was certainly born, which then trickled into the rest of Europe, arriving with Napoleon to Moscow. And with war comes Germany and its unification. It is the Franco-Prussian war and its victory by Bismarck that allows the King of Prussia to declare himself Emperor of the Second *Reich* in the hall of mirrors at Versailles.

The story of the unification of Italy is no different, as the result of battles of the Piedmontese army against the Austrians and the romantic military adventure of Garibaldi. The constitutive ideal-typical moment of the European nation is not so much democratic revolution, but war, *whether* it is won (as in the case of France, Italy and Germany), or lost (as in the case of Austria, or Poland, and also for proto-Soviet Russia). And what to say of the United States, whose national identity developed through two bloody wars? The first against the motherland England; the second a civil war, or rather a bloody internal feud between two different conceptions of federalism and citizenship. And the United States is Europe projected into the future, the Europe that got rid of its traditions, the feudalism of the noble caste, but not that of war, which is also practiced in order to enlarge the federal territory. First the natives are exterminated<sup>5</sup>, then a third of Mexico is occupied, and finally war is waged in 1898 against a decaying Spain, which had not yet realised who was at its oceanic borders, an emerging, all-powerful empire of white men.

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<sup>5</sup> Cf. G Chamayou, *Les chasses à l'homme* (Paris: La fabrique 2010) ch 4.

## II.

War is also and above all a colonial enterprise. This is clearly revealed by the last European colonial adventure, that of Italy in Ethiopia, which was an extermination war, with gases used lightly against unarmed populations, the air force enjoying bombing in a sky of which it was the absolute master. In Libya, the Bedouins were massacred, hanged with coquette nonchalance by well-dressed colonial officers. And of those two cowardly and murderous enterprises, there is nothing left, not even the language, because neither in Libya nor in Ethiopia do people speak Italian today.

Colonialism, which in the Nineteenth century became imperialism, trained on a large scale to oppression and cruelty, serves as a ground for drills and exercises to armies and policing, which then turn into the practice of authoritarianism and totalitarianism within domestic borders. Hannah Arendt explains it well. In the second part of her great book *The Origins of Totalitarianism*, it is imperialism which is said to prepare fascism. Indeed, imperialism injects the poison of racism into European culture and tests the techniques of destruction of the opponent that are later generously applied by authoritarian dictatorships in the old continent. The “horror” evoked by Kurtz when facing the slaughtering of African natives as it is told in Joseph Conrad’s *Heart of Darkness* will be mirrored and reiterated in the European Holocaust.

Franco, *Caudillo* “por gracia de Dios”, supreme leader by the grace of God, who massacred the Spanish republic, does so with his colonial army, trained to extreme violence, passing from Africa to the Iberian Peninsula in the summer of 1936, and using the same military techniques employed against the rebel tribes of Morocco and the Sahara<sup>6</sup>. And even after the Second World War, Europe, which had experienced the trauma of Nazism, did not give up on the imperial dream. The Netherlands used the money from the Marshall Plan to maintain control over Indonesia by engaging in an expensive military campaign. England quit India, but did not give up its African colonies, where it continued to wage war after war. Portugal disemboweled Angola and Mozambique until the mid-1970s, fighting against African national liberation movements. But the most striking case is that of France.

After the surrender of June 1940 and four long years of German occupation, France, liberated by the Allies in the summer of 1944, was a conquered country, despite being included in the list of victorious nations against the Third Reich and fascist Italy. It was a country conquered and, in the marrow, humiliated and demoralized. The regime of Vichy was a fascist and anti-Semitic regime<sup>7</sup>: its symbol was the double axe that would later be adopted by *Ordine Nuovo*, the Italian fascist terrorist group manhandling State massacres. That regime of Vichy, a more luxurious French Salò Republic, headed by the senile general Pétain, contributed effectively to the extermination of the Jews in France. The decadent atmosphere of that France is well illustrated in Simenon’s “hard” novel, *Dirty Snow*. Treason, Jews sold to Germans for a few francs and quick robberies of their assets, widespread collaborationism, fascism inoculated to the youth, a bourgeoisie and an army that preferred Hitler to democratic ideals and to defending freedom, equality and brotherhood. It is the France of the last Céline and the “Charlemagne” *Waffen*-SS Division, which is the last patrol of defenders of Hitler’s bunker.

The rediscovered freedom after August 1944, however, does not free France of its colonial ghosts. They want to keep the empire even after the Resistance and the Liberation and the promise of a mature republican state. They want to maintain control of the Suez Canal against the nationalization of Nasser, and so arrive

<sup>6</sup> Cf. P Preston, *The Spanish Holocaust: Inquisition and Extermination in Twentieth-Century Spain* (London: Harper 2013)

<sup>7</sup> Cf. RO Paxton, *Vichy France: Old Guard and New Order (1940–1944)* (New York: Columbia University Press 2001)

the paratroopers of France and Great Britain at the Suez, with Israeli support against republican Egypt. And here, this time, the renewed desire of Empire finds the obstacle of the United States, which imposes on its allies to withdraw and to give up the occupation of the Suez. It was 1956. A year earlier, Indochina had fallen and rebelled against French control, and the Tricolor army had been forced to surrender at Dien-Bien-Phu in an act of supreme weakness. Another surrender after the ignominious one to the Germans in June 1940. But France continues in its imperial dream, with the bloody, evil, cruel war of Algeria. Here villages are massacred, mass torture is inflicted. It's a real blood orgy<sup>8</sup>. It is De Gaulle appointed President by the new constitution of 1958 who ends the massacre. France gives in again. Algeria declares itself an independent republic. By the way, the E.E.C. Treaty of 1957 was supported by France as a possible way out of the Algerian crisis, offering the African colony free movement of goods and a rich commercial future within the European common market.

The wars of the Europeans, in any case, extend well beyond 1945<sup>9</sup> and somehow contradict all the proclamations of pacification and pacifism that the political class spread with full hands among the rubble of the European nations overwhelmed by the disaster of the Second World War. They promise not to make wars, not to blindly kill each other again. France and Germany must stop being hereditary enemies, so that Europe can rise again and heal its deep wounds.

Reconciliation between these two nations is the primary objective and starting point of the project of European integration. There are at least three versions of this project and three corresponding documents. The first of these is the *Ventotene Manifesto* drafted by Ernesto Rossi and Altiero Spinelli, two anti-fascists, a liberal and a communist, locked up in confinement by the dictatorship. The Manifesto is an indictment against monopolistic and warmongering capitalism as well as against the narrow national and nationalist state. The socialist revolution, which must occur if we want to save the spirit of equality and freedom that animates the anti-fascist struggle, must be combined with the immediate overcoming of the form of the national state. A federal union is therefore the aim of the European labour movement in its various and plural components<sup>10</sup>.

We should also remember the speech given by Churchill in the summer of 1946 in Zurich where he advocated a federation of continental European states (England is not yet included, due to its rank as an empire). But the most important document, and one that has a lot of consequences, is the statement by the French Foreign Minister, Schuman, on 9 May 1950. This date was not chosen at random; it is the same date as the end of World War Two five years earlier, marked by the unconditional surrender of Nazi Germany. European integration is therefore part of the same history as that of fighting fascism and extreme nationalism. It is worth re-reading Schuman's words: "World peace can be safeguarded only by creative efforts, proportionate to the dangers that threaten it. The contribution that an organized and vital Europe can make to civilization is indispensable for the maintenance of peaceful relations. France, which for more than twenty years has been the forerunner of a united Europe, has always had as its main objective the service of peace. Europe was not made: we had war. Europe cannot be built all at once, nor will it be built as a whole; it will be based on concrete achievements which will first and foremost create a de facto solidarity." The union of nations requires the elimination of the secular contrast between France and Germany: the action undertaken must primarily concern France and Germany. It is peace, and the rejection of war,

<sup>8</sup> Cf. A Horne, *A Savage War of Peace: Algeria 1954-1962* (New York: Viking 1978)

<sup>9</sup> Cf. T Judt, *Post-War: A History of Europe after 1945* (London: Penguin 2006)

<sup>10</sup> See A Spinelli and E Rossi, *Il Manifesto di Ventotene* (Milan: Mondadori 2006)

which motivates and gives impetus to the process of European integration since the 1950 Treaty of Paris establishing the ECSC, the European Coal and Steel Community. Europeans do not want war, they have had enough of it. They must rebuild a peaceful space of convivence. But in the meantime, France moves the battlefield from Europe to Asia and Africa.

### III.

It is as if Europe could not do without war. Nor without gold or financial profit. Gold and war are a permanent feature of modern European history. Greed seems to be its engine. The discovery of America was done with armies in search of gold, and for this, the natives are massacred. It fuelled an obsession with the *Eldorado*, a utopian cornucopia of gold and silver. Of money. David Graeber in *The Dawn of Everything*, questioning the origin of money, links it historically to war<sup>11</sup>. Money is fought over, and gold is needed to have armies. And the army, at least the way we know it today, or one that is structured in a geometric way, seems to be an entirely European invention, whose pattern then influences the structure and operations of the factory – as Lewis Mumford pointed out<sup>12</sup>.

Yet, since 1945 we have been living under the illusion that Europe is a space of peace, a “garden of wonders” – as Josep Borrell, former foreign minister of the European Union reproached us, Europeans. A space of Venus, this pacific Europe, sinuous, sleepy and lascivious, but accommodating and decadent when compared to the Mars-ruled warrior, the competitive sprinting of the United States – as Robert Kagan wanted<sup>13</sup>. But now, with a war inflicted by a neo-imperial Russia upon Ukraine, Europe is waking up from its long pacifist hibernation and once again taking up arms, or at least claiming to. We might be facing a deep change in the self-understanding of Europe itself.

It seems to no longer heed the anti-militarist and anti-authoritarian lesson that Remarque drew from his experience on the Western front, with its unspeakable, useless, senseless suffering, which is the same as what Céline offers us in his intense novel *Voyage au bout de la nuit*, “Journey to the End of the Night”. The lesson now to be learned should not however resemble that other taken from the First World War by the German nationalist bard, Ernst Jünger, in what he romantically and almost nostalgically calls “steel storms”, *Stahlgewitter*<sup>14</sup>. For him, war is an inner formative experience, “innere Erlebnis”, which pulls us beyond the conventionality and forgetfulness of ourselves, our vigour, our immense potentialities of feeling<sup>15</sup>. It reveals who we are and builds us in a final work of *Bildung*, education and training, of constitution. In the trench, he believes, the community of combatants is formed as a State entity and finally reveals itself as the purest form of society to sceptics. In the trenches for Lieutenant Sturm, the name is already a whole program (*Sturm* meaning “assault” in German), now the life of the senses was more acute<sup>16</sup>. Down there, a new lineage gives birth to a new interpretation of the world, passing through an ancient experience, the one of inflicting death upon humans. The war is a primitive fog of existential possibilities, charged with unexpected, creative developments. Down there, on the battlefield,

<sup>11</sup> See D Graeber and D Wengrow, *The Dawn to Everything: A New History of Humanity* (London: Penguin 2022)

<sup>12</sup> See L Mumford, *The Myth of the Machine (Vol. 1): Technics and Human Development* (New York: Harcourt Brace 1967)

<sup>13</sup> See R Kagan, *Of Paradise and Power: America and Europe in the New World Order* (New York: Alfred A. Knopf 2003)

<sup>14</sup> See E Jünger, *In Stahlgewittern. Aus dem Tagebuch eines Stoßtruppführers* 46<sup>th</sup> edn (Stuttgart: Klett-Cotta 2008)

<sup>15</sup> See E Jünger, *Der Kampf als inneres Erlebnis* (Berlin: E.S. Mittler & Sohn 1922)

<sup>16</sup> See E Jünger, *Sturm* (Stuttgart: Klett-Cotta 1979)

he says, they are not just an organ of the State, one of its agencies, the army, but rather project themselves as the State as a whole, as the hard core of the native communion<sup>17</sup>. This is a radical celebration of armed conflict, one that was born in the civilized Europe of the Twentieth century.

Now, war has always been at the centre of the political theory of the West. At least four main conceptualizations can be found. First, there is the war lived and thought as the “plague”, an apocalyptic event, the “red horse” of the four horsemen of the Apocalypse. It is a punishment of the innate evil of human beings and at the same time a maximum expression of it. It is like an epidemic as a retribution for an hidden guilt, an event that escapes any control of rationality. It is indeed the highest expression of the sleep of human reason. It may seem to us completely senseless, pure *ananke*, tragic fate, meaningless, but in some ways blaspheming, enrolling in a very high providential design of the divinity that governs the world. With war, the Lord punishes and decides the destiny of human beings who cannot escape from original sin.

The other doctrine is that of war as a “mission”, a teleological or functionalist theory. Here, war is like a strong wind that keeps the air of society alive and reactive. “One would be giving up the great life [*das grosse Leben*], should one be rejecting war” – this is Nietzsche’s view<sup>18</sup>. Here, war is an existential moment of human history and its end, and at the same time, one of its basic means. A step towards the epiphany of human destiny. Still a manifestation of the Antichrist, it is victory over this. It is an event that takes place in the space of a specific and historical final rationality. The “history of the world”, *Weltgeschichte*, the space of war, is the “court of the world”, *Weltgericht*, says Hegel. On the other hand, the God of the Old Testament is the Lord of armies, and it is through war on other nations, which are sometimes to be exterminated, that His people confirm themselves as the elect. Moses, coming down from the mountain that saw him talking with the Almighty and finding among His people many who had sacrificed to the Golden Calf, did not hesitate to decree the slaughter of the sinful. “Ecce homo,” Nietzsche tells us, basically means “here is the fiend”.

But there is a less dramatic conception of war. No eschatology here. It is a game of politics as an instrumental and in some ways neutral dimension. It is the continuation of earthly politics through other means, says General Von Clausewitz. It is a game of chess for the domination of man over man, or for the preservation of his living space. War is thus an act of force to compel our enemy to do our will, he writes. However, it escapes the judgment of morality, although its imperative character might remind us of law as the sovereign’s command. Somehow, in this perspective, war is law issued to the enemy, to the foreign subjects that threaten policies taken within the State precinct, though naturally reaching beyond it. There is a normative dimension of war independent from any other normativity, whether moral or legal. Only prudential calculation is appropriate for it. It is an event that takes place in the space governed by instrumental rationality. Its ends are not subject to the ethics of value, only to that of responsibility which governs the political man. And that, in substance, depends on the authenticity with which this responsibility is assumed.<sup>19</sup>

Finally, there is the theory of war as a sword of justice. *Justum bellum*: correct only as self-defence or as prevention of an unjust evil. He must obey a just cause. Vitoria and the Spanish Second Scholastic are peremptory on it. It is an event that takes place within the space of moral rationality, or else juridical, as

<sup>17</sup> See E Jünger, *Sturm* (Stuttgart: Klett-Cotta 1979). See also E Jünger, *Feuer und Blut. Ein kleiner Ausschnitt einer grossen Schlacht* (Magdeburg: Stahlheim-Verlag 1925)

<sup>18</sup> F Nietzsche, *Götzendämmerung, oder Wie man mit dem Hammer philosophiert* (Frankfurt am Main: Insel Verlag 1985) 35. Translation mine.

<sup>19</sup> Cf. WB Gallie, *Philosophers of Peace and War: Kant, Clausewitz, Marx, Engels and Tolstoy* (Cambridge: Cambridge University Press 1978), chapter three.

in the case of the legalization of war as a sanction of international law according to the doctrine of Hans Kelsen<sup>20</sup>.

But there is a fifth concept, which has already been mentioned, never specifically elaborated, but more or less explicit in more or less liberal nationalism. It is about war as a “constitutional moment”, as a founding fact of a community. The foundation of the constitutional order, as the production of the political order. Now, it is this last concept that is being felt again, even if in an ambiguous way, in the current affair of the war in Ukraine. The European Union, which in the past had conceived itself as an order that prevents war and flees from it, now seems to interpret the Ukrainian war as an event that might give it the ambitioned but so far essentially absent legitimacy as a political order proper and sovereign. This war might be somehow shaped as its “constitutional moment”. In supporting the war against Russia, it is Europe that tests its unity and determination. The Russians invading Ukraine are attacking our values, and the future of a federal Europe capable of autonomous geopolitical strategy. However, with war, Europe becomes part of the world’s powers, says the still constitutionally underdeveloped European Union. It acquires the longed-for supranational material constitution. Or so it might be claimed<sup>21</sup>. But were European integration and federation not originally thought and planned as instituting durable, possibly “eternal”, peace in the old continent? *Hic Rhodus, hic saltus*.

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<sup>20</sup> See, for instance, H Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press 1949) 328 ff.

<sup>21</sup> Cf. M Flammini, ‘L'altra Europa. La guerra in Ucraina e la forza dell'unità’ in *Esiste una guerra giusta?* (Turin: U.T.E.T 2023) 73 ff.

# CONSTITUTIONAL RIGHTS AS VALUES. ON THE ORIGINS AND CRITIQUES OF DRITTWIRKUNG

Francisco M. Mora-Sifuentes<sup>1</sup>

## ABSTRACT

This article examines the axiological conception of constitutional rights and its implications for the doctrine of *Drittwirkung*, or the horizontal effect of rights. It traces the origins of this approach to Rudolf Smend's *Integrationlehre* and its later development in the German Federal Constitutional Court's *Lüth* decision, where rights were understood as an "objective order of values" permeating the entire legal system. The article also discusses the transformation of rights from defensive guarantees against the State into principles with effects in private law. Finally, it addresses major critiques of this value-oriented approach – including concerns about judicial activism, private autonomy, and the "jurisprudence of values" – while presenting Robert Alexy's principled theory as an attempt to reconcile constitutional rights, democratic legitimacy, and legal rationality.

**Keywords:** Constitutional rights, *Drittwirkung*, horizontal effect of rights, Rudolf Smend, *Lüth* decision, constitutional interpretation, objective order of values, Robert Alexy, constitutional theory, rule of law

## I. Introduction

In contemporary constitutional discourse, increasing emphasis is placed on the 'ideal dimension' that constitutional rights are understood to imprint upon the legal system. It is now a commonplace, both in legal scholarship and in constitutional adjudication, to face the claim that constitutional rights constitute an "objective order of values", embody the "higher values of the legal order", or possess an "axiological character". This conceptual shift has given rise to two interrelated themes that are the subject of this paper.

First, the work revisits Rudolf Smend's *Integrationlehre* [theory of integration] as a frequently overlooked precursor to the interpretative approach adopted by the German Federal Constitutional Court in its seminal *Lüth* decision – a judgement often regarded as the origin of the axiological theory of constitutional rights<sup>2</sup>. Second, it explores the implication of this theoretical development for the doctrine of the horizontal effect of rights (*Drittwirkung der Grundrechte*) and considers the principal critiques it has attracted, many of which are rooted in broader concerns about the so-called 'jurisprudence of values'.

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<sup>2</sup> Böckenförde notes that the axiological theory of rights has its point of departure in Rudolf Smend's theory of integration, "even though this is not consciously recognized today." See E-W Böckenförde, "Teoría e interpretación de los derechos fundamentales" in JL Requejo & I Villaverde (trs) *Escritos sobre derechos fundamentales* (Baden-Baden: Nomos 1993) 57.

My central thesis advanced here is twofold. First, that a robust defence of the third-party or horizontal effect of rights entails the articulation of an alternative conception of the Rule of Law, and a structural theory of constitutional rights to reconstruct their role within the post-war constitutional State. Not without criticism, Robert Alexy's principled theory (*Prinzipientheorie*) provides a particularly compelling response posed by this axiological turn. The analysis that follows is also a concise and preliminary treatment of those issues.

## II. Rudolf Smend and the *Integrationlehre*

Characterization of constitutional rights as “objective principles” or “axiological decisions” – now commonplace in both European and Latin American<sup>3</sup> constitutional theory – only emerged with the enactment of the 1949 Basic Law of Bonn (*Grundgesetz*). This conceptualization developed in the mid-twentieth century and, as may scholars have pointed out, should not be regarded as “a fact that predated” the *Grundgesetz* itself<sup>4</sup>. This interpretative shift is closely linked “with the inevitable discussion that followed the collapse of the National-Socialist regime in Germany” and the perceived “failure of legal positivism”<sup>5</sup>. The historical context is crucial here, as the *Grundgesetz* and its emphasis on values may be understood as a deliberate reaction to the collapse of the Weimar Republic. That collapse, as is well known, involved not only the annulment of the regime by the occupying Allied powers but also the creation of a second German State by the Soviet Union<sup>6</sup> – the *Deutsche Demokratische Republik*. Alongside this historical dimension, a methodological point must be underscored.

Reliance upon values has been employed to prioritise ‘substantive’ or ‘moral’ dimensions over any formalist approach to the law (and the State). In this sense, it may be seen as a critique of legal positivism – here, perhaps, closer to naturalism in a philosophical sense – for its radically sceptical or non-cognitivist stance. It is no coincidence, therefore, that many authors refer to a *revival*, a “new wave,” of natural law doctrines<sup>7</sup>. But such a critique of legal positivism and formalism can be clearly discerned in Rudolf Smend's theory of integration – a doctrinal that predates the Second World War.

In his seminal 1928 work *Verfassung und Verfassungsrecht* [Constitution and Constitutional Law], Smend criticizes Hans Kelsen's approach for “emptying of substance” the concrete insights achieved by general theory of the state. In Smend's view, Kelsen's methodological project yielded no tangible outcomes within

<sup>3</sup> See, for instance, M Borowski, ‘Drittwirkung’ in *Max Planck Encyclopedia of Comparative Law* (2018) (from the European perspective); and J Mijangos y González, ‘The Doctrine of the Drittwirkung der Grundrechte in the Case Law of the Inter-American Court of Human Rights’ (2008) 9 *Indret* (from the Latin American perspective).

<sup>4</sup> Similarly, G Peces-Barba points out that in the Basic Law of Bonn “it was the constitutional court interpretation that deduced, from the system as a whole, the values that inform it. In this case there will be no prior datum, but only a consequence.” See G Peces-Barba, *Los valores superiores* (Tecnos 1984) 386.

<sup>5</sup> E-W Böckenförde, ‘Teoría e interpretación de los derechos fundamentales’ in JL Requejo & I Villaverde (trs) *Escritos sobre derechos fundamentales* (Baden-Baden: Nomos 1993) 105.

<sup>6</sup> On the formation of a second German state, see K Loewenstein, ‘Alemania desde 1945 a 1960. (Una relación de hechos)’ in Cándido Perea (tr) (1960) 110 *Revista de Estudios Políticos*, 115.

<sup>7</sup> G Dietze, ‘Natural Law in Modern European Constitutions’ (1956) 1 *Natural Law Forum* 91. According to G Peces-Barba, the reliance to values in the German system is constructed by doctrine and by jurisprudence, within a legal culture “imbued of Natural Law approaches derived in part from the accusation leveled against legal positivism for its responsibility in the rise of the Nazi regime.” G Peces-Barba, *Los valores superiores* (Tecnos 1984) 23 & 49.

its own field – namely, a ‘pure’ theory of positive law applied to the juridification of the State<sup>8</sup>. This debate unfolded within the well-known *Methoden- und Richtungsstreit* [debate on methods and orientations] of Weimar constitutional law<sup>9</sup>. For Smend, all legal formalism presupposes an underlying substantive position regarding material content, which constitutes the premise and foundation of positive norms. In opposition to such formalism, he unambiguously asserted that what the doctrine of the State requires is “a material theory of the State”<sup>10</sup>.

Two observations must be made at this point. Why, if Smend’s work was part of the *Methoden- und Richtungsstreit* of Weimar’s *Staatsrechtslehre*, is it said that the ‘evaluative turn’ only began with the German Basic Law? In my view, there is a degree of ambivalence here. On the one hand, the apparent “forgetting” of Smend’s work may stem from the dazzling success of the case-law of the German Constitutional Court and the “value-oriented” interpretation of constitutional rights – a doctrine that has since influenced numerous jurisdictions. So much so that it is often frequently regarded as an *ex-novo* creation of the Karlsruhe Court<sup>11</sup>. On the other hand, it would also seem that the reference to, or association with, Smend’s work is deliberately avoided due to the problematic aspects of his doctrine. By “problematic”, I refer to the subjectivism inherent in value philosophy and the antiliberal anatomy of his theory – elements which today might be characterized, to some extent, as “nationalist” or “communitarian”<sup>12</sup>.

Both considerations lead us directly into Smend’s intellectual project, which seeks to intertwine the realms of the State and the legal order through a methodology grounded in the humanities. His work draws upon the writings of Theodor Litt, a Hegelian philosopher with a strong phenomenological orientation. In following this path, Smend distances himself from the dominant trends of his time. He aims to understand both the State and the Constitution as “spiritual and dynamic realities in ceaseless change”, rejecting any form of methodological reductionism that would lead ultimately to a “lack of awareness of one’s actions”<sup>13</sup>. From this anti-positivist methodological foundation, he constructs his theory.

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<sup>8</sup> The problems of the *Integrationlehre* are documented in the early critique that H Kelsen himself formulated against Smend. See: H Kelsen, *El Estado como integración. Una controversia de principio*. (Juan Antonio García Amado tr, Tecnos 1997). I cannot dwell on this at length here. But it is worth noting that the reduction of the State to the law carried out by Kelsen was the object of harsh criticism. See JA García Amado, ‘Sobre el neoconstitucionalismo y sus precursores’ in *El Derecho y sus circunstancias* (Universidad Externado de Colombia 2010) 385. It has also been argued that one of the differences between the constitutional cultures of Austria and Germany lies precisely in the former’s proximity to Kelsen and the latter’s to Smend in certain respects – above all, in the evaluative interpretation of rights. See A Jakab, ‘Dos paradigmas encontrados del pensamiento constitucional en Europa: Austria y Alemania’ in Leonardo Álvarez (tr) (2010) 88 *Revista Española de Derecho Constitucional* 131–162.

<sup>9</sup> On this issue, see O Lepsius, ‘El redescubrimiento de Weimar por parte de la doctrina del Derecho político de la República Federal alemana’ in I Gutiérrez Gutiérrez (tr) (2008) 9 *Historia constitucional. Revista Electrónica de Historia Constitucional* 259–295; in more detail, see: M La Torre, *La crisis del noveciento. Giuristi e filosofi nel crepuscolo di Weimar*. (Bari: Edizione Dedalo 2006), *passim*.

<sup>10</sup> R Smend, *Verfassung und Verfassungsrecht* (Berlin: Dunker & Humblot 1928). Hereinafter all the references and the quotations of this work are taking of the Spanish translation published as: *Constitución y Derecho constitucional*, J.M. Beneyto (trans.), Madrid, Centro de Estudios Constitucionales, 1985.

<sup>11</sup> In this vein, see J Brague Camazano, “La doctrina de Smend como punto de inflexión de la hermenéutica y concepción de los derechos fundamentales por los tribunales constitucionales a partir de la posguerra” (2009) 11 *Revista Iberoamericana de Derecho Procesal Constitucional* 96.

<sup>12</sup> “Smend’s political stance,” Kelsen affirms, “is opposed to liberalism.” H Kelsen, *El Estado como integración. Una controversia de principio*. (Juan Antonio García Amado tr, Tecnos 1997) 49. On Smend’s nationalism, see M La Torre, *La crisis del noveciento. Giuristi e filosofi nel crepuscolo di Weimar*. (Bari: Edizione Dedalo 2006) 131–201.

<sup>13</sup> R Smend, *Verfassung und Verfassungsrecht* (Berlin: Dunker & Humblot 1928) 39.

For Smend, the key to the reality of the State lies in a “pre-legal” dominant and manifests itself in a “sense of union” – a “genuine voluntary association” among members of a collective. In one of the central passages of his work he writes:

“If the State exists, it is only thanks to those diverse manifestations, expressions of a spiritual framework, and, more decisively, through the transformations and renewals whose immediate object is that intelligible framework. The State exists and develops exclusively in this process of continuous renewal and permanent reviviscence; to use Renan’s famous characterization, the State lives from a plebiscite renewed each day. For this process, which is the core of the State’s dynamics, I have already proposed elsewhere the denomination of ‘integration’”<sup>14</sup>.

The core process underpinning the dynamics of the State is, according to Smend, *integration*. This may be understood as a form of spiritual connection or union arising from various elements present in mutual social interactions. In his theory, Smend identifies three forms of integration: (i) personal, (ii) functional, and (iii) material.

(i) *Personal integration* encompasses political phenomena such as leadership and *caudillaje* [autocracy], and corresponds, within continental *Staatslehre*, to the theory of organs and the head of State. Smend asserts that “the political leader does not have a merely technical role, but, through his concrete achievements – regardless of whether he resolves issues well or poorly – he must consolidate himself as the leader of those he directs.” He adds: “the substantive content of his function lies fundamentally in achieving this cohesion among the political group that sustains him,” initially, and subsequently “among the people as a whole”<sup>15</sup>.

ii) *Functional integration* consists of “forms of life that tend to create collective meaning,” aimed to producing “social synthesis”<sup>16</sup>. Elections and voting processes fall within this category, as they foster and cultivate the “spiritual substance of the community.” These are processes of will-formation within the political community – not in a strictly legal sense but in terms of renewing the political community as one grounded in shared values. From this perspective, the pluralist understanding of democracy and parliament is reconfigured. What matters is not whether parliament reaches agreements, nor even whether those agreements are sound; rather, it is whether parliamentary deliberation can engender – both within and beyond parliament – “an authentic political community, a union of wills, a general political disposition”<sup>17</sup>.

Reading Smend’s *magnum opus*, one is left to wonder whether this “community in values” is the product of rational deliberation, or whether, on the contrary, it is not an outcome at all, but rather a presupposition of his theory.

(iii) *Material integration* refers to the ensemble of values lived collectively, a “sociality of substantive experiences”<sup>18</sup>. Political symbols, flags, coats of arms, monarchs, and civic ceremonies are all manifestations of such integration. This process bears important consequences for the prevailing theory of the

<sup>14</sup> R Smend, *Verfassung und Verfassungsrecht* (Berlin: Dunker & Humblot 1928) 62–63. In these phrases, the author seems to go so far as to “substantialize” the State. However, Smend later points out: “The State is not a reality *in itself* that can be used for the purpose of achieving objectives external to itself.”

<sup>15</sup> R Smend, *Verfassung und Verfassungsrecht* (Berlin: Dunker & Humblot 1928) 72.

<sup>16</sup> *Ibid.* 78.

<sup>17</sup> *Ibid.* 86.

<sup>18</sup> *Ibid.* 93.

constitution of his time, namely, “the characteristic of positivism and legal formalism,” which considers it “a norm – not necessarily a legal one – that regulates and orders the political life of the State”. The most radical expression of this view is found in Ferdinand Lassalle, for whom the true constitution of a country is nothing more than the factual relations of power that prevail within it, rather than the written document, “a piece of paper”, referred to as “the constitution”<sup>19</sup>. At this juncture, Smend opposes both the *normativist* conception of H. Kelsen and the *realist* conception of F. Lassalle. In his view, both are problematic insofar as they are reductive: the former reduces the constitution to positive law; the latter, to empirical power relations.

Smend observes that understanding the constitution solely in sociological or pure normative terms neglects the fact that, in addition to constituting the legal order of the State, the constitution is also “the order of the vital dynamics in which the life of the State develops, the process of integration, whose aim is the perpetual reimplantation of the State’s total reality”. “The constitution,” he writes, “is the legal or normative expression of the defining features of this process”<sup>20</sup>. For Smend, the community of values, the process of integration, as well as its normative articulation within the constitution mediate between factual reality and normativity. The constitution does not aim to regulate “concrete situations, but rather to encompass the totality of the State and of the integrative process.” This objective not only permits but “requires of the constitutional interpreter an extensive and flexible interpretation, which differs to a great extent from any other form of legal interpretation”<sup>21</sup>.

This characteristic of the constitution as an integrative order stems from the “integrative efficacy of its own material values,” and among these material values constitutional rights hold a particular prominence. This is where, in my view, the impact of Smend’s work becomes most apparent: rights as conceived as an “order of values”. Smend notes that one of the main consequences of the process of material integration for positive law is “a new paradigm for the interpretation of fundamental rights within the constitution”. Contrary to the prevailing view that regards such rights merely as the “principle of legality governing the actions of the public administration”, Rudolf Smend emphasizes that fundamental rights do not belong to administrative law, to police law, to private law, etc., but rather that “fundamental rights are part of constitutional law”<sup>22</sup>.

Smend further contends that constitutional rights seek to regulate, on the one hand, an autonomous material series – a “system of values”, of “goods”, a “cultural system” – and, on the other, to regulate it as a national system, that is, as a system for all Germans, thereby affirming the national character of those values. From the standpoint of *special technical law*, constitutional rights may affect legislature, administrative agencies, individuals, all of those actors collectively, or none at all. Even when they do not confer validity directly, they nevertheless require, to be interpreted by specialised law, grounding in the cultural system from which they emerge. In this sense, constitutional rights represent the “norm that governs the Constitution, legislation, and the administration”<sup>23</sup>.

Beyond this immediate or mediate significance for each technical legal domain, constitutional rights possess a deeper foundation: they represent a concrete value system – a cultural system that encapsulates the meaning of state life as expressed in the constitution. Politically, this translates into a will to material

<sup>19</sup> R Smend, *Verfassung und Verfassungsrecht* (Berlin: Dunker & Humblot 1928) 129.

<sup>20</sup> Cf. *Ibid.* 132.

<sup>21</sup> Cf. *Ibid.* 133.

<sup>22</sup> Cf. R Smend, *Verfassung und Verfassungsrecht* (Berlin: Dunker & Humblot 1928) 230.

<sup>23</sup> *Ibid.* (italics mine).

integration; legally, it implies the legitimation of both the State and positive legal order. This legal order is valid only insofar as it reflects the value system and, by virtue of that reflection, acquires legitimacy<sup>24</sup>.

Even so, it cannot go unnoticed that this development of such a “material constitution” entails a significant deficit in pluralism. Insofar as the kind of integration is framed as a phenomenon “prior” and “superior” to legal order and governmental structure – or even where pluralism is viewed as an evil to be eliminated – there is a real risk of undermining the very function of rights as safeguards of individual autonomy. Smend’s critique of liberalism risks falling into precisely this pitfall.

That being said, I wish to highlight three core contributions of Smend’s *Verfassung und Verfassungsrecht* that are central to my analysis.

First, Smend conceives of rights as “technical (constitutional) law”, marking a departure from the nineteenth-century German constitutions, in which the primary function of such rights was to subordinate administrative action to legislative acts. He also moves beyond the Weimar Constitution of 1919, where the main issue was the binding force of constitutional rights upon the legislature – something that failed to take root either in the constitutional text or its interpretation, due to the highly programmatic nature of its provisions<sup>25</sup>. As noted, Smend already advocated for the binding force of fundamental rights upon all branches of power, notably the legislature, and even supported their applicability within the private sphere.

The second point concerns his systematic conception of rights, which implies a *holistic and pervasive* understanding: as values, fundamental rights permeate the entire legal order and must be considered in all legal acts or decisions, for they form part of a system that legitimizes both the State and the constitution. In this respect, they possess a strong “ideal-normative” component.

Finally, to render this material content operational, Smend advocates for a method of constitutional interpretation distinct from all other forms of legal interpretation. This is the third point: he affirms the specificity of constitutional interpretation within the broader legal domain, insisting that it requires an “extensive and flexible” hermeneutic approach to adjudication.

### III. The Basic Law of Bonn, the *Lüth* Decision, and the Horizontal Effect of Constitutional Rights

The German Basic Law of Bonn (1949) represented, both in form and substance, a qualitative advancement over the 1919 Weimar Constitution. In the face of political parties’ failure to defend the latter – despite its progressive provisions –, the drafters of the Basic Law did not rely solely on advances in constitutional theory. Crucially, they also drew on Germany’s tragic interwar experience, which had effectively dismantled the rule of law, separation of powers and human rights protections<sup>26</sup>.

This qualitative leap is especially evident in provisions such as the inviolability of human dignity (Article 1, §§ 1-2 of the Basic Law); the direct and immediate binding force of constitutional rights upon all public authorities (Article 1, § 3), including, of course, the legislature (Article 20, § 3); the guarantee of the “essential

<sup>24</sup> Cf. R Smend, *Verfassung und Verfassungsrecht* (Berlin: Dunker & Humblot 1928) 231.

<sup>25</sup> See for instance J Polakiewicz, ‘El proceso histórico de la implantación de los derechos fundamentales en Alemania’ (1993) 81 *Revista de Estudios Políticos* 28.

<sup>26</sup> See for instance J Polakiewicz, ‘El proceso histórico de la implantación de los derechos fundamentales en Alemania’ (1993) 81 *Revista de Estudios Políticos* 37 ff.

content of rights” [*Wesengehaltsgarantie*] (Article 19, § 2); and above all, judicial protection entrusted first to ordinary courts (Article 19, § 4), culminating in the establishment of Constitutional Court with explicit rights-protection jurisdiction (Article 93, § 1, no. 4a of the Basic Law). To be sure, it may be said that many of the political problems – i.e. the external – that plagued the Weimar Constitution became dilemmas of legal interpretation – i.e. the internal – within the German Basic Law of 1949.

This strong institutional and normative design – and the binding force of constitutional rights – was given decisive impetus by case-law from the Karlsruhe Court, the supreme interpreter of the Basic Law. Notably, the efficacy of constitutional rights upon private parties lacks a broad textual foundation in the Basic Law itself. It is therefore significant that the *Lüth* judgement (BVerfGE 7, 198) is among the paradigmatic rulings that conceive constitutional rights as embodying an objective, value-based order.

On 15 January 1958, in resolving this case, the Court addressed central questions in modern rights theory. Although arising in a private-law context<sup>27</sup>, the Constitutional Court held that rights constitute an “objective order of values” (*objektive Wertordnung*), that permeates the entire legal system (*Ausstrahlungswirkung*), creating interpretative standards well beyond the immediate dispute. It declares:

“Undoubtedly, fundamental rights are intended primarily to safeguard the sphere of individual freedom against interventions by public authorities; they are defensive rights of citizens against the State. This follows from the spiritual evolution of the idea of fundamental rights, as well as from the historical events that led to their incorporation into the constitutions of each State. Such is also the meaning of the fundamental rights enshrined in the Basic Law, which – by placing the chapter on fundamental rights at the beginning of the Constitution – intended to highlight the primacy of the human being and of human dignity vis-à-vis state power. This conception also corresponds to the fact that the legislator established a special legal remedy for the protection of these rights – the constitutional complaint – exclusively against acts of public authority.”

“On the other hand, it is equally true that the Basic Law does not aspire to be a value-neutral legal order; rather, it has established – in its chapter on fundamental rights – an objective order of values, through which the fundamental decision to strengthen the scope of application of fundamental rights is manifested. The dignity of the human person and the free development of personality (which unfolds within a social community) form the nucleus of this system of values, which constitutes, in turn, a fundamental legal-constitutional decision valid for all spheres of law. This system of values provides directives and impulses for the legislature, the administration, and the judiciary. It also influences, of course, private law; no provision of private law may contradict it, all must be interpreted in its spirit. The legal content of fundamental rights as objective norms develops in private law through the provisions that predominate directly within that field of law. Just as new law must conform to the fundamental system of values,

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<sup>27</sup> The president of a private press club in Hamburg, Erich Lüth, called for a boycott of the film *Unsterbliche Geliebte* (*Immortal Beloved*) in a speech before film distributors, arguing that the film’s director, Veit Harlan, had produced the antisemitic film *Jud Süß* (*Jew Süss*) along with other films in the service of National Socialist ideology during the Hitler era. Harlan filed a civil tort action in which his counterpart was convicted. Lüth appealed before the Constitutional Court, arguing that the constitutional right to freedom of expression required that his actions be considered legitimate. See: M Borowski, ‘La Drittwirkung ante el trasfondo de la transformación de los derechos morales en derechos fundamentales’ (2020) in AD Mateos Durán (tr) 45 *Revista Derecho del Estado* 13.

the old law [enacted prior to the Constitution] must orient itself – in terms of its content – toward that system of values. From now on, it derives a specific constitutional content that determines its interpretation. *A dispute between private parties regarding rights and duties in the case of civil law norms influenced by fundamental rights remains substantively and procedurally a civil law dispute. Civil law will be interpreted and applied, even if its interpretation must adhere to public law, i.e., to the Constitution.*”

“[...] The judge must examine, by virtue of the constitutional mandate, whether the substantive provisions of civil law applied have been influenced by fundamental rights in the manner described; if so, then he must take into account in their interpretation and application the modifications to private law that arise therefrom. This is also the meaning of the binding force of civil law to fundamental rights (Article 1, para. 3 of the Basic Law). If he omits such criteria, and his judgment disregards this constitutional influence upon civil law norms, then he not only violates objective constitutional law – by ignoring the content of the norm that encompasses the fundamental right (as an objective norm) – but also, as a bearer of public power, violates through his judgment the fundamental right that the citizen is constitutionally entitled to, even with respect to judicial power. Against such a judgment – regardless of appeals available within the civil courts – a constitutional complaint may be lodged before the Federal Constitutional Court.”<sup>28</sup>

In a nutshell, constitutional rights are not only ‘negative rights’ (*Abwehrrechte*) of the individuals against the State; they also possess an ‘objective dimension’; that is, they simultaneously constitute elements of a “value order” (*Objektive Wertordnung*)<sup>29</sup>. Because of their binding force upon public authority, it is considered that the legislative branch may not enact a statute, the executive issue an administrative decision, nor the judiciary branch render a judgment incompatible with constitutional rights. Rights thus serve as parameters of “legal validity” – even among private parties’ relations. This deep transformation of the legal implies a deep transformation of the legal system, since all law becomes impregnated with principles and values. It is the so-called “materialization of law”, whereby the negative dimension of rights is complemented by a positive dimension, action-oriented, entrusted to public authorities, closer with the paradigm of the social State<sup>30</sup>.

Critic Ernst Forsthoﬀ observed what a transformative shift this was: “to transform into positive rights those that had been formulated as defensive, and therefore negatively.” That is, to make state action compatible with rights – the so-called “duties of protection” – it was necessary to understand them as “positive principles,” something that was possible “by conceiving rights as the positivization of values, and the totality of fundamental rights as a system of values inherent to the Constitution”<sup>31</sup>.

<sup>28</sup> BVerfGE 7, 198, 204. In R Huber, *Jurisprudencia del Tribunal Constitucional Federal alemán. Extractos de las sentencias más relevantes compiladas por Jürgen Schwabe*, M Anzola Gil & E Maus (tr) (Mexico: Konrad Adenauer-Stiftung 2009) 204–205 (italics mine). The decision is translated in part into English in: DP Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2<sup>nd</sup> ed. (Durham NC: Duke University Press 1997).

<sup>29</sup> K Stern, ‘El sistema de los derechos fundamentales en la República Federal de Alemania’ (1988) in J. Nicolás Muñiz (tr) 1 *Revista del Centro de Estudios Constitucionales* 261–277. In the same vein, see HP Schneider, ‘Peculiaridad y funciones de los derechos fundamentales en el Estado constitucional democrático’ (1979) in Joaquín Abellán (tr) 7 *Revista de Estudios Políticos* 7–35.

<sup>30</sup> See J Habermas, *Facticidad y validez. Sobre el derecho y el Estado democrático de derecho en términos de teoría del discurso*, M Jiménez (tr) 5th ed. (Madrid: Trotta 2000) ch 9.

<sup>31</sup> See E Forsthoﬀ, *El Estado social en la sociedad industrial*, L López Guerra & J Nicolás Muñiz (tr) (Madrid: Instituto de Estudios Políticos 1975) 252.

Consequently, the third-party effect of constitutional rights is thus one of the “legitimate descendants” of their objective dimension<sup>32</sup>. The *Drittwirkung der Grundrechte* doctrine has been hailed as “one of the most interesting legal discoveries of modern times”, having originated in German constitutional doctrine and which subsequently “has become an article of legal export”<sup>33</sup>. Addressing this doctrinal development calls for careful analysis of two main issues: the manner in which constitutional rights operate in private relations (the *substantive problem*) and the mechanism for their enforcement (the *procedural problem*), as identified by Robert Alexy.

Substantively, two supposedly distinct approaches have been articulated: the theory of “indirect effect” (*mittelbare Drittwirkung*) and that of “direct effect” (*unmittelbare Drittwirkung*). I say “supposedly distinct” because it is questioned whether the two are in fact opposed or contradictory. That is, the difference between them is relativized by recognizing the objective dimension of rights as “optimization requirements”<sup>34</sup>. In any case, what are the positions on indirect effect vis-à-vis direct effect in a nutshell?

According to the indirect effect (*mittelbare Drittwirkung*), constitutional rights act in private relations not as directly enforceable subjective rights, but as “principles” which, in their objective character, must be “filled in”<sup>35</sup> to introduce their content into Private Law norms. They bind immediately only the acts of public authorities, and in some cases private parties<sup>36</sup>. Their main proponent was Gunter Dürig<sup>37</sup>. For him, the guarantee of human dignity contained in the Basic Law does not merely impose a negative obligation upon the State but also establishes a duty of protection against any interference that may harm a person’s human dignity, regardless of its origin. From the fact that the Constitution contemplates fundamental rights as the most effective realization of such protection of values within positive law, it follows that values protected against the State through rights must also be protected when violated by private actors, companies or firms<sup>38</sup>. Thus, the horizontal projection of rights must be realized through the mediation of the legislator and, in its absence, through the judge<sup>39</sup>. This construction prevailed in Germany after the *Lüth* ruling. In this way of seeing things, the violation of fundamental rights is not attributable to the private party, nor does it originate

<sup>32</sup> The expression is from E-W Böckenförde, ‘Teoría e interpretación de los derechos fundamentales’ in JL Requejo & I Villaverde (trs) *Escritos sobre derechos fundamentales* (Baden-Baden: Nomos 1993) 112.

<sup>33</sup> I von Münch, ‘Drittwirkung de derechos fundamentales en Alemania’ in P Salvador Coderch et. al. *Asociaciones, derechos fundamentales y autonomía privada* (Madrid: Civitas 1997) 28–30; see also footnote no. 6 on p. 28.

<sup>34</sup> This is Böckenförde’s opinion, for whom the effect vis-à-vis third parties, as a limitation on individual autonomy of will, “makes no difference whether it is done directly or indirectly.” E-W Böckenförde, ‘Teoría e interpretación de los derechos fundamentales’ in JL Requejo & I Villaverde (trs) *Escritos sobre derechos fundamentales* (Baden-Baden: Nomos 1993) 114.

<sup>35</sup> The expression is from C Starck, ‘Derechos fundamentales y derecho privado’ (2002) 66 *Revista Española de Derecho Constitucional* 67.

<sup>36</sup> M Venegas Grau, *Derechos fundamentales y derecho privado*. Prólogo de Rafael de Asís (Madrid: Marcial Pons 2004) 114

<sup>37</sup> G Dürig, ‘Grundrechte und Zivilrechtsprechung’ in Th. Maunz, *Frschr. f. H. Nawiasky*, (Munich, 1956), 67.

<sup>38</sup> Quoted by M Venegas Grau, *Derechos fundamentales y derecho privado*. Prólogo de Rafael de Asís (Madrid: Marcial Pons 2004) 116. On the centrality of G. Dürig’s figure and his *Kommentar* for the value-oriented understanding of fundamental rights, in a critical mood, see: JA García Amado, ‘Sobre el neoconstitucionalismo y sus precursores’ in G Amado, JA Antonio, *El Derecho y sus circunstancias* (Bogotá: Universidad Externado de Colombia 2010) 145.

<sup>39</sup> M Venegas Grau, *Derechos fundamentales y derecho privado*. Prólogo de Rafael de Asís (Madrid: Marcial Pons 2004) 116. See also JM Bilbao Ubillós, *La eficacia de los derechos fundamentales frente a particulares. Análisis de la jurisprudencia del Tribunal Constitucional*. (Madrid: CEPC 1997) 283 ff; A Julio Estrada, *Los derechos fundamentales frente a particulares* (Bogotá: Universidad Externado de Colombia 2000) 109; and LM Cruz, *La constitución como orden de valores. Problemas jurídicos y políticos* (Granada: Comares 2005) 21 ff.

in an *inter-privatos* relationship, but rather it is caused by the judge when, in applying ordinary law to resolve a dispute among individuals, he infringes constitutional rights<sup>40</sup>.

By contrast, the direct effect (*unmittelbare Drittwirkung*) posits that certain constitutional rights retain a direct binding effect on private parties as reinforced subjective rights – albeit with qualifications and in a differentiated manner. This thesis of their direct binding force was formulated by H.C. Nipperdey, relying on the provision establishing equal rights for man and woman and, on this basis, dealing with the gender pay gap<sup>41</sup>. According to Nipperdey, certain rights apply directly within private legal relations. Note that what was claimed was not the absolute and undifferentiated validity of the entire catalogue of constitutional rights in private relations, but rather a horizontal effect of those rights wherever admissible<sup>42</sup>.

Notably, the paradigm of the social State and the notion of the “materialization of law” suggests that *Drittwirkung der Grundrechte* logically follows from the transformations of the democratic and social State model, where the general interest acquires more centrality and equality must be upheld in practice<sup>43</sup>. In doing so, the “constitutionalization of private law” occurs, blurring the traditional legal borders between the public and the private spheres. The Basic Law thus reflects the notion of a ‘total constitution’, providing normative guidance to public actors and facilitating the juridification of politics.

As Matthias Kumm argues, against Carl Schmitt, the Basic Law may be understood as a “total constitution”, “a constitution which is committed to the realization of constitutional justice”, because it:

- 1) Protects certain structural features from change.
- 2) Does not function as a neutral procedural order.
- 3) Constitutes a framework for the constitutionalization of political conflicts.
- 4) Grants the Constitutional Court the competence to adjudicate when constitutional rights are implicated.

From Kumm, a “Total Constitution” “not only establish a comprehensive system of defences of the individual against the potential excesses of the state: Instead, a key function of constitutional rights is to provide the basis for claims against public authorities to intervene on behalf of rights-claimants in response to threats from third parties<sup>44</sup>. In emphasizing this evaluative dimension, the constitution emerges as a “material fundamental order” – close to the idea of *Ein juristisches Weltenei*<sup>45</sup> that governs *ab initio* state and social actions, albeit with attendant risks.

<sup>40</sup> Cf. A Julio Estrada, *Los derechos fundamentales frente a particulares* (Bogotá: Universidad Externado de Colombia 2000) 172–173.

<sup>41</sup> HC Nipperdey, *Allgemeiner Teil des Bürgerlichen Rechts*, (I vol., Tubinga, 1959), 91 ff.

<sup>42</sup> I von Münch, ‘Drittwirkung de derechos fundamentales en Alemania’ in P Salvador Coderch et. al. *Asociaciones, derechos fundamentales y autonomía privada* (Madrid: Civitas 1997) 35.

<sup>43</sup> Cf. A Julio Estrada, *Los derechos fundamentales frente a particulares* (Bogotá: Universidad Externado de Colombia 2000) 104–105.

<sup>44</sup> Cf. M Kumm, ‘Who Is Afraid to the Total Constitution? Constitutional Rigths as Principles and the Constitutionalization of Private Law’ (2010) 7 (4) *German Law Journal* 344.

<sup>45</sup> The famous expression in E Forsthoff, *El Estado social en la sociedad industrial*, L López Guerra & J Nicolás Muñiz (tr) (Madrid: Instituto de Estudios Políticos 1975) 242.

#### IV. Critiques to *Drittwirkung der Grundrechte*

The German Basic Law of Bonn – its provisions and, above all, its interpretation by the Federal Constitutional Court – embodies what has been described as an “invasive constitution”, insofar as its rights are conceived as constitutive of the entire legal system. It is precisely this conceptualization of the constitution as a *Wertsystem* – as its very foundation – that has attracted significant criticism. Among the most frequent objections, three stand out<sup>46</sup>.

First, critics argue that this conception alters the very nature of the Constitution. According to the traditional doctrine, the constitution’s exclusive functions are to establish a catalogue of competencies of political power. This understanding is grounded in the classical theory of the limitation of governmental authority, which materialised historically in two central mechanisms: a set of rights that public power could not infringe, and the division of governmental functions through the separations of powers, to avoid concentration and abuse. From this perspective, the constitution is intended to limit public authority, not to regulate, evidenced by characteristics such as the difficulty of amendment, its fragmentary and generalized drafting to allow for political flexibility, and its normative superiority over ordinary legislation<sup>47</sup>.

From this angle, the Constitution is said to have a “thin” scope: it does not primarily aim to regulate relations among private parties, as just a cursory read of any constitutional text confirms. Protection of rights is assigned to a special branch, i.e. Private Law (through the Civil Code), or even Public Law (through the Penal Code, and others). Among other reasons, this is due to the fact that constitutional law itself is not suited to regulate changing and conflictive social relations, both because of its ‘nature’ as special law and because of the additional difficulties of its amendment. On the contrary, ordinary law, unlike constitutional law, is naturally open to change, responsive to the demands of each moment, and susceptible to reform by contingent political majorities. The Constitution, it could be said, asserts itself against this political dynamic. Thus, a distinction has been established between a public sphere directly subject to constitutional regulation and a private sphere not directly subject to it<sup>48</sup>.

Among other reasons, this is because constitutional law is not well-suited to the regulation of dynamic, often conflict-laden social relationships. It is special law, and its entrenchment precludes the responsiveness required to address societal change. By contrast, ordinary legislation is by nature open to amendment and reform by democratically elected majorities. In this sense, the constitution asserts itself against political fluctuation. This view draws a line between a public sphere, which is directly subject to constitutional scrutiny, and a private sphere, which is not. Such a division reflects the classic liberal separation between civil society and governmental authority: the less interference the State exercises, the freer the individual.

The second critique concerns the threat posed to private autonomy by the conception of rights as values – particularly through the development of duties of protection and the horizontal effect (*Drittwirkung*) of constitutional rights. It is argued that this endangers the very foundation of Private Law: individual freedom. Private agreements would, in this view, be subject to the permanent oversight of public authorities, rendering Private Law almost redundant.

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<sup>46</sup> In general, on the critiques of *Drittwirkung*, see V Ferreres Comella, ‘La eficacia de los derechos constitucionales frente a particulares’ in AA.VV. *Estudios sobre la Constitución Española. Homenaje al profesor Jordi Solé y Tura* (Madrid: CEPC 2008) 1173–1187.

<sup>47</sup> I closely follow in this section the account given by R Kay, ‘The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law’ (1993) 10 *Constitutional Commentary* 329–360.

<sup>48</sup> Cf. R Kay, ‘The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law’ (1993) 335.

By virtue of private autonomy, individuals are regarded as free and equal legal actors, empowered to determine: (i) whether to enter into a contract (ii) with whom: (iii) the legal regime governing their agreement; and (iv) the specific clauses under which they bind themselves. Contractual freedom is thus an expression of this broader autonomy – the individuals’ capacity to create legal rights and obligations by mutual consent. This presupposes confidence in the individuals’ ability to pursue and defend their interests within a framework of formal equality.

Accordingly, the principle of private autonomy establishes a zone of individual liberty. Indeed, from this perspective, constitutional rights themselves may be seen as expressions of the recognition of human freedom and moral agency. One could argue that ‘will’ is the foundation of rights. As one formulation states: rights “belong to that branch of morality which is specifically concerned with determining when one person’s freedom may be limited by another’s”. From this perspective emerge two types of rights tied to individual choice: *special rights*, arising from voluntary agreements (i.e. promises) and binding only between the parties; and *general rights*, which operate and are asserted defensively against all other persons, and including the State<sup>49</sup>. This understanding could be associated with rationalist natural law, which regarded rights as vestiges of pre-political liberty – prior to and unavailable to the State<sup>50</sup>. The character of rights as “shields” or “trumps” over any aggregative or state-based claim constituted their core identity.

The third and perhaps the most profound critique concerns the very conceptualization of rights as values. This, it is argued, poses risks to both the legal domain and constitutional rights themselves, for values belong to a wholly different sphere. A value, it is said, “is valid” but does not “exist”, and its validity generates a “strong drive for realization”. The problem is this: to call something a value is, ultimately, to seek its imposition. As Carl Schmitt famously wrote: “Virtues are exercised, norms are applied, commands are obeyed, but values are posited and imposed”<sup>51</sup>. Values, therefore, exhibit a combative character, as they claim validity for someone and against someone else. This arises from their fundamentally subjective nature. They are immersed in pure perspectivism, despite attempts to claim their objectivity to overcome late-19th-century nihilism. Not even this presumed objectivity can mitigate the risk they pose: every “valorization” implies a “devalorization”. Values thus invite conflict – until, ultimately, the “valueless” is eliminated.

This is the essence of Schmitt’s critique in *Die Tyrannei der Werte* [The Tyranny of Values]<sup>52</sup>, which transposes his Friend-Enemy distinction also into the realm of axiology. Once values are imported into law, they trigger an internal struggle to realise competing convictions and interests.

Furthermore, values are said to belong to a teleological, not deontological, domain. This implies that understanding constitutional rights as values compromises their status as legal norms. Instead of being rules that impose duties with universal validity, they become a “model of desirable goods”, subject to contestation and re-evaluation. Their function as protective “firewalls” against majoritarian decision-making is thereby eroded, to use Habermas’s metaphor<sup>53</sup>. Critics also highlight the indeterminacy introduced by

<sup>49</sup> See HLA Hart, ‘Are There Any Natural Rights’ (1955) 64 (2) *The Philosophical Review* 173 ff.

<sup>50</sup> Cf. C Schmitt, *Teoría de la Constitución*, F Ayala (tr) (Madrid: Alianza 1928) 169 ff. There is something paradoxical here: if we regard fundamental rights as natural rights, then – contrary to what is usually thought – this should lead to conceiving of them as absolute *by definition* and, therefore, as binding above all vis-à-vis private parties.

<sup>51</sup> C Schmitt, ‘La tiranía de los valores’ in Á Schmitt (tr) (1961) 115 *Revista de Estudios Políticos* 67 ff.

<sup>52</sup> *Ibid.* 68 ff.

<sup>53</sup> J Habermas, *Facticidad y validez. Sobre el derecho y el Estado democrático de derecho en términos de teoría del discurso*, M Jiménez (tr) 5th ed. (Madrid: Trotta 2000) 332.

axiological interpretation, undermining legal certainty and the stability of legal concepts and interpretative methods. Interpretation becomes an elusive “ascertainment of constitutional reality”, a highly discretionary practice in judges’ hands. As Ernst-Wolfgang Böckenförde, following Forsthoff, observed: it is no longer legal categories, but an overarching, often politically inflected vision of constitutional meaning that governs interpretation.

In such a setting, legal interpretation loses its rational character. Every application of a right risks becoming a mutation of the Constitution itself. The key to giving meaning to fundamental rights provisions according to the system of values at any given time, in a rapidly changing context, cannot be the traditional legal method<sup>54</sup>. Interpretation of rights, therefore, becomes irrational in this perspective.

This trend threatens both the separation of powers and the rule of law, understood as the subjection of all public authority – including judges – to the law. An open-ended and axiological conception of the constitution may encourage a form of judicial omnipotence, effectively displacing parliamentary democracy. The danger of juristocracy – government by judges – becomes tangible when the *radiating effect* of constitutional rights brings about the omnipotence of courts alongside the omnipresence of the constitution. Whether the constitution says too little (thus empowering judges) or too much (thus weakening legislators), treating rights as values renders them vulnerable to aggregative or collectivist strategies and dismisses their counter-majoritarian strength as negative rights<sup>55</sup>.

Thus, criticisms of *Drittwirkung der Grundrechte* may be traced to the conflation of values and constitutional rights. In my view, the central debate does not lie in the distinction between *mittelbare* and *unmittelbare Drittwirkung*, since both theories ultimately lead to balancing rights in conflict and therefore yield functionally equivalent outcomes, as Alexy argues<sup>56</sup>. The real controversy lies between those who reject altogether the application of rights to private relations and those who defend such extension.

For this reason, the construction of *Drittwirkung* – that is, the framework through which rights throughout the legal system, especially via the constitutionalization of Private Law, have led some scholars to propose a return to the classical, defensive understanding of rights<sup>57</sup>. The aim is to avoid both the over-moralization of law (which undermines legal certainty) and the re-materialization brought about by the Social State, which turns law into an instrument for enforcing egalitarian ideals.

This strategy involves adopting a substantive liberal theory of rights and viewing the constitution as a limit on public power exclusively<sup>58</sup>. Only by reasserting this model, it is argued, can we prevent one of the most problematic features of the post-war constitutional paradigm: the interpretative omnipotence of judges, fostered by an understanding of rights as values.

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<sup>54</sup> E-W Böckenförde, ‘Teoría e interpretación de los derechos fundamentales’ in JL Requejo & I Villaverde (trs) *Escritos sobre derechos fundamentales* (Baden-Baden: Nomos 1993) 27 ff.

<sup>55</sup> See R Alexy, *Teoría de los derechos fundamentales*, C Bernal (tr), 2nd ed (Madrid: CEPC 2009) 511 ff.

<sup>56</sup> See R Alexy, *Teoría de los derechos fundamentales*, C Bernal (tr), 2nd ed (Madrid: CEPC 2009) 471–472.

<sup>57</sup> E-W Böckenförde, ‘Grundrechte als Grundsatznormen. Zur gegenwärtigen Lage der Grunderchtsdogmatik’ in *Staat, Verfassung, Demokratie: Studien zur Verfassungstheorie und zum Verfassungsrecht* (Frankfurt am Main: Suhrkamp 1991) 196 ff.

<sup>58</sup> E Forsthoff, *El Estado social en la sociedad industrial*, L López Guerra & J Nicolás Muñoz (tr) (Madrid: Instituto de Estudios Políticos 1975) 262–263.

## V. Responses to Critiques

I have long maintained that any serious engagement with the critiques of *Drittwirkung der Grundrechte* ultimately entails the defence of an alternative conception of the Rule of Law. This conception is none other than the model inherited from the post-war constitutional settlement in Europe, characterized by a commitment to the subjection of all public power – including, most significantly, the legislative branch – to juridical control. This is particularly evident in the German constitutional tradition, and it is no coincidence that the doctrine of *Drittwirkung* emerged precisely in that temporal and historical context. While drawing on the number of doctrinal antecedents, its normative core is undoubtedly rooted in the Basic Law (*Grundgesetz*) of 1949, which inaugurated an ambitious constitutional project wherein the binding force of constitutional rights upon Parliament assumed a pivotal role.

In my view, the defence of the horizontal effect of constitutional rights presupposes, first, a robust affirmation of the *normative binding force* of the constitutional text, and, more radically, the extension of this force into the social sphere. Secondly, it requires a reconceptualization of the principle of the autonomy of the will, placing it within the broader framework of the Social and democratic State, and challenging the traditional strict dichotomy between the State and civil society. This reconceptualization recalls an alternative foundation of rights: that they are not merely expressions of “protected individual choices” but also constitute “interests to be protected”. Finally, the defence of *Drittwirkung* necessitates the continued affirmation of the deontological character of constitutional rights, as opposed to their mere reduction to axiological decisions or values, and a commitment to the rationality of justifiability of their interpretation.

If the constitution may be said to possess any intrinsic “nature”, it lies in its function as an instrument for the limitation and control of power – *any* power – regardless of its origin. Conceived in this way, such a nature is not distorted by the horizontal effect of constitutional rights, rather affirmed. Indeed, the normative force of the Constitution is strengthened when it is understood as applying across the entire legal order, including the domain of Private Law. From a systematic perspective – where law and rights form an integrate normative order – the constitution, as the supreme legal norm, must necessarily regulate even relations among private actors. Under the *Grundgesetz*, constitutional rights constitute *positive law* in the fullest sense: directly applicable norms that do not depend upon legislative transposition. This implies a radicalization of their normative reach. No sphere of power – public or private – can remain beyond the purview of the constitution. Even the ostensibly private sphere is subject to constitutional scrutiny, albeit to a lesser extent<sup>59</sup>.

This is central to a further argument in support of *Drittwirkung*: the proliferation of *factual powers* in contemporary society and the growing assumption of public functions by private actors. Private power must be recognized for its potential to infringe rights and, crucially, must not be left uncontrolled<sup>60</sup>.

Regarding the objection that *Drittwirkung der Grundrechte* undermines the principle of the autonomy of the will, it must be noted that this principle – foundational as it is to classical Private Law – has never been absolute. Even within the liberal State of the nineteenth century and its accompanying codifications, autonomy

<sup>59</sup> Cf. M La Torre, ‘Constitucionalismo de los antiguos y de los modernos: Constitución y estado de excepción’ (2011) 24 *Derechos y libertades* 45–65.

<sup>60</sup> In this vein, G Peces-Barba, *Curso de derechos fundamentales* (Madrid: BOE, 1999) 624–626.

of the will was subject to legal, moral and public interest limitations<sup>61</sup>. The error, in my view, lies in treating it as the *paramount* principle to be safeguarded by the legal order, rather than as one principle among many, necessarily balanced against others<sup>62</sup>.

This point is rendered even more salient within the paradigm of the Social and democratic State, wherein liberty is no longer conceived solely as non-interference<sup>63</sup>. While the liberal State grounded liberty in pre-political terms, the Social and democratic State demands a ‘relational’ understanding, one that gives substantive content to equality and non-discrimination. Such paradigm presupposes a more active, interventionist State that “assists, distributes, adjudicates; it does not abandon the individual to his social situation but rather comes to his aid”<sup>64</sup>.

In this context, the rigid separation between State and society is attenuated, and the ideal or democratic participation is strengthened. As Konrad Hesse aptly described, this is the “actualization of liberty” – a framework in which social rights are viewed as preconditions for meaningful participation in the political process<sup>65</sup>. Within this normative structure, rights are not grounded in individual choice alone, but in the objective interest they seek to protect<sup>66</sup>.

Criticism of the conceptualization of rights as values has been addressed through multiple strategies. A preliminary response is simply to acknowledge a constitutional fact: post-war constitutions explicitly enshrine not only rights and freedoms but also principles and values, thereby shaping the “constitutional discipline of rights”<sup>67</sup>. This necessitates what may be termed a “flexible deontology”, capable of mediating the value pluralism inherent in post-metaphysical societies<sup>68</sup>. Once values have been deduced (as in the German *Grundgesetz*) or incorporated (as in the Spanish Constitution of 1978), a conceptual link is forged between axiological and normative domains. The key lies in rationalizing the interpretative application of these rights-related contents, and in understanding the constitution as not merely a *fundamental order* but also a *framework order*.

Robert Alexy’s principled theory of constitutional rights (*Prinzipientheorie*) offers a particularly compelling response to this challenge. Rights conceived as ‘principles’ – or more precisely, as ‘optimization requirements’ – retain their deontological core while preserving their aspirational dimension. They entail a form of legal reasoning that is inherently a practical reasoning, oriented toward the balancing of conflicting rights and interests<sup>69</sup>. Such reasoning necessarily incorporates substantive moral considerations. Indeed, the very

<sup>61</sup> See M Venegas Grau, *Derechos fundamentales y derecho privado*. Prólogo de Rafael de Asís (Madrid: Marcial Pons 2004) 33 ff.

<sup>62</sup> Cf. R Alexy, *Teoría de los derechos fundamentales*, C Bernal (tr), 2nd ed (Madrid: CEPC 2009) 479.

<sup>63</sup> I have dealt with this argument in: FM Mora-Sifuentes, ‘Ideas de libertad y modelos de derechos fundamentales. Una aproximación’ (2013) 28 *Cuestiones Constitucionales* 174 ff.

<sup>64</sup> E Forsthoff, *El Estado social en la sociedad industrial*, L López Guerra & J Nicolás Muñoz (tr) (Madrid: Instituto de Estudios Políticos 1975).

<sup>65</sup> K Hesse, ‘Significado de los derechos fundamentales’ in E Benda et al. *Manual de derecho constitucional*, A López Pina (tr) (Madrid: Marcial Pons 2001) 90 ff.

<sup>66</sup> See ND MacCormick ‘Children’s Rights: a Test Case for Theories of Right’ (1976) LXII *Archiv für Rechts und Sozialphilosophie* 305–316.

<sup>67</sup> See B Celano ‘¿Cómo debería ser la disciplina constitucional de los derechos?’ in A Greppi & FJ Laporta (tr) *Derecho, justicia razones* (Madrid: CEPC 2009) 195–234.

<sup>68</sup> For a development of this argument, see G Zagrebelsky *El derecho dúctil. Ley, derechos, justicia* (M Gascón (tr), Madrid: Trotta 1995); and, more recently, A García-Figueroa *Criaturas de la moralidad. Una aproximación neoconstitucionalista al Derecho a través de los derechos* (Madrid: Trotta 2009).

<sup>69</sup> For an overview with some critiques to Alexy’s *Theorie der Grundrechte*, see the contributions contained in: AJ Menéndez & EO Eriksen (eds) *Fundamental Rights through Discourse* (Oslo, ARENA) 2004 *passim*.

notion of ‘value’ may be dispensed with, some scholars (e.g. B. Schlink) have argued, and reconceptualized as ‘principle’ – a shift already evident in both jurisprudence and doctrine<sup>70</sup>.

Ultimately, the *Prinzipientheorie* offers a structural account of constitutional rights that enables the articulation of their various functions in the modern constitutional State: as negative liberties, as having an objective dimension, as grounds of protective duties, as capable of third-party effect, and as encompassing socio-economics entitlements. Crucially, it seeks to bind the legislative branch to constitutional rights, while preserving the democratic leeway essential to legitimate governance<sup>71</sup>.

## VI. Conclusion

In this work, I have provided a brief account of the axiological dimension of constitutional rights and its significance for the doctrine of third-party effect or *Drittwirkung*. Also known as the horizontal effect of rights, it derives that the Constitution (and rights specifically) constitutes a system of values enshrined in the Basic Law – values which impose positive duties of protection upon all branches of public authority. In this conception, rights acquire the status of objective norms that radiate throughout the entire legal order (*Ausstrahlungswirkung*), extending their normative reach into private legal relationships as well<sup>72</sup>.

A theoretical antecedent to this formulation may be found in the work of Rudolf Smend. His *Integrationslehre* [theory of integration] is often regarded as a foundational influence on the value-based interpretative approach later adopted by the Federal Constitutional Court in the *Lüth* case (BVerfGE 7, 198)<sup>73</sup>. Indeed, Smend advanced a vision of constitutional rights as embodying a system of values that permeates all branches of law – including private law – requiring a flexible and dynamic hermeneutics on the part of the interpreter, appropriate to the character of such norms.

Nevertheless, the limitation of Smend’s approach should not be overlooked. These include his pronounced nationalist orientation, his understanding of integration as antithetical to social pluralism, and a tendency towards irrationalism – not to mention the evident antiliberal orientation of his theory of the State. Within this framework, the individual and subjective dimension of rights – specifically, their negative and defensive character against the State and individuals – could be subordinate to their function as a constitutional value. It is not surprising, then, that critics have called for a return to a liberal conception of rights as primarily negative entitlements. Yet the question remains: is such a return viable, given the ambitious normative architecture of the German Basic Law of 1949?

<sup>70</sup> Schlink has argued that Habermas’s critique contained in *Faktizität und Geltung*, regarding the value-oriented approach of the jurisprudence of the German Constitutional Court, is not only mistaken (because it conflates values with norms) but, above all, anachronistic (because the Federal Constitutional Court has no longer employed such a category since the 1970s). Cf. B. Schlink, ‘The Dynamics of Constitutional Adjudication’ (1995) 17 *Cardozo Law Review* 1234.

<sup>71</sup> This has been problematized within *Prinzipientheorie* through the development of the concept, structure, and content of ‘formal principles’ that seek to provide a response to the problem between the democratic legitimation of the legislative branch and to the authoritative character of the law with constitutional adjudication by judges. See R. Alexy, ‘Principios formales’, MC Quimbayo (tr) (2014) 37 *Doxa* 15–29.

<sup>72</sup> I have dealt in greater detail with the objective dimension of rights in FM Mora-Sifuentes, ‘La influencia de los derechos fundamentales en el ordenamiento: su dimensión objetiva’ (2017) 150 *Boletín Mexicano de Derecho Comparado* 1216 ff.

<sup>73</sup> See, again, R. Smend, *Verfassung und Verfassungsrecht*.

A theory of constitutional rights must seek to adequately reconstruct their role within the post-Second World War constitutional state (*Verfassungstaat*). This entails the development of a structural theory of rights capable of systematically articulating their diverse functions – as negative rights, positive State actions, and to organization and procedure – without allowing judicial interpretation to undermine either the authoritative nature of law or the principle of democratic self-government, especially in judicial review of legislation. Crucially, such a theory must preserve the deontological character of negative rights. The key, in my opinion, lies in resisting their reduction to moral values *stricto sensu*, while still recognizing their ideal dimension within the constitutional framework.

Rights, in this view, are not values, and should not be assimilated to them. Their normative structure is not properly teleological, but deontological: they function as a negative of individual rights, as shields, not as policy-objectives oriented. Paradoxically, defending this position does not preclude the articulation of rights as principles, or optimization requirements, which may be balanced in the case of rights conflicts. This balancing, however, can be conducted without recourse to the vocabulary of values.

It is, indeed, one of the undeniable merits of Robert Alexy's theory of constitutional rights, that it aspires to such reconstruction. His work has not only rationalized the German Federal Constitutional Court's case-law but has also furnished a sophisticated theoretical framework for understanding constitutional rights as optimization requirements, supported by a complete theory of legal argumentation and a non-positivistic concept of law. This is both its strength and – arguably – its point of vulnerability: the jurisprudence of values that originally shaped the Court's methodology continues to cast a shadow over the balancing model that Alexy refined over the years. For this reason, the theoretical tensions inherent in the axiological conception of rights remain a focal point of critical engagement<sup>74</sup>.

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<sup>74</sup> With some changes, this is an English version of a previous book chapter: FM Mora-Sifuentes 'Derechos fundamentales como valores. Sobre los orígenes y críticas a la *Drittwirkung*' in A.D. Mateos Durán (ed) *El efecto horizontal de los derechos fundamentales* (Bogotá: Universidad Externado de Colombia 2022) 71–116. The author is in debt to Osmar Fernando Camacho Vizcaya (LL. M. Student of the University of Guanajuato), for assistance in the process of translation. Finally, I would like to thank Professor Massimo La Torre, Chief Editor of East-West Studies, for his support and leadership.

# PHENOMENOLOGICAL CONSTITUTION OF THE LEGAL NORM AND IDENTIFICATION OF LAW

Leonardo Di Carlo<sup>1</sup>

## ABSTRACT

In legal theory, we can speak of normative validity in several senses. Here we will focus on the notion of validity as the *identification* of the legal norm. In trying to analyse the characteristics underlying the process of identification of law, the result will be the recovery of the *phenomenological perspective* in the form of the constitution of the norm in consciousness. From the point of view of the ideology of the sources, however, the present author will adopt a position of *moderate legal positivism* that reduces the substantive dimension of justice to the paradigm of argumentative correctness.

**Keywords:** validity, identification of Law, competence, correctness, positivism

In legal theory, we can speak of normative validity in several senses. Here we will focus on the notion of validity as the *identification* of the legal norm. In fact, even before asking whether it is worth observing and obeying a norm, it is appropriate to ask whether a norm is valid in the sense of being capable of being identified as a legal norm. In trying to analyse the characteristics underlying the process of identification of law, regarding method, the result will be the recovery of the *phenomenological perspective* in the form of the constitution of the norm in consciousness. Regarding the ideology of the sources, however, the present author will adopt a position of *moderate legal positivism* that reduces the substantive dimension of justice to the paradigm of argumentative correctness.

## I. Three meanings of legal validity

Within general legal theory, the validity of a norm can take on different meanings. Here three senses are adopted and distinguished. First, it is said that a norm is valid in the sense that it is capable of *being valid* as a norm. In this sense, the suitability of a norm as a valid norm coincides, as already mentioned, with the problem of the *identification of the law*, or rather, of the *identification of the legal norm*.

A second profile, on the other hand, sees the validity of a norm as *the adequacy* of the norm itself for some purpose. In this sense, a valid norm is a *good* norm because it is suitable for achieving certain purposes. A physical object, such as the apple that is before my eyes, or an ideal object, such as, for example, a poem or a norm, are good only with respect to the criterion which coincides with the concept of the thing itself.

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A good poem is a poem that corresponds to the idea of poetry, which realises the concept of poetry, that is, the intrinsic beauty of every work of art. Similarly, a legal norm, after being identified as such, will be said to be good if it succeeds in achieving its intrinsic purpose or the purpose of law in general, which is defined here as the *concept of law*. Therefore, in this second sense, it can be said that the validity of a norm will therefore be the congruence of a norm with respect to that concept or purpose of the law.

Finally, we can also speak of validity in a third sense. A norm is valid if it belongs to a legal system. If we ask when a norm belongs to a legal system, we find no other answer than the one that identifies this third meaning of validity with its enforceability by the judges. In this third sense, the validity of a norm coincides with its *enforceability*<sup>2</sup>.

## II. The two conditions for the identification of the legal norm

Let us limit our analysis to the identification of legal norms, asking ourselves when a norm is perceived as such or, rather, to adopt the terminology used so far, when a norm is identified as a valid norm. Here it would seem that a norm can be perceived as a valid norm only in the simultaneous presence of two conditions:

- 1) the first, which is external to the norm and as such has a pragmatic nature, is that the norm has been issued by a *competent authority*;
- 2) the second, on the other hand, is internal to the norm, and consists of the fact that the conditional antecedent of the normative pronouncement is true or plausible, i.e. correct, where *correctness* means the truth or likelihood of the conditional antecedent. If I say, “You must close the door,” that command or norm expresses a prescriptive sense insofar as the antecedent is true or plausible, that is, the pronouncement that the door is open. The “Close the door” norm can be perceived as a norm, and therefore as a norm that is valid as a norm, only on the assumption that the door is open. If the door were already closed and both the sender of the command and the recipient were aware of it, then the command “close the door” would not be perceived as a valid norm.

Before returning to these two points, however, it is worth making a brief reference to the structure of the legal norm. The typology of legal norms presents a wide taxonomic range<sup>3</sup>; however, it is beyond the scope of this study to classify them further. On the contrary, here we will focus on what seems to be the main type of legal norm, i.e. the *norm of conduct*<sup>4</sup>, characterized by a conditional form with the consequential presence of a deontic mode<sup>5</sup>. Let us now resume our analysis of the first condition for the identification of legal norms, that is, the competence of the body that issues them.

<sup>2</sup> Similarly, but not identically, Bulygin distinguishes between validity as binding force or “obligation”, which is prescriptive or normative in the broad sense; validity as the “belonging” of a norm to a given legal system, which is descriptive in character; and validity as the “enforceability” of an  $N_2$  norm on the basis of another  $N_1$  norm, which is also descriptive. On this point, cf. E Bulygin, *Norms, validity, regulatory systems* (Turin: Giappichelli 1995) 66 ff., 71–73. It is a distinction based on positive norms, while the distinction of the three senses of validity advanced in this theory is conceptual in nature.

<sup>3</sup> Cf. G Carcaterra, *Presupposti e strumenti della scienza giuridica* (Turin: Giappichelli 2012) 40 ff.

<sup>4</sup> On the norms of conduct as the main type of norm, cf. N Bobbio, *Teoria generale del diritto* (Turin: Giappichelli 1993) 96–99.

<sup>5</sup> On the presence of a deontic operator of permission, obligation and prohibition as a sign of the directive nature of a norm of conduct, cf. E Bulygin, *Norms, validity, regulatory system* (n 1) 244.

### III. Formal validity, competence and the norm of recognition

The first condition for which a norm of conduct is valid, and therefore valid to be identified as a legal norm, is that it has been issued by a *competent* authority. A prescriptive pronouncement uttered by a person without competence, for example, a child walking in the street, does not count as a norm in the sense that it is not identified or perceived as a legal norm<sup>6</sup>.

Of course, the idea of competence is not the only indicator, but it is still the most important one within a set of defining traits that define the notion of *formal validity* (generality, promulgation, clarity of norms, absence of antinomies, norms that ask for the impossible, constancy over time, etc.) and which has found its most apposite formulation in the concept of *procedural morality*<sup>7</sup>.

With the observance of these criteria of formal validity, together with that of the correct conditional antecedent, a pronouncement *definitively takes* the form of a legal norm. And it will remain so even if it is repealed. A law promulgated hundreds of years ago and repealed fifty years ago is still validly to be considered as a norm only if it has been issued by a competent authority, and if the antecedent of the conditional case is correct. It is for this reason that we also define as norms the norms of ancient Roman law, even though they have been repealed, despite the fact that in this way the universe of legal norms risks becoming platonically crowded with an infinite number of ideal objects<sup>8</sup>. Of course, a repealed norm, if it is still identified as a norm, is no longer enforceable, unless it is referred to by valid norms belonging to the legal system.

In this regard, two clarifications should be made. In the first place, the universe thus obtained of valid norms, in the sense of norms that are identifiable as such, will subsequently be divisible into enforceable norms, and norms that are no longer enforceable. Secondly, the inclusion of the criteria of formal validity in terms of the identification of the law implies the distinction between formal validity and enforceability, making the latter mutually irreducible<sup>9</sup>.

But let us return to competence. In advanced legal systems, the latter tends to be connected to compliance with procedural and substantive norms. Thus, a norm of conduct is valid as a norm, that is, it is capable of being perceived as a norm, not only if the participant is aware that it has been issued by a competent body, but also

<sup>6</sup> There is no need here to recall the debate on the reduction of the norms of competence to the norms of conduct. In this regard, however, it is worth recalling an attempt at such a reduction that is actually misunderstood. Reference is made to the thesis of R Alexy, in Id., *Teoria dei diritti fondamentali*, edited by L Di Carlo (Bologna: il Mulino 2012) 408–411, according to which the principle of competence derives from the principle of freedom: if there were no competences, the regulatory authorities would arbitrarily produce law, which would lead to the loss of freedom. In reality, Alexy does not claim that the idea of competence is reduced to permissions, but only that the principle of competence is implied by the principle of freedom. Therefore, Sieckmann's objection that Alexy reduces the idea of competence to norms of conduct cannot be shared: cf. J-R Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems* (Baden-Baden: Nomos Verlagsgesellschaft 1990) 48–50.

<sup>7</sup> Cf. LL Fuller, *The morality of law*, edited by A Dal Brollo (Milan: Giuffrè 1986) 65 ff.

<sup>8</sup> In a similar way, cf. J-R Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems* (n 5) 28, according to whom the adoption of a semantic conception of the norm, separate from the criteria of validity, would lead to considering as norms even norms that are no longer valid according to the criteria of validity; N Jansen, 'Die Geltung des Rechts. Begriffsgeschichte und Begriffsbildung' in C Bäcker (ed), *Rechtsdiskurs, Rechtsprinzipien, Rechtsbegriff. Elemente einer diskursiven Theorie fundamentaler Rechte* (Tübingen: Mohr Siebeck 2022) 405–406 which highlights the distinction between validity and existence in the sense that there are norms that are no longer valid, and therefore no longer enforceable, but equally existing because they are still perceived as such.

<sup>9</sup> On the opposing thesis that reduces validity to enforceability, it is worth recalling the contrary position of Bulygin, expressed in *Norms, validity, regulatory systems* (n 1) 83–87.

if it has been issued in compliance with the procedural norms provided for its issuance, such as, for example, in democratic regimes, having been approved by a majority in Parliament. If one is aware of the fact that a law has been approved by a minority of 2% of the members of parliament, the participant does not perceive that prescriptive pronouncement, perhaps uttered by a competent authority, as a law of their own legal system, nor therefore as a norm endowed with prescriptive force. Of course, among these procedural indicators, the most important remains that of competence. A law of the legal system of a liberal democracy, even if passed with a minority of 2% of the votes, is always perceived as a norm better than a normative act issued by a body without competence, such as primary school pupils who are role-playing as members of a legislative assembly.

If compliance with procedural norms affects the validity in terms of the identification of the norm, here it would seem that this is because compliance with procedural and substantive norms could fall within a broad meaning of competence, therefore, within the idea of *competence in the broad sense*. A prescriptive pronouncement is valid as a norm only if an authority issues such a norm in the exercise of its competence: a mayor of a city, according to the Italian system, cannot declare war on a foreign state. It is also necessary that this norm be issued in compliance with formal criteria – a mayor cannot issue a building permit unless they have obtained the opinion of the municipal technical office – as well as in compliance with substantive criteria, such as constitutional and ordinary urban planning regulations, which are hierarchically superior to administrative regulations. Without these three procedural conditions in the broad sense, the prescriptive force of a norm, and thus the validity of a norm as a legal norm, is weakened. Obviously, for the ordinary citizen it would be a generic “secular” knowledge of the principle of competence, beyond these three internal articulations which, on the other hand, require at least the bare minimum of legal culture.

Within this broad meaning of competence, even the substantive criteria, which the competent authority authorised to issue a given norm should observe, become *procedural in a broad sense*. Compliance with the substantive criterion, which the competent body must take into account, should not be interpreted as a predetermination, by the higher norm, of the content of the lower norm that the authority in question is enacting. On the contrary, the substantive criteria that the authority must take into account – and in this “taking into account”, while remaining of a substantive nature, they would also acquire a procedural nature – if they were not to be understood as criteria for predetermining the content of the lower norm, they would have to be read only as simple parameters of mere *conformity* of the lower norm to the higher norm. For example, constitutionally established fundamental rights should not be understood only as norms from which other norms at the legislative level are derived, but also as norms that the legislative body “should take into account” when issuing an ordinary norm<sup>10</sup>.

<sup>10</sup> On this point, cf. L Di Carlo, ‘Nomodinamica come teoria procedurale del diritto. Between normativism and axiomatic theory’ (2018) 1 *Diritto e processo amministrativo* 220–226. On this assumption, if nomodynamics has procedural value – in the sense that every norm is not so much a substantive parameter to which the lower norm must adapt, but rather a procedural situation to which the lower norm must more or less *conform* – then the indication of Kelsen’s theory as a decision-making theory cannot be shared. In this sense, cf. JJ Moreso, ‘La giustificazione kelseniana del judicial Review’ in JJ Moreso and M Troper (ed), *Giustizia costituzionale e Stato di diritto* (Naples: Edizioni Scientifiche Italiane 2012) 20–21 where the doctrine of the “alternative clause” is discussed. According to Kelsen’s doctrine, any norm, always and exclusively having a constitutive character, could never be invalid: in other words, if a norm is valid unless it is annulled by the Constitutional Court – and, therefore, potentially always valid – the idea of a hierarchical legal system in which the validity of a norm derives from its being in accordance with some superior ruling would lose its meaning.

This objection is doubted here. If Kelsen’s grading is interpreted in a procedural sense, then a graded reconstruction is already a first form of epistemic control in the creation of norms. In the same vein, cf. B Celano *Lezioni di filosofia del diritto* (Turin: Giappichelli 2018) 187–188, who speaks of the “paradox of nomodynamics” in Kelsen: in a nomodynamic structure, the substantive, even if reduced to a procedural situation, would tend to recur over and over again.

Beyond the narrow or extended meaning of competence, the latter should be seen as part of a system of sources, in which the highest body is identified by the *rule of recognition*<sup>11</sup>, which it would therefore be appropriate to place within the dimension of the constitutive identification of the norm itself.

#### IV. Conditional antecedent and factual and regulatory correctness

The second condition that allows a norm to be valid, and therefore to be identified as a legal norm and thus expressing prescriptive force, after the parameters of competence and *formal validity*, is that of the true or plausible conditional antecedent. The characteristics of the truth or verisimilitude of the conditional antecedent can be summarised under the concept of *correctness*<sup>12</sup>. It can therefore be said that the second condition for the identification of a norm is the presence of a correct conditional antecedent.

If one then asks what it means that the conditional antecedent of a norm of conduct must be true or plausible, and therefore correct, we can immediately affirm that, for a good percentage of norms, the norm must express a purpose, and therefore contain the idea of *functionality*. A norm that does not express a purpose is an invalid norm, that is, it is unsuitable for being perceived as a norm. Of course, it may happen that a norm, on closer analysis, turns out to be aimless. The idea of functionality, however, must be present, at least potentially. And this happens when the conditional antecedent is correct, that is, true or plausible. Correct antecedent and the idea of functionality here seem to be interchangeable. A clearly and evidently false conditional antecedent, where the interpreter is aware of this falsehood, leads to the denial of functionality. That an Italian citizen acquires the right to vote at the age of eighteen implies a purpose that would be completely absent if the same norm allowed the exercising of the right to vote from the age of ninety onwards. In fact, since it is patently false, and therefore incorrect, that psychological maturity is reached at ninety years of age, a norm that allowed Italian citizens to participate in any type of election only from that age would be meaningless and, as such, devoid of prescriptive force.

<sup>11</sup> Cf. HLA. Hart, *The concept of law*, edited by M Cattaneo (Turin: Einaudi 2002) 118 ff. On the conceptual, and therefore definitory, character of the rule of recognition, cf. E Bulygin, *Norms, validity, normative system* (n 1) 24, 220–224, 227–228, 245–246, 252–256: only in this way would the objection of circularity formulated against the rule of recognition be avoided. For the opposite thesis that reduces the rule of recognition to precepts, and in particular to sanctions, cf. G Tarello, *Diritto, enunciati e usi* (Bologna: il Mulino 1974) 107–111.

Although it tends to be postulated as a single position – cf. HLA Hart, *The Concept of Law* (n 10) 144–145 – there is no lack of positions asserting the existence of more than one rule of recognition, as in J Raz: on this point, cf. J Raz, *The Concept of Legal System* (Bologna: il Mulino 1977) 75, 267–269; Id., *Praktische Gründe und Normen* (Frankfurt am Main: Suhrkamp 2006) 176–178 and, above all, 198–199, 208; on Raz, cf. also B Bix, *Teoria del diritto. Ideas and contexts*, edited by A. Porciello (Turin: Giappichelli 2016) 53 and D Kuch, *Die Autorität des Rechts. Zur Rechtsphilosophie von Joseph Raz* (Tübingen: Mohr Siebeck 2016) 240. On the rule of recognition as a norm of obligation and not as a norm of power in Raz's interpretation, *ibid.*

<sup>12</sup> With regard to correctness, one cannot ignore the fundamental work of R. Alexy, *Theory of Legal Argumentation. The theory of rational discourse as a theory of legal motivation*, edited by M. La Torre (Milan: Giuffrè 1998) 149 ff., which sees correctness as a new paradigm for the constitutive identification of legal norms. On the interpretation of the rules of discourse in Alexy as a condition for the constitutive identification of legal norms, cf. L Di Carlo, 'Robert Alexys Diskursregeln zwischen funktionaler und transzendentaler Dimension' in *Rechtsdiskurs, Rechtsprinzipien, Rechtsbegriff* (n 7) 74–77. Overall, the paradigm of correctness as a new model of interpreting the law as a whole is part of the broader phenomenon of the rebirth of practical reason in the second half of the twentieth century: on this point, cf. M Kriele, *Recht und praktische Vernunft* (Göttingen: Vandenhoeck & Ruprecht 1979) 19 ff.

Alongside the conditional antecedent of a *factual type*, which has been referred to so far, there could also be a conditional antecedent of a normative type, as in the case of judicial or administrative norms. In such a case, the correctness of the conditional antecedent depends on compliance with the *principle of lawfulness*, which thus constitutes a parameter of assessment for the correctness of the conditional antecedent. An administrative act or a judicial judgment *clearly* in contrast with the legislative regulatory parameter would appear to be *manifestly* incorrect and, therefore, cannot be identified as a legal norm.

The two constituent elements for a norm to be a norm, although so far coming within the norms of conduct, could also be considered as norms expressed by *performative acts*. This is not the place to analyse the complex and fascinating phenomenon of constitutiveness<sup>13</sup>. Even with regard to performative acts, however, it can be said that they fulfil felicity conditions if the two conditions of competence and correctness are respected. The performative act “I declare you husband and wife” exerts its effects on two conditions: if these words are uttered by a state official or a minister of religion, both with competence, and if the postulate of correctness is respected: it makes sense to say “I declare you husband and wife”, but it would be absolutely senseless to say “I declare you master of the universe”.

In any case, the profile of correctness, beyond its possible positivization in regulatory texts, remains an ideal element of legal experience. Although it could also be prescribed by positive norms of the legal system, it remains autonomous from any type of ruling, including constitutional ones. Argumentative correctness, in fact, always transcends positive law<sup>14</sup>. Two arguments support this. First, a constitutional norm that is manifestly “unconstitutional” can only be repealed by the principles of general practical discourse<sup>15</sup>. Secondly, the fact that constitutional values are often balanced with non-constitutionalised values can probably be adequately explained by the idea that this is required by the principles of practical reason, or rather by the principles of general practical discourse.

## V. Validity as a constitutive identification between descriptive and prescriptive judgments

The validity of a norm as the suitability of the norm to be perceived and identified as such is also a process of *constitution* of the norm itself. By virtue of this process of constitution, a norm is perceived as an object that is separate and independent from other objects of reality, which no subsequent act of repeal can ever eliminate. What should be emphasised is that this identification of the norm is the identification of the norm within the consciousness of the subject, because the identification of a norm as a norm is also a *constitution* of the norm in the consciousness of the participant.

<sup>13</sup> For Italian legal theory, cf. G Carcaterra, *Le norme costitutive* (Turin: Giappichelli 2014) 62–63; Id., *Lezioni di filosofia del diritto. Legal Norms and Ethical Values* (Rome: Bulzoni Editore 1992) 99; A G Conte, *Filosofia del linguaggio normativo* (Turin: Giappichelli 1995) vol. I, 337–339.

<sup>14</sup> Cf. J-R Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems* (n 5) 196.

<sup>15</sup> For an opposite opinion, cf. C Bäcker, *Gerechtigkeit im Rechtsstaat* (Tübingen: Mohr Siebeck 2015) 302–304, who, in the case of “unconstitutional” constitutional norms, proposes the amendment of the Constitution by Parliament, rather than appealing to the principles of practical reason by the Constitutional Court itself. On the principles of general practical discourse, cf. R Alexy, ‘Grundlage der juristischen Argumentation’ in W Krawietz and R Alexy (eds), *Metatheorie juristischer Argumentation* (Berlin: Duncker & Humblot 1983) 46–47.

From the foregoing a substantially phenomenological approach to the identification of legal norms can be derived. As such, the process of constitutive constitution or *identification* is a substantially *phenomenological* process of separation of the norm from other types of objects. A prescriptive pronouncement that has the two conditions just mentioned – formal competence/validity and correct conditional antecedent – emerges by separating itself from the totality of prescriptive pronouncements, among which it is still confused, to become a legal norm. And if this norm thus constituted were to lose one of the two requirements or both, it would return to be confused in the indistinct totality of prescriptive pronouncements.

This is an example of Husserlian reduction, but here we are in presence not of a world of things, but of universe of prescriptive utterances: we know that this reduction is only a formal method<sup>16</sup>. As in the Husserlian perspective we must suspend the judgement above the existence of the things – this is the reduction of the world in the consciousness: the world as universe not of things but of universe of phenomenons and perceptions in the consciousness<sup>17</sup> – so in Law we must suspend the judgement above the existence of the legal norms and believe that the universe of practical utterances is made only by prescriptive utterances<sup>18</sup>. Afterward a prescriptive utterance which has the two conditions of competence and correct conditional antecedent emerges by separating itself from the totality of prescriptive pronouncements: a legal norm emerges in the consciousness as legal norm.

Moreover, the phenomenological position needs to be understood as both a supplement to the limitations of a legal theory based upon language and argumentation. Thereby it is capable of encompassing the Alexyian position or, better, the argumentation's field.

The merit of the constitutive-transcendental perspective is that it is more attentive in terms of grasping the legal experience in its entirety. The constitutive character of normative identification originated as a category before the famous Hartian pair of *internal aspect* and *external aspect*<sup>19</sup>. The concepts of internal and external aspects turn out to be secondary concepts insofar as they only have the function of correctly identifying which norms actually belong to a legal system and which are not part of a legal system. However, once the internal attitude is assumed, and the correct identification of the norms of a legal system is reached, a further question remains: why is norm  $N_1$  correctly indicated as belonging to system X perceived as a legal norm? To answer this question, the concepts of internal and external aspects seem to be inadequate insofar as they say nothing about the fundamental characteristics for the identification of the law. The correct identification of legal norms, in fact, already presumes that consciousness is able to outline the structure of the norm itself. Therefore, something else, here called the process of identifying the legal norm, is needed to serve as the first dimension of legal experience.

The validity of a norm as a predicate attributed to a prescriptive pronouncement by means of its constitutive identification makes it appropriate to revisit the conceptual pair of external aspect and internal aspect in

<sup>16</sup> On the Phenomenology in general see F Kaufmann, *Die Kriterien des Rechts: eine Untersuchung über die Prinzipien der juristischen Methodenlehre*, Tübingen: Mohr 2024 and F Schreier, *Grundbegriffe und Grundformen des Rechts*, Wien: Deuticke 1924; G. Stella, *I giuristi di Husserl*, Milano: giuffrè 1990. On the critical aspect of the interpretation of reduction after Husserl, see J. Taminiaux, *The Metamorphoses of the Phenomenological Reduction*, Milwaukee: Marquette University Press 2004. On the relationship between F. Kaufmann and the legal phenomenology see S. Loidolt, *Einführung in die Rechtsphänomenologie. Eine historisch-systematische Darstellung*, Tübingen: Mohr Siebeck 2010, 144 f.; on the relationship between F. Schreier und the legal phenomenology, *ibid.* 153 f.

<sup>17</sup> On the relationship between reduction, constitution and transcendental idealism in Husserl, *ibid.*, 34–35

<sup>18</sup> On the reduction in Law, *ibid.* 54 ff.

<sup>19</sup> Cf. HLA Hart, *The Concept of Law* (n 10) 106 ff.

a further direction, with respect to the one just considered. We have already seen how constitutive identification is the true original attitude of the legal operator.

On this basis, it is worth adding a further reflection. When consciousness perceives and identifies a prescriptive pronouncement as a legal norm, this constitution of the norm takes place through the release of a prescriptive meaning, which could be defined as a *prescriptive force*.

Now, it is worth asking whether the constitutive identification of a norm as a valid norm has a descriptive nature or a prescriptive nature. In the constitution of the object, the subject has an active role: the object emerges from ..., it is constituted on the basis of other objects, amongst which it is initially confused, by virtue of certain properties perceived by the subject. The constitutive identification of the norm as a norm genetically shows how a deontic pronouncement is transformed into a norm. If the constitutive identification of a norm coincides with its suitability to *be valid* as a norm, and if this suitability is nothing more than the ability of consciousness to perceive the prescriptive force of the norm itself, it follows that the constitutive identification of the norm is conceptually close not so much to the external descriptive aspect, but rather to the internal and prescriptive aspect. Indeed, as mentioned above, the very concept of prescriptive force here suggests the idea that the classical dichotomy between external and internal aspects, or between the observer's perspective and the participant's perspective, should be overcome in the sense of adopting only the internal and prescriptive aspect of the participant<sup>20</sup>.

## VI. From the constitutive identification of the norm to the legal system: the concept of law

The constitutive identification of a norm by means of the parameters of formal validity and correct conditional antecedent implies the transition from the single norm to the organised set of norms defined as *the legal system*. In fact, the idea of legal order is rooted in the dimension of the constitutive identification of the norm. Once a norm has been constitutively identified as a valid norm, it remains in being perceived as such only insofar as it does not contradict other norms. In other words, the properties of *formal validity*, especially that of *coherence*, are essential for the identification of a norm as a norm. If I perceive a norm  $N_1$  as a norm on the basis of the two characteristics listed above, and then I place it next to norm  $N_2$ , which, on the other hand, is antinomian to it, what happens after a while is that the perception of the prescriptive force of both norms gradually weakens, with the consequence that over time they can no longer be identified as legal norms.

Obviously, this happens in the case of norms whose mutual disvalue is not immediately perceived by the participants. On the contrary, of two antinomian norms  $N_1$  "killing is forbidden" and  $N_2$  "killing is allowed" – whose axiological asymmetry is immediately evident – the participants will tend to disapply  $N_2$  which is clearly antithetical to civil coexistence, thus observing and applying  $N_1$ . However, out of two norms such as  $N_3$  "it is mandatory to pay taxes at a rate of 60% of income" and  $N_4$  "it is permitted not to pay taxes at a rate of 60%", the participants would not know which of the two norms,  $N_3$  or  $N_4$ , to prioritise. The result is that both would

<sup>20</sup> On the inclusive surpassing of the descriptive attitude only in its internal and prescriptive aspect – particularly with regard to the concept of law as an interpretative practice by R Dworkin, expressed in Id., *Law's Empire* (London: Fontana Press 1986) 58 ff. and Id., *Justice in Robes* (Cambridge Mass.: The Belknap Press 2006) 11 ff. – cf. M La Torre, *The right against himself. Essay on legal positivism and its crisis* (Florence: Leo S. Olschki Editore 2020) 16–21.

gradually lose their preceptual force until they are downgraded from legal norms to simple prescriptive pronouncements of models of conduct.

Therefore, the absence of antinomies also implies the conceptual necessity of the possibility of a plurality of norms, and therefore of a legal order as an organised totality of norms. However, in order to ensure the criterion of coherence to the greatest extent possible, the notion of the concept of law must be introduced.

The constitutive identification of a norm, as we have seen, is closely linked to the notion of competence. The latter, however, already presupposes the notion of law and legal norm: if a body has the competence to issue norms, this already presupposes that it knows what law is and what a legal norm is. Therefore, to avoid this circularity, it is necessary to know the very general notion of law – which we could define as the *concept of law in the broad sense* or, more simply, *the definition of law* – which allows us to distinguish law from other social subsystems such as economy, religion, etc. To give an example, consider the Kantian definition of law as a set of norms relating to external conduct, etc. It is a very general notion of law, firstly, conceivable by everyone irrespective of their degree of knowledge of legal-institutional culture and which, secondly, allows for a distinction, albeit minimal, between law and other social subsystems.

In this context it's appropriate to underline, that, if we use a conceptual and linguistic tools near to system's theory of Luhmann, nevertheless it isn't our purpose to apply the system's theory of Luhmann, which falls outside of this paper. The relationship between social subsystems and environment here isn't important, because this analyses remains exclusively into the law. The here adopted perspective isn't dynamic and social, but develops only on the conceptual level. The phenomenological standpoint of norm's perception goes before of the difference between law and environment. We know that Luhmann's social system's theory is explicitly post-phenomenological: as a theory of social systems, she is elaborated beyond Husserlian phenomenology<sup>21</sup>.

Now, in addition to protecting us from the objection of circularity, the concept of law in the broad sense allows us to recall one of the most widespread notions of the general theory of contemporary law, namely Raz's idea of *norms as reasons for action*<sup>22</sup>, which is rooted here in the context of the constitutive identification of norms. In fact, to state that a legal norm is a reason for action that prevails over other competing reasons would be like saying that the law, in effectively directing the conduct of the participants, is the only social subsystem that manages to prevail, for definitional reasons, over other competing subsystems. Regardless of the degree of effectiveness of a norm, a legal norm is such if it succeeds in directing the conduct of participants by prevailing over other types of norms, including moral ones: if it fails to prevail, it means that it is not a reason for action and, therefore, it is not a legal norm. For definitional reasons, law is that subsystem which prevails over other subsystems in order to coordinate the actions of individuals: social integration, for conceptual reasons, is the responsibility of legal norms, not of moral ones. Raz's idea of norms as reasons for action is nothing more than the repetition of the definition of the idea of law. And if the underlying idea of norms as reasons for action is nothing more than the re-proposition of the definition of law, it follows that it would be nothing more than an analytical definition.

To avoid the trivialization of Raz's idea, here it is suggested to place it within the dimension of the constitutive identification of legal norms. It is true that Raz often emphasises the need for the legal system to be

<sup>21</sup> On the Luhmann's social system's theory as explicitly post-phenomenological theory, see N. Luhmann *The Modern Sciences and Phenomenology* in N. Luhmann, *Theories of Distinction. Redescribing The Descriptions of Modernity* (Stanford: Stanford University Press 2002) 33–61.

<sup>22</sup> Cf. J Raz, *Praktische Gründe und Normen* (n 10) 16–17, 67.

such if it is effective<sup>23</sup>. Effectiveness, however, is not the defining feature of law. In fact, it is an emphasis that is already present within the law, therefore subsequent to the other fundamental idea that law for definitional reasons must prevail over other practical subsystems, such as the moral one. On the basis of this interpretation, the idea of a norm as a reason for action implies the other interpretation according to which, in order to identify a norm, extrajudicial moral criteria are not necessary. In this way, we can see the strictly positivistic nature of Raz's thesis more clearly, its theoretical scope emerging not only after contextualising the idea of norms as reasons for action in the identification of norms, but also after comparing it, as will be done below, with Radbruch's Formula, which should also be rooted in the constitutive identification of law, emphasising the necessary connection between law and justice<sup>24</sup>.

Returning to coherence, we have seen how a legal norm has meaning and prescriptive force, and therefore remains valid, only if it is not antinomian with other norms. In order to avoid and overcome normative antinomies, however, it would be appropriate to have a final goal, a final value to which the production of legal norms should be directed and which would guarantee the harmonization of legal norms in a totality that can be posited as a legal system. This final goal is defined here as *the concept of law in the narrow sense*<sup>25</sup>.

## VII. Constitutive identification of law and legal positivism

Within the dimension of the *constitutive identification* of the norm, here a moderately *positivist position* is maintained. A norm is suitable for being perceived as a norm and, therefore, for being valid as a norm, if it meets the requirements of formal validity and the correct conditional antecedent or of functionality, which is the same thing.

Now, an unjust norm – for example, think of the National Socialist laws that hatefully discriminated against citizens of Jewish citizens should remain a legal norm like all the others, even if intolerably unjust, unless this injustice, whether slight or serious, were to succeed in translating into *incorrectness*. The incorrectness of the conditional antecedent, reflected in the loss of the requirement of functionality, would consequently bring with it the loss of the physiognomy of the norm, and therefore its validity. Conversely, if the injustice of a norm were not to succeed in translating into incorrectness, such injustice would not be relevant for the validity of the norm.

On this basis, we are closer to the positivist position of pre-war Radbruch than to the non-positivistic, or rather post-positivistic one of the homonymous post-1945 Formula. On the basis of the generally accepted, but not proven, assumption of Radbruch's conversion from positivism before 1945 to non-positivism after the Second World War – though there is no shortage of scholars asserting the thesis of Radbruch's non-positivistic

<sup>23</sup> Cf. J Raz, *Praktische Gründe und Normen* (n 10) 168–170, 174.

<sup>24</sup> On the debate between Raz and Alexy, see G. Pavlakos (ed.) (2007) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart) 17–58.

<sup>25</sup> This is the reason that may have prompted theorists such as Santi Romano to affirm that the legal system is not reducible to a sum of norms, but it is a totality that precedes the single norm: on this point, cf. S Romano, *L'ordinamento giuridico*, edited by M Croce (Macerata: Quodlibet 2018) 27. On antinomies in general and in practice, cf. N Bobbio, *General Theory of Law* (n 3) 213–217. The issue of antinomies in concrete terms can then be traced back to the legal clashes of principles that can be resolved by finding a point of equilibrium: on this point, cf. R Alexy, *Teoria dei diritti fondamentali* (n 5) 108 ff.

continuity<sup>26</sup> – for Radbruch’s *Philosophy of Law*, for the purposes of the constitutive identification of a norm, not only equality but also certainty and functionality are relevant, the latter being conceptually close to the parameters stated here of formal validity and the correct conditional antecedent or functionality<sup>27</sup>.

It is the second Radbruch, the non-positivist one of the Formula, who, while still giving space to the concepts of certainty and functionality, ends up emphasising the fundamental role of equality in terms of the *constitutive identification* of the norm. The Formula, in fact, states that the value of certainty prevails over justice even when the law is slightly flawed from a moral point of view, unless the threshold of intolerable injustice has been crossed; and that those norms which, by consciously denying the right to equality, do not present any aspiration to justice, should be considered as non-legal<sup>28</sup>.

More specifically, the Formula distinguishes the following three situations: there are slightly unjust norms that have the character of legal norms and that must be enforced by the judge; then at the opposite extreme we find norms devoid of the character of law because they have consciously violated the principle of equality and, as such, should not be enforced by the judge; finally, in an intermediate position, there are intolerably unjust norms, which, while still retaining a legal nature, should nevertheless not be enforced in court by the judge.

This Formula, together with its assumption by Alexy<sup>29</sup>, represents the most recent attempt from the point of view of the history of ideas to insert justice as a factor for *identifying* a legal norm: an intolerably unjust norm is no longer a valid legal norm, because it is no longer identifiable as a legal norm<sup>30</sup>. The second Radbruch ends up representing the modern variant of non-positivism in terms of validity as a *constitutive identification* of the norm.

Here, however, it seems that the Radbruch Formula, although appealing from a theoretical point of view, presents some critical points. An unjust norm is still a norm if it reflects the criteria of certainty and functionality, or, in the lexicon adopted here, if it respects the criteria of formal validity and functionality, that is,

<sup>26</sup> Cf. SL Paulson, *The Philosophy of Law of Gustav Radbruch*, edited by N Bersier Ladavac, P Chiassoni and A Sardo (Milan: Mimesis 2023) 53, 75, 91, 120–123, 141, where it is highlighted that the idea of justice to which law is instrumental is already present in writings before 1945. Moreover, both before the Second World War and after, the idea that legal certainty is a question for the judge to solve while equality as an absolute value is a question for the legislator to solve have remained unchanged: *ibid.*, 125; with the only difference being that, if in the *Philosophy of Law* of 1932 the judge must always enforce the law, even an unjust one, after 1945 the judge must not enforce an intolerably unjust law, or one that consciously denies equality: *ibid.*, 159. On this change of attitude towards the judge in the enforcement of an unjust law, cf. G Radbruch, *Rechtsphilosophie*, edited by R Dreier and S Paulson (Heidelberg: C. F. Müller Verlag 2003) 84–85; C Bäcker, *Gerechtigkeit im Rechtsstaat* (n 14) 41–43 and p. 60 where it is emphasised that the annulment of an intolerably unjust law should be the sole responsibility of the judges of the higher courts or even of the legislative body. On the idea of the annulment of an intolerably unjust law being reserved for the Superior Courts or for the legislative body itself, cf. also G Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, in *Rechtsphilosophie* above, 217.

<sup>27</sup> For the influence of neo-Kantianism on the first Radbruch – values and validity of the norm as prerequisites for the legal evaluation of conduct – cf. S Ziemann, *Neukantianisches Strafrechtsdenken* (Baden-Baden: Nomos Verlagsgesellschaft 2009) 66 ff. On Baden neo-Kantianism as a common perspective for both the non-positivist Radbruch and the positivist Kelsen, cf. SL Paulson, *Gustav Radbruch’s Philosophy of Law* (n 25) pp. 55–56, 201 ff.

<sup>28</sup> Cf. G. Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, in *Id.*, *Rechtsphilosophie* (n 25) 215–217; SL Paulson, *The Philosophy of Law of Gustav Radbruch* (n 25) 70–71, 111–112, 141.

<sup>29</sup> On the interpretation of Radbruch’s Formula by Alexy in terms of correctness, see B. Bix, ‘Robert Alexy, Radbruch’s Formula, and the Nature of Legal Theory’ in (2006) 37 *Rechtstheorie*, 139–149 (141). On relationship between law and justice in Alexy, see too R. Alexy, *The Argument from Injustice. A Reply to Legal Positivism* (Oxford: Oxford University Press 2002); *ibid.*, *Law’s Ideal Dimension* (Oxford: Oxford University Press 2021), 18 f.

<sup>30</sup> Cf. R Alexy, *Concept and validity of law*, edited by M La Torre and translated by L Di Carlo (Rome: Carocci 2022) 49, 65–67, 93 ff.

of the correct conditional antecedent. Such a norm, however, begins to lose the characteristics of a legal norm as soon as the threshold of injustice begins to rise beyond the limits of tolerability. An unjust norm is still a norm that could gradually and progressively begin to lose the defining features of a norm. A norm validly constituted as such, at a certain point, loses the physiognomy of a norm; that is, it loses its identity. In Hegelian terms, quantity changes the quality of an object. When does this happen? How is it possible that a norm, which guarantees certainty and functionality, at a certain point is no longer itself? Yes, this is possible as long as we interpret the idea of *justice* in terms of *correctness*<sup>31</sup>.

As anticipated, a norm validly constituted as such could lose its physiognomy as a norm only if the internal parameters of the structure of the norm itself that guarantee its identity and validity as a norm, at a certain point, are lost. And they fail when, as the intolerability of the injustice increases, the parameter of functionality, and therefore of correctness, fails. The National Socialist norms that led to the intolerable persecution of the Jews were intolerably unjust norms because they were based on absolutely false empirical data and on weak and ridiculous arguments already at the time of the National Socialist regime, without having to wait for the development of genetics from the 1950s onwards which showed that Jews are perfectly equal to all other people. If it is not possible to translate injustice and inequality into terms of correctness and incorrectness, here it is affirmed that not only does an intolerably unjust norm remain a valid norm, but that even a norm that knowingly violates the principle of equality continues to have the quality of a legal norm.

Therefore, the dimension of the constitutive identification of the norm does not seem to imply any appeal to natural law and morality as the criterion for identifying the norm itself. If a norm is constituted as such on the basis of the criteria of formal validity and of correct conditional antecedent, or of functionality, and therefore correctness, this correctness, however, is not interchangeable with the idea of morality. Also, from a linguistic point of view, if I say that “this norm is immoral”, I have already pronounced the expression “this norm”, which is possible only after identifying a prescriptive pronouncement as a legal norm<sup>32</sup>.

In order for a natural law position to be relevant in terms of the identification of law, two situations have to exist. Firstly, any immoral or highly immoral content should automatically be interpreted as the incorrectness of the conditional antecedent of the normative proposition; an idea which has been excluded insofar as this produces immoral norms which, nevertheless, respect the parameter of correctness. Secondly, an intolerably immoral norm which respects the parameter of correctness if it wants to be defined as a legal norm must also lose its physiognomy as a norm and therefore no longer be identifiable as a legal norm. However, this would be a paradoxical and contradictory hypothesis; that is, a borderline case: on the one hand, the norm in question is correct, and is therefore a norm; on the other hand, it is devoid of its physiognomy as a norm, so it is no longer identifiable as a norm. Only in this remote and very unlikely eventuality would a natural law position be admissible even in terms of the identification of the norm.

On the basis of these considerations, therefore, in the phase of the constitutive identification of the norm, a *moderate positivism* is professed here. We are dealing here with positivism because it excludes moral content from the process of identifying the legal norm. And we are dealing here with moderate positivism because the will of the legislative body that has the competence to issue norms must always pass through the filter of correctness.

<sup>31</sup> For justice as correctness, cf. R Alexy, *The dual nature of law*, in *Concept and validity of law* (n 23) 147, 150.

<sup>32</sup> Cf. N MacCormick – O Weinberger, *Law as an institution*, edited by M La Torre (Milan: Giuffrè 1990) 227–231.

# WALTER HALLSTEIN AND EUROPEAN LEGAL INTEGRATION

Jacopo Volpi<sup>1</sup>

## ABSTRACT

This article tries to reconstruct the figure of Walter Hallstein, as an emblematic representative (practical and theoretical) of the fundamental directions taken, over the decades, by the development of European integration. Thus, we attempt to analyze some essential elements of his theoretical-legal conception, to emphasize the critical links with the ideological dimension of the Union's structure. First, we provide a brief comparison with other theorists of European integration. Second, we trace, specifically, some fundamental thematic elements that emerge from internal reflection on Hallstein's writings. Third, we highlight the similarities with the theoretical positions of that complex of doctrines attributable to the so-called German 'ordoliberalism'. Considering these analytical passages, we try to argue the profound connection of Hallstein's perspective with some founding paradigms of the architectural structure of the EU, which see the centrality of law as one of their key elements. The perspective of the German politician and jurist sees the legal dimension as the indefectible requirement for a solid and structured European integration (even if this does not exclude the importance of politics and economics). The centrality of law is what reveals the relevance of Hallstein's positions to understand, on a genealogical level, and from a philosophical-political profile, a good part of the historical and institutional developments of the EU.

**Keywords:** Walter Hallstein, European Integration, Ordoliberalism, Legal Theory and European Union

**Summary:** I. Walter Hallstein: a complex figure, between politics and doctrinal analysis – II. Altiero Spinelli and Hans-Peter Ipsen: different conceptions of European integration – III. Hallstein's political path and legal reflection – IV. The 'European Community' and *integration through law* – V. Hallstein's vision, ordoliberal theories, and some conclusions

## I. Walter Hallstein: a complex figure, between politics and doctrinal analysis

It can be said that a prominent role in the construction of the legal order of the European Communities can be attributed, depending on the different phases, to multiple political and institutional actors. There is no doubt, however, that a decisive influence in the first 'season' of European integration was played by an eminent

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politician, professor, and public figure: Walter Hallstein (1901-1982). Hallstein, in fact, contributed significantly, and on several levels, to the architectural development of the European order. First, through the articulation of the idea of the European Community as a ‘Community of Law’, which would find practical expression in the case law of the Court of Justice itself. Second, on a more general level, by determining and directing, directly and indirectly, the overall development of the European reality.

Hallstein’s vision will be one of the ‘winning’ perspectives (despite the contrasting opinions on the topic<sup>2</sup>), and will characterize, in a hidden way, the development of European institutions. This is unlike other readings or interpretations – such as those, for example, of Altiero Spinelli or Hans-Peter Ipsen. Spinelli’s and Ipsen’s interpretations apparently seem to have a prevailing importance, but they will not exert, from a *juridical-institutional* point of view, the real influence sometimes claimed (a different argument applies when looking at a broader horizon: in this case, the implications are more varied). However, a quick comparison will be made with authors such as Spinelli and Ipsen. This will allow us to understand why Hallstein’s vision takes on the characteristics of an almost ‘ideal-typical’ conception for the practical and conceptual articulation of the European Community legal and political order.

At first glance, the image that portrays Walter Hallstein’s political and legal trajectory seems alien to a complete historical-philosophical determination, appearing controversial and difficult to characterize. In his time, Corrado Malandrino highlighted a substantial obliteration of Hallstein’s thought. At the national level, in Germany, his image was essentially framed in the somewhat overly stylized figure of the “Christian Democrat collaborator of Adenauer in the Federal Foreign Office and author of the anti-communist *Hallstein-Doktrin*”<sup>3</sup>. In the studies of political doctrines and in the history of European integration, “his ideas, the positions he took, and the kind of Europe he actually wanted to create are no longer precisely remembered”<sup>4</sup>.

The legal thought of Hallstein<sup>5</sup> has therefore been the subject of contrasting analyses in the literature<sup>6</sup>. On the one hand, its lack of originality has been highlighted, for example by tracing its theoretical perspective back to the (neo)functionalist conception of Jean Monnet<sup>7</sup>. On the other hand, however, the German jurist has been regarded as an emblematic figure of the traditionally federalist ideology, “based on slogans such as ‘United States of Europe’”<sup>8</sup>. “Slogans” which, all things considered, “were part of the ideal baggage of the

<sup>2</sup> See W Wessels, *Walter Hallstein’s Contribution to Integration Theory: Outdated or Underestimated?*, in W Loth, W Wallace, W Wessels (eds.), *Walter Hallstein: The Forgotten European?*, foreword by J Delors, Sir E Heath and H Kohl, translated by B Ruppert (London: Macmillan 1998) 229–254, 229 ff.

<sup>3</sup> C Malandrino, “Tut etwas tapferes”: *compi un atto di coraggio. L’Europa federale di Walter Hallstein (1948–1982)* (Bologna: Il Mulino 2005) 14 (my translation).

<sup>4</sup> *Ibid.* (my translation).

<sup>5</sup> Among the various works: W Hallstein, *United Europe: Challenge and Opportunity* (Cambridge, Mass.: Harvard University Press 1962); Id., *The European Community: A New Path to Peaceful Union* (India: Indian Council for Cultural Relations 1963); Id., ‘Some of our ‘Faux Problèmes’ in the European Economic Community’ (1965) 21 n. 1 *The World Today* 10–24; Id., *Der unvollendete Bundesstaat* (Düsseldorf-Wien: Econ Verlag 1969) (Italian translation: Id., *Europa. Federazione incompiuta* (1969), Italian translation by B Bianchi, foreword by G Petrilli (Milan: Rizzoli 1971); English translation: Id., *Europe in the Making*, introduction by GW Ball, translated by C Roetter (New York: Norton & Company 1973)); Id., *L’integrazione economica come fattore di unificazione politica* (Brussels: Servizio pubblicazioni delle Comunità Europee 1961). See, also, the speech given before the European Parliament, in the session of June 1965, entitled *Primacy of Community Law over Municipal Law of the Member States*. For an overview: W Loth, W Wallace, W Wessels (eds.), *Walter Hallstein: The Forgotten European?* (n 2).

<sup>6</sup> Highlights in W Wessels, *Walter Hallstein’s Contribution to Integration Theory* (n 2) 229.

<sup>7</sup> C Malandrino, “Tut etwas tapferes”: *compi un atto di coraggio* (n 3) 17.

<sup>8</sup> *Ibid.* 17–18 (my translation).

founders of the community experience, who saw precisely in the final horizon of the United States of Europe the general aim of European integration”<sup>9</sup>. From this perspective, its importance has been valued, also from a theoretical-doctrinal perspective, for understanding various developments in the European Community (and then, European Union) in the 1980s and 1990s<sup>10</sup>, while at the same time emphasizing the historical localization of his ideas<sup>11</sup>. In a further sense, Hallstein “has been seen as the proponent of a particular concept with a vaguely idealistic flavour, *Sachlogik*, a sort of logical-objective force driving European integration [...] towards ever broader and more advanced goals”<sup>12</sup>, in a manner analogous to the economic-political interpretation of Ernst B. Haas and his notion of *spill-over*<sup>13</sup>. In this sense, his modest originality was highlighted, once again.

In any case, the reconstructions of Hallstein’s thought must be considered here instrumentally regarding the precise *idea* of the Union that Hallstein proposed, and, consequently, the concept of law that underlies it and supports its theoretical framework. From this perspective, we will attempt to understand the contribution that Hallstein’s work may have provided to the conceptualization of the idea of law and legality implicit in the institutional dynamics in the European political context.

In this light, it is useful to bear in mind that, like other visions or perspectives, the primary *purpose* towards which Hallstein’s effort seemed directed was, precisely, the satisfaction and guarantee of peace<sup>14</sup>. Peace was configured as the *τέλος*, the general goal to be achieved to structure a legal-economic order that was consistent with the spirit of the member states and with the social needs that emerged following the Second World War<sup>15</sup>. In this sense, Hallstein underlined: “Since the end of the First World War onwards, the mechanism of the so-called system of European states has been losing its balancing force, while after the Second World War the outlines of a new order have become increasingly clear”<sup>16</sup>. The reasons for the crisis of the system of states born from nineteenth-century politics lay in the failure to overcome “in the twentieth century the only truly decisive test: that of knowing how to maintain peace”<sup>17</sup>. It was therefore urgent to consider the opportunity of new institutional formulas, which would also respond to the renewed needs and unprecedented challenges emerging in the field of world politics<sup>18</sup>.

In any case, we do not wish to dwell excessively on the historical contextualization of the German politician and jurist here. Rather, it is, specifically, his theoretical-legal contributions that we intend to briefly examine. This does not imply, of course, devaluing or minimizing the institutional role that Hallstein played in European political history. However, we place this role in the background, seeking instead to derive from the Mainz jurist’s theoretical contributions a guiding vision of the characteristics of ‘legality’ within the Union.

<sup>9</sup> C Malandrino, “Tut etwas tapferes”: *compi un atto di coraggio* (n 3) 17–18 (my translation). See W Wessels, *Walter Hallstein’s Contribution to Integration Theory* (n 2) 233.

<sup>10</sup> W Wessels, *Walter Hallstein’s Contribution to Integration Theory* (n 2) 231.

<sup>11</sup> *Ibid.* 233.

<sup>12</sup> C Malandrino, “Tut etwas tapferes”: *compi un atto di coraggio* (n 3) 17 (my translation).

<sup>13</sup> EB Haas, *The Uniting of Europe: Political, Social, and Economic Forces. 1950–1957* (Stanford, California: Stanford University Press 1968) (quote taken from Malandrino, “Tut etwas tapferes”: *compi un atto di coraggio* (n 3) 17).

<sup>14</sup> W Hallstein, *Europe in the Making* (n 5) 42–43.

<sup>15</sup> C Malandrino, “Tut etwas tapferes”: *compi un atto di coraggio* (n 3) 59.

<sup>16</sup> W Hallstein, *L’integrazione economica come fattore di unificazione politica* (n 5) 5–6 (my translation).

<sup>17</sup> *Ibid.* 6 (my translation).

<sup>18</sup> Among these ‘challenges’, Hallstein cites “the defense against communism, the fight against poverty, the development of underdeveloped countries, Africa which is rising up, the stabilization of raw material prices, surpluses of agricultural products, economic fluctuations, the stability of currencies” (*ibid.* 5, my translation).

## II. Altiero Spinelli and Hans-Peter Ipsen: different conceptions of European integration

Hallstein's thought takes on greater conceptual flexibility when examined from a comparative perspective, especially with the positions of two other important theorists of European unity: Altiero Spinelli and Hans-Peter Ipsen. These comparisons, in fact, offer the opportunity to highlight how the vision of European integration proposed by Hallstein is the one that has substantially prevailed from a historical-political point of view. Conversely, the theoretical perspectives of Spinelli and Ipsen, while fundamental in many respects, have proven to have less impact on the multifaceted supranational institutional reality. In short, the implications of Hallstein's juridical-political reflection have often found direct expression in various concrete manifestations, generative and constitutive of the general European order and its historical development.

At first glance, it might actually seem that there is substantial continuity among the various integration theorists and that internal differences are, all things considered, small. The political vision, the legal theory that underpins it, the finalistic perspective that pervades it (and the means to achieve those ends), would appear, broadly speaking, to be the same. Upon closer inspection, however, even within a common general direction, notable differences arise.

As is well known, one of the main supporters of European federalism was the Italian Altiero Spinelli<sup>19</sup>. The federalist trajectory of the Roman politician was oriented in a 'voluntarist' direction and in the spirit of a broader socialist framework<sup>20</sup>. The pivotal moment, for Spinelli, was symbolized by a constituent political practice, attributed to an assembly. The democratic assembly, in its authentic, tangible and effective action, would have brought out the fundamental essence of the European people, through the decision-making process aimed at giving shape to political unity<sup>21</sup>. In this way, a European constitution seemed conceivable only once the idea of a democratic process, aimed at establishing a new common constitution, was seriously considered<sup>22</sup>. This constitution was to be superior to the constitutions of the individual nation states of the Old Continent. This Constituent Assembly would also have the task of deciding on the fundamental economic formulas that would characterize the future political structure of the (hypothetical) Federation<sup>23</sup>.

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<sup>19</sup> See: A Spinelli, *L'avventura europea* (Bologna: Il Mulino 1972); Id., *Una strategia per gli Stati Uniti d'Europa*, edited by S. Pistone (Bologna: Il Mulino 1989). As regards secondary literature: A Chiti Batelli, *L'idea d'Europa nel pensiero di Altiero Spinelli*, foreword by G Arfè (Manduria-Bari-Rome: Lacaita 1989); E Santarelli, *Altiero Spinelli* (Florence: Leo S. Olschki 1994); PS Graglia, *Altiero Spinelli* (Bologna: Il Mulino 2008); U Morelli (ed.), *Altiero Spinelli. Il pensiero e l'azione per la federazione europea*, Conference Proceedings (Turin, December 6–7, 2007) (Milan: Giuffrè 2010); D Preda (ed.), *Altiero Spinelli e i movimenti per l'unità europea* (Padua: Cedam 2010); A Venece, *L'Europa possibile. Il pensiero e l'azione di Altiero Spinelli*, foreword by S Acquaviva (Rome: Carocci 2010).

<sup>20</sup> Recent critical studies have attempted to highlight its connection with some technocratic fronts: see A Somma, *Contro Ventotene* (Rome: Rogas 2021).

<sup>21</sup> H Canihac, 'The Making of an Imagined 'Community of Law': Law, Market and Democracy in the Early Constitutional Imaginaries of European Integration' (2022) 18 n. 1 *European Constitutional Law Review* 2–29, 9.

<sup>22</sup> In this perspective, "after the failure of the French National Assembly to ratify the European Defence Community (EDC), which would have forced the national states to have a common army and therefore, in perspective, a common policy (1954), [Spinelli] became convinced that the objective of a federal Europe would never be achieved if we did not move from a top-down policy to an action of popular mobilization" (G Gay, *Spinelli, Altiero*, in *Enciclopedia italiana*, V Appendix (1995) my translation (available online: [https://www.treccani.it/enciclopedia/altiero-spinelli\\_\(Enciclopedia-Italiana\)/](https://www.treccani.it/enciclopedia/altiero-spinelli_(Enciclopedia-Italiana)/), last access: September 19, 2025).

<sup>23</sup> In the *Ventotene Manifesto* (1941–1944), Spinelli's orientation, in terms of potentially adoptable economic models, was rooted in a socialist-utopian perspective. In the 1950s, however, his conception and horizons changed, undergoing a more 'pragmatic' twist: see H Canihac, 'The Making of an Imagined 'Community of Law'' (n 21) 10.

Spinelli's idea, therefore, was to articulate a plausible institutional discourse on a possible European union by valorizing and recognizing the centrality of the constituent moment, through the mobilization of a 'European people'<sup>24</sup>. All this was possible provided that the people were fully aware of their own reformist capabilities, to be able to foster an evolutionary process that would find its outlet in a federation of states. Following a theoretical framework advanced in the literature, it can be said that: *a*) the *founding* moment resided, according to Spinelli, within a politically elected and democratically legitimized constituent assembly. *b*) The *goal* was to be found in the construction of a European Federation. *c*) The *means* (to achieve this goal) were a political process, and a consequent democratic deliberation, of a constituent nature<sup>25</sup>. Spinelli's democratic-constituent perspective, however, does not represent the only historical expressive modality for the articulation and theoretical thinkability of the development of European integration. Alongside this vision there are at least two other trajectories, respectively depicted by Hans-Peter Ipsen and, indeed, by Walter Hallstein.

Ipsen would take the functionalist vision<sup>26</sup>, based on faith in the principle of *spill-over* and the idea of establishing common and integrated sectors of economic convergence, to extremes. He would argue for the need to initiate a 'constitutional' process of an economic-functional nature. This process would pave the way for a sort of *sui generis* organism, not strictly comparable to a true federal state, but rather to a *coordinating organization* between sovereign states collaborating on specific economic sectors. From this perspective, for Ipsen, neither constituent processes nor, logically, representative assemblies aimed at initiating such processes were necessary.

What was the main consequence of this purely functional vision? The main effect was the assumption of the *centrality* of the *economic market*. From this perspective, it is difficult to deny the connections with the current European context and the jurisprudential legitimacy that has developed since the *Cassis de Dijon* ruling (1979, C-120/78)<sup>27</sup>, later formalized with the *Delors' White Paper* of 1985 and the *Single European Act* (1986).

<sup>24</sup> Regarding the European constituent process, see S Dellavalle, *Una costituzione senza popolo? La costituzione europea alla luce delle concezioni del popolo come potere costituente* (Milan: Giuffrè 2002).

<sup>25</sup> H Canihac, "The Making of an Imagined 'Community of Law'" (n 21) 13.

<sup>26</sup> Functionalism can therefore be defined as an economic-legal doctrine which states that "international relations can and must develop according to an evolutionary, and essentially involuntary, logic, through causal relationships of communication and economic or technical interdependence, which give rise to a necessary *spill-over*, to a relapse into closer connections and relations"; consequently, the political sphere is "considered roughly in terms of a 'superstructure' that is produced deterministically by a deep structure of functional relationships, of a fundamentally economic and communicative nature" (M La Torre, "Civis europaeus sum". L'Europa e la sua cittadinanza' (2021) 1 *Materiali per una storia della cultura giuridica* 127–155, 148–149, my translation). Already in 1947, Norberto Bobbio was committed to highlighting the origin of the concept of functionalism, which he identified in a work by David Mitrany, entitled *A Working Peace System* (London: National Peace Council 1946): for Mitrany, in the opinion of the Turin philosopher, the unity between the European states was achievable by means of the "progressive and successive unification of economic and social activities (to give the simplest examples: communications, the postal service, maritime transport, etc.) and thus through the institution of international administrative offices which are the direct and responsible executors of these unified activities" (N Bobbio, 'Funzionalismo e federalismo' (1947) 2 n. 3 *La comunità internazionale* 353–359, 354, my translation). The superiority of the *functional method* lies, therefore, in the 'naturalness' of the processes it establishes, in opposition to the 'artificiality' of the formal method of a federal nature. On this topic, see also V Cannizzaro, *Il diritto dell'integrazione europea. L'ordinamento dell'Unione* (Turin: Giappichelli 2017) 2. Regarding neo-functionalism: W Sandholtz, A Stone Sweet, 'Neo-Functionalism and Supranational Governance' in Erik Jones et al. (eds.), *The Oxford Handbook of the European Union* (Oxford: Oxford University Press 2012) 18–33.

<sup>27</sup> See M Dani, AJ Menéndez, *Costituzionalismo europeo. Per una ricostruzione demistificatoria del processo di integrazione europea*, edited by L Mellace (Naples: ESI 2022) 64. For further information: M Dani, M Goldoni, AJ Menéndez, *The Legitimacy of European Constitutional Orders: A Comparative Inquiry* (Cheltenham: Elgar 2023).

The real turning point in the supranational integration process dates back to these years, where the neo- and ordo-liberal vision (in its various forms), which places the centrality of economic freedoms before the need to guarantee social rights, assumes a central value, a true *Grundnorm* of the entire political-economic structure<sup>28</sup>. Precisely because European law is not shaped by a process of ‘popular’ origin, but arises by virtue of individual formations resulting from integration processes ‘from above’ and of an economic nature, it does not require democratic legitimation<sup>29</sup>. The process of supranational (economic) integration rather resembles the emergence of international economic law (in the terms of a *non-state* law limited to certain areas or sectors of social life<sup>30</sup>).

The other aspects, starting with the protection of individual rights, were the natural outcome of this basic theoretical approach. The peculiarity, however, was that citizens of the European Communities could not be primarily configured, according to Ipsen, as bearers of freedom rights or specific social rights. Rather, and primarily, they were configured as holders of ‘economic’ rights functional to the guarantee of the free market. They were, in essence, elementary economic actors<sup>31</sup>: entrepreneurs (producers of goods), or consumers (users of goods). Or better still, they were ‘market citizens’ (*Marktbürger*)<sup>32</sup>. Citizens, thus configured, were certainly holders of subjective rights, but these were aimed only at guaranteeing access to the four fundamental economic freedoms (free movement of people, goods, services, and capital), which were ‘counterbalanced’ by the general prohibition of non-discrimination, functional to the protection of these economic rights. From this perspective, Ipsen appears even more radical than other functionalists – such as Ernst B. Haas, who, for example, at least until 1966 and the famous ‘Empty Chair Crisis’<sup>33</sup> (a moment that was ‘fatal’ for Hallstein himself), advocated a possible transition towards forms of democratic articulation of the European Communities<sup>34</sup>. Comparing Ipsen’s perspective with that of Spinelli, it is possible to observe, following a scheme proposed by Hugo Canihac, how there are many elements of difference. From a theoretical perspective, the divergences can be found both in the *genetic* element – the constituent democratic moment for Spinelli; the role of the market for Ipsen – and in the *means* – political-deliberative practice for the Italian theorist and politician, and economic processes for the German jurist – as well as in the *final outcome* – a European federal state for Spinelli; an international organism for Ipsen<sup>35</sup>.

The brief analysis of the theoretical-political conceptions of Spinelli and Ipsen now allows us to focus on the legal thought of Hallstein, who, as far as the European vision is concerned, could be considered a sort of *moderate functionalist* (also in light of the different interpretative lines that we have outlined above – neo-functionalism, theoretician of *Sachlogik* and of the *spill-over* principle, federalist doctrinaire –, and which Hallstein tries to mix and skillfully combine). Perhaps for this very reason, his trajectory seems to be the one that has

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<sup>28</sup> M La Torre, *Europa*, in M La Torre, G Zanetti, *Nuovi seminari di filosofia del diritto* (Soveria Mannelli: Rubbettino 2021) 135–154, 141 ff.

<sup>29</sup> On the problem of the relationship between forms of legitimation of power of an ‘ascending’ nature and forms of legitimation of power of a ‘descending’ nature, regarding the reality of the European Union, see S Dellavalle, ‘Il potere dell’Unione europea’ (2016) 6 *Teoria politica* 193–223.

<sup>30</sup> H Canihac, *The Making of an Imagined ‘Community of Law’* (n 21) 12.

<sup>31</sup> M La Torre, *Europa* (n 28) 145.

<sup>32</sup> *Ibid.*

<sup>33</sup> On the topic, see HH Götz, *The Crisis of 1965–66*, in W Loth, W Wallace, W Wessels (eds.), *Walter Hallstein* (n 2) 151–162.

<sup>34</sup> EB Haas, ‘International Integration: The European and the Universal Process’ (1961) 15 n. 3 *International Organization* 366–392.

<sup>35</sup> H Canihac, *The Making of an Imagined ‘Community of Law’* (n 21) 13.

most influenced the jurisprudential work of the Court of Justice of the EU<sup>36</sup>, but also on the overall structure of the other European institutional bodies (Commission<sup>37</sup>, ECB<sup>38</sup>). Hallstein appears as a ‘moderate’ because, after all, he attributes to the *legal* and *juridical* moment a crucial role of *mediation*, and this determines a less radical nature of his theoretical positions regarding the European integration process. Ipsen’s economic functionalism does indeed seem to influence some fundamental political and judicial determinations of the supranational integration process, but the valorization of the legal dimension – which is specifically identified in Hallstein – cannot be ignored when the primary aim of the investigation is to adequately understand the developments of a united Europe, at least from the early 1960s up to Maastricht (1992), and even beyond. Emphasizing the centrality of the economic aspect in the European integration process is undoubtedly necessary. However, reducing the entire formative development of ‘Community’ institutions to the mere economic component is partially misleading. This component is incomprehensible without the ‘filter’ role that legal categorization has played<sup>39</sup>. And Hallstein’s perspective and intellectual trajectory are in line with this process of valorization of the legal dimension.

### III. Hallstein’s political path and legal reflection

Walter Hallstein earned his doctorate in 1925, defending a thesis in private international law, and, very early in 1929, was awarded a professorship at the University of Berlin. He subsequently became a full professor in Rostock before moving, in 1940, to the Johann-Wolfgang-Goethe University of Frankfurt<sup>40</sup>. His thinking was fully integrated into German legal culture, following the method of the Historical School and the teachings of Friedrich Carl von Savigny<sup>41</sup>. He served in the *Wehrmacht* and was captured by the Americans in 1944. He was

<sup>36</sup> For a comprehensive analysis of the Court of Justice: H Rasmussen, *The European Court of Justice* (Copenhagen: GadJura 1998); G De Búrca, JHH Weiler (eds.), *The European Court of Justice* (Oxford: Oxford University Press 2001); H-W Micklitz, B De Witte (eds.), *The European Court of Justice and the Autonomy of the Member States* (Cambridge: Intersentia 2012); L Azoulai, R Dehousse, *The European Court of Justice and the Legal Dynamics of Integration* in Erik Jones et al. (eds.), *The Oxford Handbook of the European Union* (n 26) 350–364; SK Schmidt, R Daniel Kelemen (eds.), *The Power of the European Court of Justice* (London-New York: Routledge 2013). For an analysis of the legal reasoning of the Court of Justice: R-M Chevallier, ‘Methods and Reasoning of the European Court in its Interpretation of Community Law’ (1965) 2 n. 1 *Common Market Law Review* 21–35; J Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford: Clarendon 1993); M Kiiikeri, *Comparative Legal Reasoning and European Union Law* (Dordrecht: Kluwer 2001); G Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge University Press 2012); S Sankari, *European Court of Justice Legal Reasoning in Context* (Groningen: Europa Law Publishing 2013).

<sup>37</sup> See: G Edwards, D Spence (eds.), *The European Commission* (London: Cartermill 1995); A La Spina, G Majone, *Lo Stato regolatore* (Bologna: Il Mulino 2000) 227–272; S Gozi, *La Commissione europea. Processi decisionali e poteri esecutivi* (Bologna: Il Mulino 2005); SK Schmidt, A Wonka, *European Commission*, in E Jones et al. (eds.), *The Oxford Handbook of the European Union* (n 26) 336–349.

<sup>38</sup> See: D Wilsher, *Ready to Do Whatever it Takes? The Legal Mandate of the European Central Bank and the Economic Crisis* in C Barnard et al. (eds.), *Cambridge Yearbook of European Legal Studies* (Oxford: Hart Publishing 2013) 503–536; S Baroncelli, *The Independence of the ECB after the Economic Crisis* in M Adams, F Fabbrini, P Larouche (eds.), *The Constitutionalization of European Budgetary Constraints* (Oxford-Portland: Hart Publishing 2014) 125–147; RM Lastra, *The Evolution of the European Central Bank* (2017) 35 *Fordham International Law Journal* 1260–1281.

<sup>39</sup> G Itzcovich, *Teorie e ideologie del diritto comunitario* (Turin: Giappichelli 2006).

<sup>40</sup> Hallstein, Walter in *Enciclopedia italiana*, available online: <https://www.treccani.it/enciclopedia/walter-hallstein/#> (last access: September 19, 2025); C Malandrino, “Tut etwas tapferes”: *compi un atto di coraggio* (n 3) 34–35.

<sup>41</sup> W Hallstein, ‘Von der Sozialisierung des Privatrechts’ (1942) 102 n. 3 *Zeitschrift für die gesamte Staatswissenschaft* 530–544.

then sent to the United States. During his stay in North America, he taught various law courses, deepening his knowledge of American federalists. In that context, he grew, more generally, aware of the need to initiate a process of European integration worthy of the renewed historical demands. Once back home, he became rector of the Goethe-Universität in Frankfurt from 1946 to 1948. He also participated in the Hague Congress of 1948, presenting himself as a rather convinced European federalist, representing the opposite trend to the vision of Altiero Spinelli<sup>42</sup>.

Hallstein, therefore, collaborated and actively contributed to the process of reconstruction of Germany after the Second World War. He was well regarded within the European establishment. In fact, his figure demonstrated good relations with the Allies and was accompanied by a profile that was not too politically compromised and rather defined from a technical-legal point of view<sup>43</sup>. He led the negotiations, on behalf of the German delegation, for the implementation of the *Schuman Plan*, and in 1951 he was appointed Secretary of State for Foreign Affairs in the Federal Republic of Germany<sup>44</sup> (a position he would relinquish only in 1958, coinciding with the contemporary and prestigious European appointment). His historically crucial election as (the first) President of the Commission of the European Communities was therefore not unexpected<sup>45</sup>. The post of Commissioner was relinquished in 1967 – after almost ten years – following the famous, and already mentioned, ‘Empty Chair Crisis’ of 1966<sup>46</sup> and disagreements with Charles de Gaulle<sup>47</sup>. The very fact that Hallstein played such a prominent role in the first phase of the supranational integration process gives to the German politician a decisive weight. Moreover, unlike other politicians of the time, he had a background as an academic jurist and, therefore, possessed a qualitatively significant doctrinal expertise. This background, in fact, emerges from many of his writings dedicated to the problem of the European federation and its integration process.

Hallstein did not aim at the creation of a basic international organization but hoped for the creation of a truly *democratic federal European state*<sup>48</sup> (although his positions did not have any direct links with traditional Europeanist doctrines<sup>49</sup>). In fact, already in 1961, Hallstein spoke of European economic integration as a “*fact of political democracy*”<sup>50</sup>, and, in 1965, he stated that the European system contained, *in essence*, “the features of a federal constitution: a structure that depends on co-operation between the higher entity and the constituent

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<sup>42</sup> H Canihac, *The Making of an Imagined ‘Community of Law’* (n 21) 14–15.

<sup>43</sup> *Ibid.*, 15.

<sup>44</sup> Hallstein, Walter in *Enciclopedia italiana* (n 40). See L Lahn, *Walter Hallstein as State Secretary* in W Loth, W Wallace, W Wessels (eds.), *Walter Hallstein* (n 2) 17–32.

<sup>45</sup> H von der Groeben, *Walter Hallstein as President of the Commission*, in W Loth, W Wallace, W Wessels (eds.), *Walter Hallstein* (n 2) 95–108.

<sup>46</sup> The so-called ‘Empty Chair Crisis’ would later find a solution in the *Luxembourg Compromise* (or *Luxembourg Accord*) of January 1966.

<sup>47</sup> Hallstein, Walter in *Dizionario di Economia e Finanza*, Enciclopedia Italiana 2012, available online: [https://www.treccani.it/enciclopedia/walter-hallstein\\_%28Dizionario-di-Economia-e-Finanza%29/](https://www.treccani.it/enciclopedia/walter-hallstein_%28Dizionario-di-Economia-e-Finanza%29/) (last access: September 19, 2025). See, also, W Loth, *Hallstein and de Gaulle: The Disastrous Confrontation*, in W Loth, W Wallace, W Wessels (eds.), *Walter Hallstein* (n 2) 135–150.

<sup>48</sup> H Canihac, *The Making of an Imagined ‘Community of Law’* (n 21) 19 ff. This should not lead to the impression of possible (but erroneous) overlaps. Spinelli, in fact, also advocated the formation of a federal state, but the perspectives of the two authors are evidently very different.

<sup>49</sup> Also, by virtue of a certain pragmatic inclination towards the interpretation of political doctrines: C Malandrino, «Tut etwas tapferes»: *compi un atto di coraggio* (n 3) 63 ff.

<sup>50</sup> W Hallstein, *L’integrazione economica come fattore di unificazione politica* (n 5) 16 (my translation and emphases added).

States<sup>51</sup>. In this process, a crucial role was played by the legal component, to which Hallstein entrusted, almost entirely, the task of channeling economic forms and framing the flow of political decisions within a framework of stability. From this perspective, the definition of the European Community as a *Community of Law* (*Rechtsgemeinschaft*) is well known. This concept (of Savignyan and Gierkian origin<sup>52</sup>) would be taken up, as is, by the European Court of Justice<sup>53</sup>.

Indeed, according to Hallstein, the dynamics of Europe and its Community were very similar to the federal perspective. These dynamics brought together multiple instances, typically constitutional and federalist, and were connected to the more “classical” questions of the doctrine of the State in the European tradition<sup>54</sup>. In Hallstein’s opinion, the European Community was, to all intents and purposes, a new legal order. Undoubtedly, it still had to demonstrate a certain technical maturity and had to be subject to a broader, general constitutional design. However, it represented a true source of law, not reducible to the casuistry of international law and its organizational products. Furthermore, the concept of a ‘Community of Law’ presented significant affinities with the various discussions of doctrinal and theoretical public law that took place between the two world wars. On the one hand, it was linked to the discussion surrounding the ‘*Rechtsstaat*’<sup>55</sup> (‘Rule of law’) and legal positivism<sup>56</sup>. On the other hand, it was linked to the issues of international law and the possibility of achieving, through its instruments, a stable and lasting peace<sup>57</sup>: “The longing for *peace* is undoubtedly the strongest motive for unifying Europe”<sup>58</sup>.

However, the final goal that Hallstein aimed at must not lead to easy misunderstandings. Although he ideologically supported the prospect of building a European federal state, the German politician was far from configuring the structure of the then European Community as a reality of a fully *state-like nature*<sup>59</sup>. Thus, for

<sup>51</sup> W Hallstein, *Some of our ‘Faux Problèmes’ in the European Economic Community* (n 5) 12.

<sup>52</sup> G Itzcovich, ‘Integrazione giuridica. Un’analisi concettuale’ (2005) 3 *Diritto pubblico* 749–785, p. 751.

<sup>53</sup> See A D’Attorre, *L’Europa e il ritorno del ‘politico’. Diritto e sovranità nel processo di integrazione* (Turin: Giappichelli 2020) 95–137. In a historical perspective: M Stolleis, *Europa, Comunità di diritto*, Italian translation by C Ricca (2012) 2 *Materiali per una storia della cultura giuridica* 293–306.

<sup>54</sup> H Canihac, *The Making of an Imagined ‘Community of Law’* (n 21) 12.

<sup>55</sup> See G Ridolfi, *Rechtsstaat. Percorsi nella cultura giuridica tedesca del XIX secolo* (Naples: Editoriale Scientifica 2017). For an overview, instead, of the concept of ‘rule of law’: AH Huq, *The Rule of Law: A Very Short Introduction* (New York: Oxford University Press 2024).

<sup>56</sup> In this sense, “the European Communities, as communities of law, can only exist thanks to an integrated circuit of institutions, including state institutions, which collaborate in the creation of a common legality: the community of law guarantees respect for the fundamental principles of the rule of law, first and foremost the subordination of public authorities, both Community and national, to a common law [diritto comune]. Therefore, in the case of violation by the States, common law [il diritto comune] must be able to impose itself and prevail” (G Itzcovich, ‘Integrazione giuridica’ (n 52) 751, my translation). To date, the process has been enriched by a perspective that is, in a certain sense, *bidirectional*, or even *multidirectional*. From this perspective, it is correctly noted that Community law is integrated not only “into state legal systems, but also state constitutional law is integrated into Community law; for legal integration to proceed, Community law must be open to the principles of the ‘constitutional traditions common to the Member States’”, but, equally, “to the main international treaties on the protection of human rights” (*ibid.*, my translation).

<sup>57</sup> See H Canihac, *The Making of an Imagined ‘Community of Law’* (n 21) 16–17.

<sup>58</sup> W Hallstein, *Europe in the Making* (n 5) 42–43.

<sup>59</sup> For an analysis of the ‘nature’ of the European Union, see: LF Pace, *La natura giuridica dell’Unione europea: teorie a confronto. L’Unione ai tempi della pandemia* (Bari: Cacucci 2021); L Mellace (ed), *L’ircocervo europeo. Un dialogo sul tortuoso cammino di una “strana creatura”* (2017) 2 *Ordines* 306–354. Of extreme interest is the essay by ML Jones, *The Legal Nature of the European Community: A Jurisprudential Analysis using H.L.A Hart’s Model of Law and a Legal System* (1984) 17 n. 1 *Cornell International Law Journal* 1–59.

instance, he will try to downplay the scope of the notion of ‘supranationality’<sup>60</sup>. In this sense, Wolfgang Wessels noted: “Hallstein wants as much as possible to replace the concept ‘supranational’ with other concepts [...], precisely because this term ‘appears to some to imply that we are bent upon destroying national identities’”<sup>61</sup>. Distinguishing three theoretical forms (unitary, international, community) through which to conceive the modalities of relations between the Community and member states, Hallstein deemed it more appropriate to speak of the existence of a structure with a *federal vocation*: “a state is competent in all matters touching public policy”, while “our Community is competent only in certain limited spheres which are clearly laid down in the Treaty”<sup>62</sup>. This was, precisely, the ‘community model’. The European Community therefore exhibited, in Hallstein’s opinion, forms that could be described as *proto-federal* and *semi-state*. These showed, within their internal seeds, strong potential for development, which could have led, within a few decades – thanks to a synergy between economic processes, political practice and the guiding role of law – to the establishment of a true European federal state.

In this vein, Hallstein emphasized the fact that the Community presented various elements in common with federal realities, in that “its member-states transfer part of their national sovereign powers to a union to which they all belong but which has its own identity, different from that of any of its individual members”<sup>63</sup>. Both the ‘unitary’ and the ‘international’ solutions were flawed on several fronts. The former repressed regional and peripheral powers. The latter, however, left individual national powers too intact, limiting itself to a mere organization of contractual “rights and duties”<sup>64</sup>. The ‘community’ solution, on the other hand, appeared more appropriate, both lexically and at the political-institutional level, establishing a legal balance “between a central European authority, deriving its power from the parts of the national sovereignties transferred to it, and the separate national authorities of the member-states”<sup>65</sup>. In this way, the theme of the European Community as a *Community of Law* (in its implicit connections with the concept of *Rechtsstaat*) emerged more clearly.

#### IV. The ‘European Community’ and integration through law<sup>66</sup>

In what terms did the idea of *Rechtsgemeinschaft* evoke the concept of the ‘rule of law’? First, from a formal perspective, it was necessary to understand whether the rule of law was limited to an entity with legal personality required to respect existing laws (which it itself created), self-limiting its legal powers. Second, and from a substantive perspective, it was necessary to understand whether the rule of law was also aimed at guaranteeing the protection of fundamental subjective rights. For Hallstein, a Community of Law – such as the European Communities – configured both a *formal community* of the first type and a *substantive community* of the second type: the Community had to guarantee the identical and uniform application of the laws in the individual member

<sup>60</sup> W Hallstein, *Europe in the Making* (n 5) 39 ff.

<sup>61</sup> W Wessels, *Walter Hallstein’s Contribution to Integration Theory* (n 2) 234.

<sup>62</sup> W Hallstein, *Europe in the Making* (n 5) 39.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*, 39–40.

<sup>66</sup> However, the role that Hallstein attributes to law is sometimes ambiguous. This is the case, for instance, where, while emphasizing the centrality of political processes, he fails to attribute to them the real transformative and reformative significance that is conceptually consequent, while at the same time conferring on certain social phenomena a character of partial or total inevitability (with reference, for example, to the theme of the development of science and technology). See W Hallstein, *L’integrazione economica come fattore di unificazione politica* (n 5) 7 ff.

states, within a framework of essential legal values to which a set of fundamental rights was attached. In this way, this legitimized a necessarily *hierarchical vision* of the Community order and its *supremacy* over the legal systems of individual nation states, so as not to create discriminatory thresholds between the various member states. But the Community was also required to establish *subjective rights* for European citizens<sup>67</sup>, which it had the task of protecting through carefully planned and designed jurisdictional mechanisms<sup>68</sup>.

One can see, therefore, how in Hallstein's vision the basic lines of what will be the 'community' structure of the decades to come were already well structured: an *autonomous order*, whose norms can produce *direct effects*<sup>69</sup> over individual national legal systems. An order, moreover, endowed with *primacy* (or supremacy)<sup>70</sup>, with *hierarchically superior* and *exclusive powers*<sup>71</sup>, and aimed at safeguarding the *economic rights* of European citizens, thanks also to the assistance of a Court that would become the linchpin of the system<sup>72</sup> (an idea

<sup>67</sup> With regard to European citizenship, see: M La Torre (ed.), *European Citizenship: An Institutional Challenge* (The Hague: Kluwer Law International 1998); J Pomoell, *European Union Citizenship in Focus: The Legal Position of the Individual in EC Law* (Helsinki: University of Helsinki 2000); A Weale, *Democratic Citizenship and the European Union* (Manchester: Manchester University Press 2005). See also: C Margiotta, *Cittadinanza europea. Istruzioni per l'uso* (Rome-Bari: Laterza 2014); L Mellace, *I diritti dei cittadini europei presi sul serio. Diritti e cittadinanza nella giurisprudenza della Corte di Giustizia dell'UE* (Milan-Udine: Mimesis 2025).

<sup>68</sup> H Canihac, *The Making of an Imagined 'Community of Law'* (n 21) 16 ff.

<sup>69</sup> The origins of the principle of 'self-executing' (see M La Torre, *Cittadinanza e ordine politico. Diritti, crisi della sovranità e sfera pubblica: una prospettiva europea* (Turin: Giappichelli 2004) 71 ff.) can be traced back to the historical phase of the ECSC'S operativity. This principle was embodied, above all, in the capacity of the High Authority – the principal autonomous institution of the Community – to adopt measures that were directly applicable and directly binding on private individuals (JHH Weiler, *Il sistema comunitario europeo. Struttura giuridica e processo politico* (Bologna: Il Mulino 1985) 53). On the principle of direct effects, see: S Prechal, *Directives in EC Law* (Oxford: Oxford University Press 2005) 97–106; M Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy' (2007) 44 n. 4 *Common Market Law Review* 931–963; S Prechal, *Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union* in C Barnard (ed.), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Oxford: Oxford University Press 2007) 35–69; J Bengoetxea, *Is Direct Effect a General Principle of European Law?* in U Bernitz et al. (eds.), *General Principles of EC Law in a Process of Development* (Alphen aan den Rijn: Kluwer Law International 2008) 3–24; S Prechal, *Protection of Rights: How Far?* in S Prechal, B Van Roermund (eds.), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford: Oxford University Press 2008) 155–182; B De Witte, *Direct Effect, Primacy, and the Nature of the Legal Order* in P Craig, G De Búrca (eds.), *The Evolution of EU Law*, 3<sup>rd</sup> ed. (Oxford: Oxford University Press 2011) 187–227; D Chalmers, L Barroso, 'What *Van Gend en Loos* Stands for' (2014) 12 n. 1 *International Journal of Constitutional Law* 105–134; S Robin-Olivier, 'The Evolution of Direct Effect in the EU: Stocktaking, Problems, Projections' (2013) 12 n. 1 *International Journal of Constitutional Law* 165–188; J Jans, M Verhoeven, *Europeanisation via Consistent Interpretation and Direct Effect* in J Jans et al. (eds.), *Europeanisation of Public Law* (Groningen: Europa Law Publishing 2015) 71–132; R Schütze, *Direct and indirect effects of Union Law* in R Schütze, T Tridimas (eds.), *Oxford Principles of European Union Law*, Vol. 1: *The European Union Legal Order* (Oxford: Oxford University Press 2018) 265–310.

<sup>70</sup> See A Von Bogdandy, SW Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 n. 5 *Common Market Law Review* 1417–1453. See also: A Arena, 'Sul carattere "assoluto" del primato del diritto dell'Unione europea' (2018) 2 *Studi sull'integrazione europea* 317–340, 320 ss; G Bebr, 'How Supreme is Community Law in the National Courts?' (1974) 11 n. 1 *Common Market Law Review* 3–37.

<sup>71</sup> See JHH Weiler, *Il sistema comunitario europeo* (n 69) 61 ff. See also: M La Torre, *Cittadinanza e ordine politico* (n 69) 69 ff. and 77. On the relationship between 'supremacy' and the principle of 'pre-emption', see: R Schütze, 'Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption' (2006) 43 n. 4 *Common Market Law Review* 1023–1048; A Arena, *The Twin Doctrines of Primacy and Pre-emption* in R Schütze, T Tridimas (eds.), *Oxford Principles of European Union Law* (Oxford: Oxford University Press 2018) 300–349. On the principle of 'pre-emption', more generally: A Arena, *Il principio della preemption in diritto dell'Unione europea: esercizio delle competenze e ricognizione delle antinomie tra diritto derivato e diritto nazionale* (Naples: Editoriale Scientifica 2013).

<sup>72</sup> L Mellace, *L'Unione europea tra destino comune e crisi permanente. Profili di teoria del diritto* (Naples: ESI 2021) 19 ff.

already present in Hallstein's own reflections<sup>73</sup>). By constraining state powers, the concept of the Community of Law was also in line with the idea of the possibility of achieving forms of peace through the measures of international law.

Hallstein's vision of the European Community is thus extremely interesting from another perspective, which concerns not so much the theorization of the supranational order as an autonomous legal system, but rather the very function of *law* within the integration process. According to the German jurist and politician, law (including Community law) was to be the fruit of an 'incremental' process, arising in synergy with the progressive implementation of social and economic developments<sup>74</sup>. In other words, the states and the European Community, in Hallstein's view, were intertwined within a complex organism, structuring themselves into a common fabric that saw law both as the *formalization* of what was emerging on the political and socioeconomic fronts, and as the *medium* through which to *constitute* (and advance) political-social reality. The "logic of integration"<sup>75</sup> embedded in social and economic practice facilitated the constructive movement of an increasingly united Europe: this was achieved, however, under the *direction of law*.

In this respect, Hallstein attempts to accentuate, from various quarters, certain implicit potentialities within the Community, which seemed capable of fostering a federal legal process<sup>76</sup>. And it is here that the highly ideological vision of Hallstein's thought comes into play, and which has produced extremely decisive repercussions on the current conceptualization of European paradigms. In the opinion of the German jurist, in fact, the integrative process of a juridical nature would also gradually favour the affirmation of a *democratic perspective*. In the wake of the idea that juridical and economic developments can orient the political processes themselves<sup>77</sup>, he considered the possibility of achieving a federal state without going through the obligatory path of a constituent phase. Juridical (-economic) integration would have brought about a 'natural' *democratization* of the European institutions. The latter, to respond to the natural needs of citizens, would have been forced, in the years to come, to prepare fundamental changes aimed at the democratization of the main institutions and various community bodies: *first and foremost*, the European Parliament<sup>78</sup>. The demands for the affirmation, therefore, of a more

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<sup>73</sup> Note, for example, what the German politician stated at the end of the 60s: "In setting up a European Court of Justice, our aim was very ambitious: to crown the constitutional structure of the Community with a Supreme Court which was a truly constitutional body. This European Court was to be like the Supreme Court of the United States in the days of its greatest glory under Chief Justice John Marshall. It was under his guidance that the broad outlines of the American Constitution were given content, form, and body by the US Supreme Court. We were not disappointed. The European Court of Justice, because of its independence, settled what was in dispute, defined what was vague, and clarified what was in need of clarification. Without its guiding hand, the Community could not hope to develop as it has developed and as it will develop. The decisions of the Court, to which I have just referred, are the apex of its achievements so far" (W Hallstein, *Europe in the Making* (n 5) 35).

<sup>74</sup> H Canihac, *The Making of an Imagined 'Community of Law'* (n 21) 19 ff.

<sup>75</sup> W Hallstein, *Europe in the Making* (n 5) 24.

<sup>76</sup> W Wessels, *Walter Hallstein's Contribution to Integration Theory* (n 2) 235 ff.

<sup>77</sup> "Economics and politics could not be divorced" (W Hallstein, *The European Community: A New Path to Peaceful Union* (n 5) 14).

<sup>78</sup> Regarding the European Parliament and its institutional configuration, however, Hallstein expressed some doubts, so much so that he underlined how, in this regard, "the way in which the now-merged European Community is at present organized leaves quite a lot to be desired from the parliamentary point of view", representing a democracy that is still "underdeveloped" (W Hallstein, *Europe in the Making* (n 5) 72). Indeed, "even if we examine merely the legal status of the European Parliament, we find that it has little, if anything, in common with that of national parliaments in the democracies. In a parliamentary democracy, parliament elects the government, makes the laws and controls the budget. Admittedly, there is a European Parliament, but it does not elect a government because there is no government, in the accepted sense of that term" (*ibid.*).

in-depth and pervasive rule of law, strictly consequent to the increasingly imposing economic functions performed by the Community, would have generated a *politicization* of the institutions, and the Community would have therefore progressively converted into a more democratic institutional structure. Guiding this process – and here lies the true peculiarity of Hallstein’s thought, as already partially mentioned – would have been, precisely, the law<sup>79</sup>: it is the first germ of the future, very famous, concept of *integration through law*<sup>80</sup>. The urgency of the federal purpose, and the greater emphasis and confidence in the formal capacity of the law to guarantee unitary processes of formation<sup>81</sup>, led Hallstein to identify the *legal dimension* as the essential instrument for ensuring *order* and *stability* in the heterogeneous unfolding of political and social factors.

The *power* of law was expressed through a series of essential dimensions. The structure of the European Community represented a *creation* of law, a *source* of law (it *constituted* law and was, at the same time, *constituted by it*), and, overall, a new *legal order*<sup>82</sup>. Furthermore, the dynamics of the Community had to deal with a crucial aspect: the articulation of the notion of a ‘European Constitution’, including the guarantee of certain fundamental values (social, economic, political). The concept of ‘constitution’ was to represent a (normative) *tool* for the process of building unity and, at the same time, a *reality to be recognized*, with a consequent shift from the sphere of ‘ought’ to that of ‘is’ (and vice versa) that generated many conceptual problems<sup>83</sup>.

The legal Constitution found its essential characteristics in a series of elements: *peace, unity, equality, liberty, solidarity, well-being, progressiveness, security*, and, finally, assurance of an *economic-financial constitution*<sup>84</sup>. These elements were configured as *objectives to be implemented*, and, simultaneously, as effective, already existing components *to be enhanced*. These aspects were linked together in a conceptual development that best embodies the integration *through* law mentioned above, and in which descriptive needs and prescriptive demands, theory and doctrine are combined and intertwined in a comprehensive attempt to ideologically and politically legitimize the community’s reality.

<sup>79</sup> Hallstein emphasized, in this sense, how the Community was, at the same time, a “creation of the law” and a “source of law” (W Hallstein, *Europe in the Making* (n 5) 30). “Creation”, because it is only thanks to the “majesty of the law” that it was possible to “achieve what centuries of ‘blood and iron’ could not”: only “unity by consent has a chance of surviving. That means not only equality before the law for all belonging to the Community but also a common legal system. For without a common legal system there can be no equality before the law”. “Source of law”, moreover, because “the association”, created by the Treaties, “had to be supplied with a motor to enable it to develop into its declared goal, the economic and social union of Europe” (*ibid.*). For further information on the role of the European Parliament: T Raunio, *The European Parliament*, in E Jones et al. (eds.), *The Oxford Handbook of the European Union* (n 26) 365–379; A Ripoll Servent, *The European Parliament* (London: Palgrave Macmillan 2017). See also: C Martinelli, *Il Parlamento europeo. Simbolo o motore dell’Unione?* (Bologna: Il Mulino 2024). For an interesting perspective, see: H Canihac, F Laruffa, ‘From an Ordoliberal idea to a Social-Democratic ideal? The European Parliament and the institutionalization of ‘social market economy’ in the European Union (1957–2007)’ (2022) 60 n. 4 *Journal of Common Market Studies* 867–884.

<sup>80</sup> See L Azoulai, “Integration Through Law” and Us’ (2016) 14 n. 2 *International Journal of Constitutional Law* 449–463.

<sup>81</sup> “The goal of the political unification of Europe has not been, is not and will never be pursued with ‘economic’ instruments alone”; and economic integration “was neither conceived nor implemented as an end in itself” (W Hallstein, *L’integrazione economica come fattore di unificazione politica* (n 5) my translation). On the topic of European economic integration: D Adamski, *Redefining European Economic Integration* (Cambridge: Cambridge University Press 2020).

<sup>82</sup> W Hallstein, *Europe in the Making* (n 5) 30 ff.

<sup>83</sup> We are referring, of course, to the problem of the naturalistic fallacy. See: GE Moore, *Principia Ethica* (1903) (Cambridge: Cambridge University Press 1996). For a first in-depth look: N Sinclair (ed.), *The Naturalistic Fallacy* (Cambridge-New York: Cambridge University Press 2019).

<sup>84</sup> W Hallstein, *Europe in the Making* (n 5) 42 ff. These principles also seem to recall the values now enshrined in art. 2 TEU (related to the so-called ‘european society’). On this topic, see: A von Bogdandy, *The Emergence of European Society through Public Law: A Hegelian and Anti-Schmittian Approach* (Oxford: Oxford University Press 2024).

If, in fact, a moment of *peace*<sup>85</sup> symbolized the golden goal, the goal that cannot be subordinated to any other goal, *unity* constituted the ‘watchword’ of the integration process. Unity was meant to ensure the elimination of “frictions”, or, at the very least, their channeling and disciplining, their domestication<sup>86</sup>. In other words, such unity was meant to confirm the need to safeguard a solid and stable space of peace in Europe. Without the minimum conditions of coexistence guaranteed by peace, in Hallstein’s opinion, all major problems, even those of “foreign” policy, tend to transform into problems of “domestic” policy.

But unity necessarily brought with it the need for legal *equality*. This equality concerned both European citizens and Member States. If no citizen, in any part of the European territory, should be subjected to any form of discrimination in legal protection, similarly no Member State “takes precedence over another; there is no such thing as hegemony. History teaches us that the domination of one power over others does not work. When it was attempted, it seldom lasted long, and the attempt, as well as the subsequent failure, has always caused conflict and periods of uncertainty”<sup>87</sup>. Thus, from the recognition of equality follows the equal relevance of the principle of *liberty*: freedom in the movement of people, and, hence, freedom of movement; likewise, freedom in the movement of goods, through the guarantee of freedom of establishment, the free movement of services, capital, and workers<sup>88</sup>. In Hallstein’s vision, political liberalism and economic liberalism find complete overlap and are impossible to separate.

On the other hand, to avoid the risks of overemphasizing market dynamics and expanding individual (economic) freedoms beyond plausible limits, Hallstein highlighted the centrality of *solidarity* as a guiding criterion for ensuring equity and justice within the European space. This dimension of solidarity, for Hallstein, was framed, however, within a purely economic context. The problem of constraints on individual freedoms was traced back to the need to place interpersonal relationships within the framework of a *social market economy* (a theme that evokes various elements of the ordoliberal tradition, as will be briefly seen in the next and final paragraph), for which Hallstein expressed his full approval, probably in overly emphatic tones: even the “Community, like the Federal German Republic, practises a market economy, tempered with a sense of social responsibility. A market economy is not postulated as a kind of immutable dogma; it is merely the best economic system man has so far devised and tested”, and it is “part and parcel, as well as the tool, of a healthy, stable society which seeks to provide conditions in which all its members can lead satisfactory lives”<sup>89</sup>. Since the market economy, thus envisaged, involves an incessant movement, a perpetual interplay of encounter and clash, conflict and dialectic, there is an urgent need for a *force* that ensures that the changes, displacements and adjustments that result from it do not unduly burden one with respect to the other: it is necessary to “guard against the danger of one section of society, or even specific individuals, being unfairly affected by the changes, variations and necessary adjustments resulting from the interplay of market forces”<sup>90</sup>. And this force is precisely the *law*.

Confidence in the functioning of a stable and fair economic market, limited in its most extreme and conflictual forms, led Hallstein to recognize the importance of the requirement of ‘*well-being*’ for the European peoples. This requirement also had to guide politicians and institutional actors to reduce poverty, make general culture prosper, and ensure social progress<sup>91</sup>. The Community, in fact, found one of its essential features in the

<sup>85</sup> See also W Hallstein, *The European Community: A New Path to Peaceful Union* (n 5) 8 ff.

<sup>86</sup> W Hallstein, *Europe in the Making* (n 5) 43.

<sup>87</sup> *Ibid.*, 44.

<sup>88</sup> *Ibid.*, 44–45.

<sup>89</sup> *Ibid.*, 45.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*, 46.

dimension of *progressiveness*<sup>92</sup>. The Community has a dynamic character, it is a becoming, a *continuous creation*, it is not a *state*, but a *movement*, a “process”<sup>93</sup>, which rejects forced automatisms and embraces the political need to provide ever new solutions to new problems. All this, however, can be implemented and realized within a “kingdom” in which full *societal security* reigns. Societal security is embodied in the possibility of calculating the future and, consequently, in the capacity to ensure stability in interpersonal relationships. But it also embodies a *secure market*, which allows entrepreneurs to plan their activities with relative certainty, within a global framework that ensures a good level of economic growth. For this reason, according to Hallstein, in addition to the existence of an effective *legal structure*, it is also vital to establish forms of autonomous financing for the Community. In this way, the Community can steadily work to achieve the objectives necessary and useful to ensure fundamental European values, within the framework of a general *economic-financial Constitution*<sup>94</sup>.

## V. Vision, ordoliberal theories, and some conclusions

Hallstein’s conception, according to which the essential values of the Community took on an economic content to be supported through a rigorous system of legal forms, recalls some similar ideas. These ideas were theorized, starting in the 1930s<sup>95</sup>, by some authors belonging to the complex and multifaceted current known as *ordoliberalism*<sup>96</sup>. Ordoliberalism envisioned a market structured according to the classic matrices of liberal thought – efficiency, price stability, guaranteed equilibrium in the relationship between the laws of supply and demand. This market had to be characterized, however, by a specificity, represented by the importance of the legal dimension: the law had to be conceived as a fundamental instrument for safeguarding the market

<sup>92</sup> “Integration is a process of political dynamics. What matters is ‘shared progress’ and not the static material norms that set the level of tariffs or prohibit discrimination», so much so that the “Treaty itself is based on evolution” (W Hallstein, *L’integrazione economica come fattore di unificazione politica* (n 5) 17, my translation). At the same time, however, the “vehicle of unification has become, so to speak, an automobile”, and lives on a process of apparently unlimited expansion (*ibid.*, 18, my translation). Thus, in Hallstein, one finds a certain ambiguity between the emphasis placed on voluntaristic dynamics and the observation of an automatic development of phenomena. Consequently, it is not easy to understand where one process ends and the other begins: see *ibid.*, 18.

<sup>93</sup> W Hallstein, *Europe in the Making* (n 5) 46.

<sup>94</sup> *Ibid.*, 49 ff.

<sup>95</sup> As regards the links between Hallstein and the main exponents of *Ordoliberalism*, one can usefully consult the reconstruction contained in C Malandrino, «Tut etwas tapferes»: *compi un atto di coraggio* (n 3) 40 ff.

<sup>96</sup> For an introduction to the ordoliberal theoretical-political and philosophical-economic vision, among the many possible references, see, at least: M Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979*, edited by M Senellart, translated by G Burchell (New York: Palgrave Macmillan 2008); A Somma, *La dittatura dello Spread. Germania. Europa e crisi del debito* (Rome: DeriveApprodi 2014) 174–210; F Forte, F Felice (eds.), *Il liberalismo delle regole. Genesi ed eredità dell’economia sociale di mercato* (Soveria Mannelli: Rubbettino 2016); A Zanini, *Ordoliberalismo. Costituzione e critica dei concetti (1933–1973)* (Bologna: Il Mulino 2022); L Mesini, *Stato forte ed economia ordinata. Storia dell’ordoliberalismo (1929–1950)* (Bologna: Il Mulino 2023). See also the monographic section dedicated to *Ordoliberalismo*, in *Filosofia politica*, n. 1 (2019) 3–136, as well as the recent work by O Malatesta, *Ordoliberalism, State and Society: A Political Theory of Social Order* (Abingdon: Routledge 2025). For further information: C Joerges, ‘Europa nach dem Ordoliberalismus: Eine Philippika’ (2010) 43 n. 4 *Kritische Justiz* 394–406; R Klump, M Wörsdörfer, ‘On the Affiliation of Phenomenology and Ordoliberalism: Links between Edmund Husserl, Rudolf and Walter Eucken’ (2011) 18 n. 4 *European Journal of the History of Economic Thought* 551–578; J Hien, C Joerges (eds.), *Ordoliberalism, Law and the Rule of Economics* (Oxford-Portland: Hart 2017); MA Wilkinson, ‘Authoritarian Liberalism in Europe: A Common Critique of Neoliberalism and Ordoliberalism’ (2019) 45 n. 7–8 *Critical Sociology* 1023–1034; Id., *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford: Oxford University Press 2021).

itself, ensuring its (ontological) *artificiality*. If possible imbalances arise (always plausible, given the nature of the economic market as a *social product*), the law will intervene to reorder and restructure those same imbalances<sup>97</sup>. It was a kind of law, undoubtedly, purely functional (or ancillary) to the economic dimension, but, nevertheless, fully existent and operational, and *necessary* in its *instrumentality*.

For the ordoliberal, the error of nineteenth-century classical liberalism was “believing that the market was self-sufficient, without being actively connected to the rest of the social territory, that is, without being supported by effective and pervasive mechanisms of social integration”<sup>98</sup>. It was believed and thought that the market did not need the state, and therefore, not even the law. For ordoliberalism, instead, it is necessary “to make the State an active entity with respect to the market, in the sense of a regulatory agency. The state must correct the anti-competitive distortions of the market and alleviate its dissonant and disintegrating effects on the social fabric through strong intervention”<sup>99</sup>. The state must make itself independent of social conflict and pluralism and intervene where the economy needs to be restored.

In the post-World War II period, the ordoliberal vision presented itself not only as an economic theory, but, more precisely, as a true project of political order. Faced with a European reality torn apart by the tragedies of the Second World War, the integrative capacity of the economy took on a central role: it would be necessary and essential “to first tame the devils, civilize or re-civilize them, give them a stable context for action, make them a people, which they are no longer, also because they are divided from each other by a curtain more rigid and resistant than iron”<sup>100</sup>. To this end, the only possible remedy “is to make them market actors, entrepreneurs, and consumers”<sup>101</sup>. Citizenship and sovereignty, as Hallstein himself argued, would arrive later and as a natural and ‘physiological’ consequence.

Likewise, the State, and, more generally, the organization of the European Communities (before that: the High Authority for the European Coal and Steel Community, the fundamental body of the ECSC), must establish a common (or single) economic market<sup>102</sup>, which it will then have to regulate and formalize through law. In the absence of an immediate political union, it is decided to create an economic union based on free-market capitalist principles. In this way, the *economic constitution* will be governed by independent authorities free from the parliamentary representation of the various states. It will be Hallstein himself who will state this in the meetings preceding the Treaty of Paris, establishing the ECSC: “La force et l’indépendance de la Haute Autorité sont la clé de voûte de l’Europe”<sup>103</sup>. The horizon is that of the liberal vision. The vision is anchored, however, to a strong and formally structured *Legal State*<sup>104</sup>.

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<sup>97</sup> To continue along the lines of theoretical analogies, see Hallstein’s statement regarding the relationship between the legal sphere and the market: “The guiding principle of the European Economic Community, and its entire ‘philosophy’, are based on the market economy. The *leitmotiv* is the establishment of an undistorted game of competition within the no longer divisive space of the Community. To the extent that it exercises coercive action to this end, it is coercion against freedom itself. For freedom, too, is not ‘the natural condition of man’. Coercion is therefore directed primarily against the state powers that seek to limit this freedom, not against the European citizen, to whom new freedoms must be guaranteed” (W Hallstein, *L’integrazione economica come fattore di unificazione politica* (n 5) 14, my translation).

<sup>98</sup> M La Torre, *Europa* (n 28) 143 (my translation).

<sup>99</sup> *Ibid.* 144 (my translation).

<sup>100</sup> *Ibid.*, 145 (my translation).

<sup>101</sup> *Ibid.* (my translation).

<sup>102</sup> See: JHH Weiler, *La Costituzione dell’Europa*, edited by F Martines (Bologna: Il Mulino 2003) 307 ff.

<sup>103</sup> J Monnet, *Mémoires* (Paris: Fayard 1976) 480.

<sup>104</sup> A theme that recalls a famous essay by C Schmitt, *Starker Staat und gesunde Wirtschaft*, in Id., *Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916–1969*, edited by G Maschke (Berlin: Duncker & Humblot 1995) 71–91.

Hallstein's theoretical trajectory and the Ordoliberal vision partially coincide on a strictly theoretical-legal level, but also, or so it would seem, on a historical-political level. The Ordoliberals would indeed play a crucial role in the early years of European integration, being present in many of the original Community institutions. Furthermore, they would influence the main political bodies and guide the development of the jurisprudence of the Court of Justice. Starting in the 1960s, law also becomes economics, and fundamental questions become the prerogative of judicial decisions.

We are still, partially, within this horizon. The market has evolved from being 'common' to 'single', and (after Maastricht) the European Central Bank has become the cornerstone of the Union's economic and legal system. This latter institution largely reflects ordoliberal credentials, as a politically 'neutral' technical-legal body, yet one that is in fact lacking democratic requirements, (also) by virtue of the ideological differentiation and autonomy of the 'economic' from the 'political'. It therefore seems that Hallstein's vision has certainly outlined many elements that will be further refined and elaborated in the decades to come.

Hallstein's vision provided a useful, temporary tool for legitimizing a certain historical situation<sup>105</sup>. It proved to be functional in ensuring a general order of meaning that supported the community's political structures both *internally* and *externally*. Hallstein was very careful to maintain an intimate link between 'politics' and 'science', seeking to legitimize his own political perspectives by representing them in terms that were as 'scientific' as possible<sup>106</sup>. His ideas had to be presented as scientifically founded and theoretically sustainable, otherwise the entire philosophical-political framework would have inexorably collapsed. The link between academia and the political-institutional context, moreover, was strengthened by Hallstein from a specific perspective as well: he worked tirelessly to keep dialogue alive in academic debates and to discuss future changes to the European order<sup>107</sup>.

Furthermore, from a theoretical perspective, Hallstein's thought presented itself as the best representation of a general vision in which the concept of a 'community of law' symbolized the central element of the entire ideological and institutional architecture of a united Europe. Rather than being founded and articulated by *popular will* or mere *economic interest considered in isolation*<sup>108</sup>, Hallstein's pro-European vision found in the idea of *law* the instrument for ensuring an *impersonal process of formation* of the supranational order. In this way, it responded to the needs of the more immediate 'present', ensuring the stable structure of the free market, while safeguarding the possibility, in a near future, of developing – perhaps somewhat utopianly – a European federal democracy. This has, up to now, facilitated the strongly "depoliticized" vision that is blamed – with some justification – on the current European order<sup>109</sup>, and that Hallstein's thought, despite its internal contradictions, has partly contributed, theoretically, to legitimizing<sup>110</sup>.

<sup>105</sup> See W Wessels, *Walter Hallstein's Contribution to Integration Theory* (n 2) 233 ff.

<sup>106</sup> Hallstein evokes, in various parts, the urgency of appealing to the *facts* and the need for a faithful description of reality, although he does not hide the general 'political' intent that animates his scientific and doctrinal work: W Hallstein, *Europe in the Making* (n 5) Foreword.

<sup>107</sup> H Canihac, *The Making of an Imagined 'Community of Law'* (n 21).

<sup>108</sup> *Ibid.*, 27.

<sup>109</sup> And a philosophical approach can help us understand this multifaceted dimension of the EU. From this point of view, see: J Dickson, P Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford: Oxford University Press 2012).

<sup>110</sup> On the other hand, there are those who have emphasized the usefulness of Hallstein's theoretical contributions especially starting from the discussions around the Maastricht Treaty (1992): see W Wessels, *Walter Hallstein's Contribution to Integration Theory* (n 2) 238 ff.

# MORALISM AND SOCIAL MEDIA

## THE ASCENT OF BEAUTIFUL AND PUNITIVE SOULS

Alejandro Nava Tovar<sup>1</sup>

### ABSTRACT

In this essay, I begin a philosophical reflection concerning moralism on social media platforms. I am interested in explaining the negative consequences for critical debate and morality itself. To do so, I describe how this moralistic trend emerged in recent years, replacing postmodernism, and then I explain its characteristics, namely the culture of victimhood, permanent outrage and cancel culture, and the rejection of institutions. Finally, I argue that this moralism, beyond publicly displaying the “beauty of the soul” of its proponents, does not contribute to achieving genuine social justice, since, ultimately, moralism ends up discrediting morality.

**Keywords:** moralism, social media, cancel culture, woke, morality

### I. Introduction

A sense of immaculate, yet punitive and complacent moral sensitivity prevails on social media platforms; a sense that grants social prestige and boosts one’s own ego. The intensity, the duty, and even the satisfaction of exercising it publicly give the feeling of changing the world’s injustices. But it is also a form of moral empowerment that seeks to suppress plurality of opinion, critical thinking and, ultimately, brings morality into discredit. Indeed, this moral sensitivity, which can be seen by accessing any social network, is often called moralism. Moralism, through its various manifestations, can have a number of consequences: the cancelling of certain books, actors, musicians or films; the disdain of certain theories or social theorists; and the rejection of basic institutions of the rule of law, such as due process. All these manifestations, claimed from the supposed moral superiority of a certain discourse or group, create an unbreakable moral shield. Thus, in the name of what is right or good, it becomes possible to do evil or harm others.

If the spectre of populism is currently haunting the world<sup>2</sup>, I would say that behind it there is often another spectre lurking: moralism. What used to be a matter of aesthetic pleasure, musical taste or an epistemological issue is now a matter of morality. We see this moralistic trend in new discussions on issues that are equally

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<sup>2</sup> M La Torre, ‘Populism as a Spectre and an Unmanageable Concept’ in I van der Geest, H Jansen, and B van Klink (Eds.), *Vox Populi. Populism as a Rhetorical and Democratic Challenge* (Cheltenham: Edgar Elgar Publishing 2020) 29–42.

important and inconsequential: political debates often end with a moral condemnation of the other side. Long-time friends end up “permanently estranged because of one of those fleeting indignations”<sup>3</sup>. Appealing to victimhood is the best weapon, because “the victim is always right”<sup>4</sup>. In sum, “moralism is our religion, and hypermoralism is its theology”<sup>5</sup>.

In one way or another, this renewal of moralistic discourse on social media, which has nothing to do with the justification of rational moral standards, is criticized in a wide variety of Western academic circles. But few voices publicly confront moralism. There is a fear of being lynched in the new virtual public sphere. No one wants to be accused of being an insensitive victimizer. The price to pay is high: being lynched, cancelled, immoralized. My recent work on punitive populism<sup>6</sup> led me to analyze this new form of moralism in more detail, for punitive culture has been strengthened by this cultural phenomenon. For this reason, in this essay I aim to explain its origin and consequences. This is a first step toward minimizing its effects and, at the same time, saving morality from moralism.

## II. How the New Moralism arrived

In various academic and even personal conversations, we regularly hear that we should stop moralising others, because it is one thing to offer moral criticism and quite another to offer moralistic criticism. While the nature and inclusion of morality in some institutions is debatable, for example in the philosophy of law,<sup>7</sup> there is general agreement that the concept of moralism has a “negative characteristic of statements or persons. Those who use the word ‘moralism’ in this way attribute a specific moral flaw to persons or statements”<sup>8</sup>. However, in political debates and social media, it is clear that the most effective accusations are those with a moralistic tone. Immoralizing others is perhaps the most effective weapon for refuting their arguments. The same can be said of other expressions such as “cancel culture” or the adjective “woke”: they can be criticised academically, but they undoubtedly have power in the digital public sphere. But what is moralism, and how does it relate to “cancel culture” to arise and amplify on social media? A minimal but sufficient conceptualisation of moralism becomes necessary. According to John Kekes:

Moralism is the misguided tendency to exaggerate the moral importance of what has little or none. Led by this misplaced emphasis, moralists arrogate to themselves a spurious authority to judge

<sup>3</sup> G Bronner, *Apocalipsis cognitivo. Cómo nos manipulan el cerebro en la era digital* (Barcelona: Paidós 2022) 105

<sup>4</sup> F Bosco, *A vítima tem sempre razão? Lutas identitárias e o novo espaço público brasileiro* (São Paulo: Todavia 2022) 17.

<sup>5</sup> A Grau, *Hypermoral: Die neue Lust an der Empörung* (München: Claudius 2021) 57.

<sup>6</sup> A Nava, *Populismo punitivo. Crítica del discurso penal moderno* (Tlalpan: INACIPE 2021); Id., *Populismo punitivo. Crítica del discurso penal* (Rome Castelvechi 2024); Id., ‘Toward the critique of punitive populism’ (2025) 19(19) *Problema. Anuario De Filosofía Y Teoría Del Derecho*, e19531. <https://doi.org/10.22201/ijj.24487937e.2025.19.19531>.

<sup>7</sup> The relation between law and morality occupies a central place in the philosophy of law, whether to deny their connection (J Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press 1979)) or to recognise their necessary connection (R Alexy, *The Argument From Injustice – A Reply To Legal Positivism* (Oxford: Oxford University Press 2002)). Meanwhile, the issue of legal moralism has been the subject of important reflections, such as those of the renowned British legal philosopher H. L. A. Hart on the imposition and criticism of moralism (the “Hart-Devlin debate”) in the context of sexual morality (HLA Hart, *Law, Liberty and Morality* (Redwood City: Stanford University Press 1963)). However, for the purposes of this essay, I will go beyond my usual reflections on legal philosophy.

<sup>8</sup> M Scheftzyk, *Der Moralismusvorwurf als Verkennungs und Übermaßkritik* in C Neuhäuser & C Seidel (Eds.), *Kritik des Moralismus* (Berlin: Suhrkamp 2020) 153.

others. They cultivate a hyperactive sensitivity that finds serious moral problems behind ordinary, customary practices, and condemn those who resist their bullying for colluding in immorality. They pontificate about how we should live, but their inflated claims actually give morality a bad name<sup>9</sup>.

This spurious attitude, which gives morality a bad name, has recently been amplified by the use of social media. Regardless of whether moralism is parallel to morality, the first twenty years of the 21st century, writes Gérald Bronner in his splendid book on brain manipulation in the digital age, “have brought about massive deregulation of a cognitive market that we can also call the *market of ideas*”<sup>10</sup>. This deregulation has led to situations such as *gatekeepers*, who previously editorialized to the world, now being questioned by anyone with a social media account, who “may even claim to have a larger audience than the latter”<sup>11</sup>. This horizontally-oriented virtual communication may, on the surface, have its advantages, but it also has its downsides.

During the second half of the 2000s, social media emerged in a context where postmodern philosophy still dominated the social sciences. According to this philosophical movement, nothing can be rationally justified, for everyone has their own truth or criteria for correctness: “*Es ist alles subjektiv*”<sup>12</sup>. In short, the famous philosophical and cautionary discourse from Hideo Kojima’s video game *Metal Gear Solid 2*, “no one is invalidated, but no one is right”,<sup>13</sup> summed up the emergence of social media and its relation with the still-prevailing postmodern thought. But in recent decades, moral thinking evolved, and so did the way we express our emotions on social media.

Unjust acts happen every day, but we rarely hear about them. Even if these events occur nearby, we probably won’t hear about them. But what used to remain in the private sphere or as an isolated incident soon became visible. The ability to post and record news on social media contributed to the exposure of these acts. Everyday injustices, both local and global, soon began to go viral on social media. Private or secret vices became public. What once went unnoticed was exposed. And what was exposed, outraged us. And what outraged us was shared by other people, some known and some unknown, but united by the same causes. Thus, recognition, as a “vital human need”<sup>14</sup>, found a new space in which to be demanded. In the North American context, two social movements gained particular notoriety and subsequently spread to other cultural contexts. Both movements, represented by the hashtag symbol (#), are Black Lives Matter (BLM) and MeToo.

Since its inception in 2013, the Black Lives Matter movement has aimed to highlight the discrimination, police violence and racial inequality suffered by black people. Constant incidents of police brutality, many of them exposed on social media, led to mass protests and awareness campaigns about historical inequalities

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<sup>9</sup> J Kekes, *The Nature of Philosophical Problems. Their Causes and Implications* (Oxford: Oxford University Press 2014) 101.

<sup>10</sup> G Bronner, *Apocalipsis cognitivo. Cómo nos manipulan el cerebro en la era digital* (n 3) 14

<sup>11</sup> *Ibid.*, 15.

<sup>12</sup> F Nietzsche, *Sämtliche Werke: Kritische Studienausgabe 12: Nachgelassene Fragmente 1885–1887* (Berlin: Walter de Gruyter 1999) 60

<sup>13</sup> The whole discourse of this game, released in 2001, reads, “The untested truths spun by different interests continue to churn and accumulate in the sandbox of political correctness and value systems. Everyone withdraws into their own small gated community, afraid of a larger forum. They stay inside their little ponds, leaking whatever ‘truth’ suits them into the growing cesspool of society at large. The different cardinal truths neither clash nor mesh. No one is invalidated, but nobody is right.” For more information on this, see <https://www.washingtonpost.com/video-games/2019/11/08/we-are-living-hideo-kojimas-dystopian-nightmare-can-he-save-us/>

<sup>14</sup> C Taylor, ‘The politics of Recognition’ in A Gutmann (Ed.) *Multiculturalism and ‘The Politics of Recognition’* (Princeton: Princeton University Press 1992) 26.

towards black people. Similarly, starting in 2016, the MeToo campaign against sexual harassment, sexual abuse, and rape culture became popular on social media, seeking to highlight the testimonies of many famous women who were victims of powerful men. Although the initial focus was on film producer Harvey Weinstein, allegations made by famous women spread against men in other industries. This led to the empowerment of women who had suffered sexual harassment and assault in their workplaces. With the allegations centred on two historically vulnerable groups, social media soon shifted towards a “Call-Out Culture”. The generations born at the end of the 20th century and the beginning of the 21st were not indifferent to these movements: they *woke up*.

To say that society “woke up” has several meanings: on the one hand, there was a growing awareness of social inequalities. Violence against women and black people became causes of outrage. On the other hand, in the search for safe spaces, this “Call-Out Culture” spread to new horizons, such as universities and even private communications. Some social media platforms such as X or Facebook were not indifferent to the outrage of the “woke” movement. On social networks such as Facebook, outrage can be expressed. As William Davies points out<sup>15</sup>, by expressing our feelings through emojis, we provide artificial intelligence with accurate data through which advertisements can be sold. The use of emojis has enabled several things. First, it allows us to express our emotions. Whether genuine or not, the diversity of social reactions encompasses most of our emotions. Secondly, seeing other people’s expressions allows us to make a moral assessment of which social cause is being defended or attacked. Finally, the visibility of our emotions allows us to show a sense of identity to a group. This allows us to recognise our friends in a moral cause, as well as our enemies. The others. The moral monsters.

Zamyatin’s provocative imagination envisioned a dystopia in which citizens lived in almost panoptic glass cages where their guardians could see all their actions in his novel *We*. Nothing remained private; it was a dystopia of complete visibility. Now, social media platforms such as Instagram and TikTok enable us to see people’s moments of fun, travel and hobbies, while other digital platforms such as X and Facebook also enable us to see where others stand morally. In the face of such horizontal surveillance, not taking a moral stance is not an option.

Postmodern philosophy, which for years dominated the field of social sciences due to its opposition to the grand narratives of reason and Enlightenment ideals, began to fade in the face of the rise of the woke movement and the emergence of outrage on social media. Everything that seemed to have the same value was questioned by internet users, who, in search of identification with a digital tribe, began to doubt “the postmodern condition”<sup>16</sup>. Moral relativism, in the face of extreme injustices, ceased to have explanatory value. Postmodern explanations lost their meaning in the eyes of the new generations who became “woke”. Anti-racist, classist, misogynistic and LGBTQ+ rights discourses achieved what Habermas failed to achieve with his critic to postmodern philosophy<sup>17</sup>: they banished postmodernism in spectacular fashion. Without it being part of their agenda, the “digital warriors” cancelled postmodern thinking. Instead, they spawned a form of moralistic thinking that calls for the cancellation or lynching of anyone who is not part of their identity politics.

<sup>15</sup> W Davies, *Nervous States: How Feeling took over the world* (London: Jonathan Cape 2018)

<sup>16</sup> J-F Lyotard, *The Postmodern Condition: A Report on Knowledge* (Minneapolis: University of Minnesota Press 1984)

<sup>17</sup> J Habermas, *The Philosophical Discourse of Modernity* (Cambridge, UK: Cambridge University Press 1987)

### III. The Manifestations of the New Digital Moralism

I agree with Markus Gabriel that the early 21st century has shown significant moral progress with the rejection of slavery, misogyny, racism, classism, and other forms of disregard for human dignity<sup>18</sup>. Today, more than ever, the younger generations are aware that there are things that should not be done to others. That is why they are often referred to as the “awakened” generation. But what did society awaken from? From the dream of moral relativism? From the nightmare of not making our voice heard by others? Postmodern philosophy, faced with the rise of indignation on social media, became insufficient to provide a foundation for this moral awakening. If the motto of postmodernism, as I said before, was to say that “no one is invalidated, but no one is right”, now the motto would be, “Everyone else is wrong. I am right”. And this is where things, morally speaking, get ugly.

If “woke” is no longer a morally acceptable label, it is because it has reached reprehensible punitive extremes. In Germany, for example, works criticising moralism have recently been published, understood as a “hypermoral”<sup>19</sup> of the outraged or a “moral spectacle”<sup>20</sup> that does not make the world a better place. Meanwhile, in the English-speaking world, the tribalist claims of woke culture, opposed to universalism, are being questioned<sup>21</sup>. Cancel culture, spawned by wokeism, with its hypermoralistic and punitive pretensions, attacks the moral relativism that at one time served as a justification for racism, classism, misogyny, and other discourses that undermined human dignity. At the same time, by virtue of its attitude of revenge, it endangers critical thinking, which, paradoxically, supported the moral awakening of new generations. Thus, the child of critical thinking is thrown out with the relativistic bathwater.

If these hypermoral manifestations are perceived academically as negative, how is it that they have spread so widely throughout society? Social media has played an important role in establishing moralism as the new secular religion. Equally important are the elements with which moralism operates its cancel culture logic, namely victimhood, punitive outrage, and the rejection of institutions and rationality. These elements deserve closer analysis.

*Moralism and victimhood.* There is no moralism without a victim. If the victim is the hero of our time<sup>22</sup>, then moralism elevates them to its epicentre. There is now a “culture of victimhood”<sup>23</sup> that manifests itself in almost all areas of life: “microaggressions”, “safe spaces” and “trigger warnings” are part of today’s language. What once sounded like private distress is now a public honourable praise: seeing influencers or famous people talk about their vulnerability, family traumas, or healing therapies can be comforting to those who never imagined that they too had been victims of something. If they were victims, then “Me too”.

In the *Phänomenologie des Geistes (The Phenomenology of Spirit)*, Hegel introduces and elaborates his conception of the “Schöne Seele”, the “beautiful soul”. For Hegel, this figure of the Spirit, in which self-consciousness

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<sup>18</sup> M Gabriel, *Moralischer Fortschritt in Dunklen Zeiten. Universale Werte für das 21. Jahrhundert* (Berlin: Ullstein 2020) 265–342.

<sup>19</sup> A Grau, *Hypermoral: Die neue Lust an der Empörung* (n 5).

<sup>20</sup> P Hübl, *Moralspektakel. Wie die richtige Haltung zum Statussymbol wurde und warum das die Welt nicht besser macht* (Berlin: Siedler 2024)

<sup>21</sup> S Neiman, *Left is Not Woke* (Cambridge, UK: Polity Press 2023); U Özkirimli, *Cancelled: The Left Way Back from Woke* (Cambridge, UK: Polity Press 2023); D Rieff, *Desire and Fate* (New York: Columbia University Press 2025)

<sup>22</sup> D Giglioli, *Critica della vittima. Un esperimento con l’etica* (Milan: Nottetempo 2014) 9.

<sup>23</sup> B Campbell and J Manning, *The Rise of Victimhood Culture. Microaggressions, Safe Spaces, and the New Culture Wars* (London: Palgrave Macmillan 2018)

and consciousness of duty have the same content, represents the moralist for whom words speak louder than his actions, insofar as the beautiful soul does not externalise its interiority because it considers this action to be irrelevant. Its only activity is to challenge other interpretations of moral law. In other words, it rejects the relevance of arguments that contradict its own perspective. For Hegel, by being obsessed with purity, this “beautiful soul, being conscious of this contradiction in its unreconciled immediacy, is unhinged, disordered, and runs to madness, wastes itself in yearning, and pines away in consumption”<sup>24</sup>.

This madness, to which the beautiful soul is driven, now presents itself as a “self-empowerment” to lynch opposing opinions, because for the modern beautiful soul the important thing is to appear moral in virtual space and shut yourself away in your echo chamber. Anyone who interacts in virtual space must be morally virtuous. There is no more dignified way to empower yourself as a beautiful and punitive soul than to be a victim or assert yourself as a potential or collateral victim, or, ultimately, as a defender of victims. That is, a social media account is enough to show yourself as a beautiful soul.

Beautiful souls are not only those who have the pure status of victims. They are also those who, in support of victims, show their outrage on social media, for “the victim is always right”. A beautiful soul signs petitions on change.org, shares news articles or posts that confirm their biases (while disapproving of news articles or posts from those with opposing beliefs) but, above all, expresses outrage, cancels or punishes. Beautiful souls become punitive souls. Therefore, it is not surprising that any trivial discussion on social media becomes “an occasion for people to exhibit their moral intransigence and the beauty of their soul”<sup>25</sup>. In social media the beauty of the soul is now demonstrated by cancelling or lynching someone.

*Moralism and outrage.* Prior to the plethora of works on moralism or hypermoralism, conservative German philosophers such as Arnold Gehlen and Hermann Lübbe analyzed this phenomenon. Gehlen used the concept of “hypermorality” to refer to the tendency to absolutize ethics in times of instability, noting, among other things, how in this “movement toward pure moral extremes, aggression is unleashed”<sup>26</sup>. Lübbe, meanwhile, reflected in the 1980s on political moralism, understood as “the self-authorisation to violate the rules of customary law and moral common sense by appealing to the higher law of a morally superior cause”<sup>27</sup>. He summarised this self-empowerment with the phrase “*Uns ist alles erlaubt*”, “Everything is permitted to us”<sup>28</sup>. One of moralism’s main features is that it gives the outraged absolute legitimacy to exercise various forms of violence against those who do not share their views. Hence one of the main theses of my previous work: “there is no moralism without punitivism and there is no punitivism without moralism”<sup>29</sup>. The practices of cancelling and lynching on social media are a matter of concern because they are justified under a special case of the claim to correctness, namely, the claim according to which there is an objective moral justification for a legal norm or a moral action<sup>30</sup>. On social media who could openly defend racism, classism or misogyny? Who could openly defend the bombing and killing of Palestinians in Gaza?

<sup>24</sup> GWF Hegel, *Phenomenology of the Spirit* (Oxford: Oxford University Press 1977) §§ 668.

<sup>25</sup> G Bronner, *Apocalipsis cognitivo. Cómo nos manipulan el cerebro en la era digital* (n 3) 110.

<sup>26</sup> A Gehlen, *Moral und Hypermoral. Eine pluralistische Ethik* (Frankfurt: Klostermann, 2016) 119.

<sup>27</sup> H Lübbe, *Politischer Moralismus. Der Triumph der Gesinnung über die Urteilskraft* (Berlin: LIT, 2019) 22.

<sup>28</sup> H Lübbe, *Philosophie nach der Aufklärung. Von der Notwendigkeit pragmatischer Vernunft* (Düsseldorf und Wien: Econ) 261.

<sup>29</sup> A Nava, ‘Toward the critique of punitive populism’ (n 6) 12.

<sup>30</sup> R Alexy, *Law’s Ideal Dimension* (Oxford: Oxford University Press 2021) 36–40.

There are things that are indefensible on social media, things that are extremely unfair and cruel. But criticizing injustices can enable people to hurt others under the mantra of moral justification if there is no clear distinction between extreme injustices and trivial issues. Usually, arguing with someone with contrary beliefs will end with one telling the other that they are as evil as Hitler. Nowadays, those who judge morally on social media have the support of strangers who share their resentment or political affiliation. In the past, moralists would debate and lose to another person. Today's moralists will make the debate public on social media so that unknown individuals who share their resentment and political affiliation will join the cause and condemn the opposing side. To preach moralism is tempting and empowering when "everything is permitted to us". Such power must be intoxicating and addictive.

Cancel culture empowers ordinary people to punish colleagues at university, private companies, and famous people in many different ways. Suddenly, recording an event in a classroom leads us to call for the cancellation of a professor for microaggressions against a student. Some new movie star is put on a moral pedestal, until a comment written ten years ago is revived by the woke community to claim that he is not up to the moral standards of the new times. A legendary rock band, when asked for its position on Gaza and not being critical enough, is cancelled for its "complicit silence."

Being "woke" is linked to being sensitive to intersectional injustices, but not to the possibility of forgiveness. If some cancellers forgave, they would lose their power. Endless reproach is the trump card of those who morally judge others. Only groups considered victims can be forgiven or even justified, but everyone else is a moral monster. No matter what they have done, forgiveness would make them part of the community again, an "insider". Anyone who does not appear to have a beautiful soul on social media should be viewed with suspicion, and if they say or do something inappropriate, they will never be forgiven. They will forever be a moral "outsider."

*Moralism and rejection of institutions.* Most "digital warriors" or defenders of the woke movement may not identify with populism, but both share a certain similarity in their rejection of institutions. The basic institutions of the rule of law must be rejected for being "on the side of corrupt power". Resentment cannot ally itself with political institutions. Historical injustices and impunity serve as rhetorical resources for judging the present and future of all institutions. If musicians, filmmakers, actors, and social theorists are cancelled, institutions will be burned. They all will be burned. In the event of a call to cancel or question due process, there is no forgiveness or institutional defence.

Any rational defence of such institutions will be dismissed as "rationally cold". The canceller is always in a comfortable position of uncompromising rhetoric, allowing them to disqualify anyone who defends institutions as "lacking empathy", "lukewarm," or "complicit." As Bronner points out, there is a fascination for negative things<sup>31</sup>, and much of the news circulating on social media is related to negative news, such as the limits of the justice system or notorious institutional impunity. An unpunished predatory professor, an exonerated businessman, an untouchable film director, an ongoing genocide. In the face of this, justice must go beyond institutions, and there is no room for lukewarm responses or theories.

Hypermoral reasoning does not hesitate to reverse the burden of proof for those accused of committing something contrary to political correctness. As Hübl points out, this victim culture (*Opferkultur*) does not seek to appeal to the authorities of the criminal justice system, "but rather to university authorities or the public

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<sup>31</sup> G Bronner, *Apocalipsis cognitivo. Cómo nos manipulan el cerebro en la era digital* (n 3) 262.

sphere (*Öffentlichkeit*), which can be reached through digital media”<sup>32</sup>. Suddenly, social media is flooded with posts assuming the possible impunity of the accused person, and this might trigger warnings of a possible escape of the criminal who may go unpunished. The number of “likes” and “shares” will determine who is innocent and who is guilty. The hermeneutics of suspicion will fall on all members of an institution. Everyone is potentially an ally of power. The same will happen with social theories.

If social theories come from the academic sphere and are not radical enough in offering solutions, they will be characterized as “complicit theories”. Any academic questioning of dogmatic positions of vulnerable groups or empowered minorities will be considered a “moral offense.” The fear of being cancelled will cause social science research to refrain from questioning certain forms of identitarian reasoning or to avoid citing yesterday’s fashionable theorists. This explains two things: first, why sensitive issues involving victims and panic, such as criminal justice<sup>33</sup>, self-help culture and therapeutic language<sup>34</sup>, or sex work<sup>35</sup> are burdened with moral biases. And, second, why most postmodern philosophers ceased to exist publicly or, if they wanted to continue working at universities, became postcolonial.<sup>36</sup>

Indignation, victimhood, and rejection of institutions are the basic elements of digital moralism, of this rise of beautiful and punitive souls. Digital lynching and cancellation will become as addictive as bad news and sugar. Doing harm to others in the name of good causes has never had so much social prestige, so much self-validation, so many “likes.” In light of all this, what does social justice, the main concern of the woke generation, improve?

#### IV. And who does this Woke Moralism help?

Harming others has led to controversial social experiments. Understanding its causes, manifestations, and consequences is a matter that goes beyond mere philosophical speculation. Peter Singer, for example, recalls that in “the 1960s and early ‘70s, famous experiments by Stanley Milgram and Philip Zimbardo suggested that most of us would, under specific circumstances, voluntarily do great harm to innocent people”<sup>37</sup>. I wonder what Milgram and Zimbardo would think if they knew that reacting with “likes” or the “heart” icon would be another way of expressing the intention to harm, immoralize, or cancel someone else. The virtual theatre of hypermorality leads us to shape how we present ourselves to others. The greater the beauty and punitiveness of the soul, the greater the morality. The greater the reflexivity and restraint, the greater the immorality.

<sup>32</sup> P Hübl, *Moralspektakel. Wie die richtige Haltung zum Statussymbol wurde und warum das die Welt nicht besser macht* (n 20) 84.

<sup>33</sup> Y Jewkes, *Media and Crime* (Thousand Oaks: Sage 2015)

<sup>34</sup> E Illouz, *Saving the Modern Soul: Therapy, Emotions, and the Culture of Self-Help* (Berkeley: The University of California Press 2008)

<sup>35</sup> A Ramírez, *Sesgos, derecho y trabajo sexual* (Mexico City: Ubijus 2025)

<sup>36</sup> Decolonial thinking, which is now a strong trend in the field of social sciences, differs from postmodernism in several ways. One of these is its strongly moralistic tone, which is incompatible with the main postmodern tenets. I have already addressed this issue previously, see A Nava, ‘Kulturrelativismus und Menschenrechte. Eine Antwort auf die dekoloniale Wende’ in C Bäcker (ed.), *Rechtstheorie, Rechtsprinzipien, Rechtsbegriff. Elemente einer diskursiven Theorie fundamentaler Rechte* (Tübingen: Mohr Siebeck 2023) 109–123.

<sup>37</sup> P Singer, *Ethics in the Real World. 82 Brief Essays on Things That Matter* (Princeton: Princeton University Press 2016) 19.

Modern moralism is more than simply having “strong convictions”. Rather, it is about how morality, in the face of outrage at injustice and fatigue of postmodern relativism, takes a different meaning in the digital world. However, there is still a theological parallel in this moralism. Whereas morality was traditionally derived from traditional systems – such as religion – today, a morality has been imposed that is self-founded and defends an “absolutist claim.” Morality, which was once based on religion, sought to fight evil in a metaphysical sense; this struggle was transferred to the real world, and then to the digital world. Thus, “the biblical apocalypse at the end of time became the apocalypse in this world – the bloody war of ideologies in the name of good”<sup>38</sup>.

Over the past decade, cancel culture has become the battle cry of those disappointed by liberalism, post-modernism, and even Marxism. Permanent outrage sought an intersectional approach to global, local, and private injustices. But this outrage, along the way, began to reveal a dark side. What began as an awakening of consciousness became a tool for the elevation of the ego, the creation of echo chambers, and the suppression of debate. The aspiration for a better society became a “*vorwerfbarer Fetischismus*”, that is, a “morally reprehensible fetishism”<sup>39</sup>.

This moralistic fetishism is thriving because it has turned us into guardians of morality. Social media platforms, as Mathiesen lucidly observed almost thirty years ago, marked a transition from Foucault’s panopticon to the synopticon<sup>40</sup>. Now, there is no guardian watching from a panoptical structure. Rather, “the many” watch “the few”, we are each other’s guardians. We make sure that no one deviates from the dominant morality. If someone “likes” something we consider wrong, it is a reason for judging them mercilessly. The same goes for many social theories, movies, albums, books, or actors we consider immoral. Only then will beautiful souls reach the heaven of the purest morality.

But the heaven of the purest morality is not for those who do not make their moralism public. *Moral appearance* is more important than *being moral*. Herein lies a central problem with the woke movement: the intoxication of cancel culture forgets to do justice to the victims of social injustices. It seeks revenge, not reparation for the damage caused. It seeks to satisfy emotions, not to create just institutions. It seeks to appear moral in the mirror of social media, not to transform reality. In their own quest for moral expiation, beautiful souls end up denying universalism. Thus, a contradiction arises: moralists abominate perverse acts, but they are not fully aware that for this judgment and refusal they appeal in one way or another to norms implicitly assumed as objectively valid; universal norms are not admitted by the woke movement, but when there are conflicts and problems, like the unfolding genocide in Gaza, they appeal to justice, solidarity and human rights.

This is one of the reasons why a certain universalist left seeks to distance itself from the woke movement and its culture of victimhood. Precisely, in Neiman’s words, “Those on the left who are uncomfortable with universalism should consider: there is no more successful example of identity politics, complete with the appeal to past victimhood, than the Jewish nationalism of Israeli politicians like Binyamin Netanyahu”<sup>41</sup>.

If the beautiful souls of the woke movement reject universalism and only seek to punish those who think differently, who exactly are they trying to help? More precisely, who does woke moralism help? If the aim is to cancel any thinking that challenges victimhood, then critical thinking is thrown into the bonfire, and with it the possibility of transforming outrage into policies that can truly repair damage and create genuine social

<sup>38</sup> A Grau, *Hypermoral: Die neue Lust an der Empörung* (n 5) 40.

<sup>39</sup> M Rehm, ‘Ist moralistisches Handeln eine Form des de dicto motivierten Handelns?’ in C Neuhäuser & C Seidel (eds.), *Kritik des Moralismus* (Berlin: Suhrkamp 2020) 152.

<sup>40</sup> T Mathiesen, ‘The Viewer Society: Michel Foucault’s Panopticon Revisited’ (1997) 1 n. 2 *Theoretical Criminology* 215–234.

<sup>41</sup> S Neiman, *Izquierda no es woke* (Madrid: Debate 2024) 40.

justice. But I suppose this is not part of the plans of contemporary moralism, because if the world were truly transformed, its discourse of permanent outrage would be lost, and with it, the power it wields. I suppose this would greatly diminish the power of many identitarian arguments, which do not see the narcissistic self-affirmation of their souls in the possibility of transforming real institutions, but rather in moralistic and punitive discourses that keep them forever on a higher moral pedestal.

Therefore, I claim that woke moralism through social media has replaced postmodernism and even Marxism as a form of thought and protest against great inequalities. The void and discontent against moral scepticism led to hypermoralism, which is right in what it affirms but wrong in what it denies. It is right in seeking to raise awareness of many injustices that are impossible to criticize from the point of view of academic moral relativism. It is wrong in leading moralism and punitivism to cancel any form of thought that questions its moral crusades. Burning, cancelling, or boycotting books, singers, theories, or philosophers with whom one disagrees because of their alleged immoral acts is not the solution.

In sharp contrast to this, a truly moral discussion on what matters allows for different opinions, precisely because it is worthwhile to debate controversial moral issues without violence or fear of cancellation. Freedom of expression is a necessary condition for rational debate. Losing it comes at a high cost to critical thinking. Therefore, those who, like me, are fed up with moralists on social media should not hide their political convictions for fear of cancellation, but rather point out how immoral their woke moralism is: unfairly discrediting morality at a time when we need it most.

## V. Conclusion

It is tempting to fall into the traps of moralism on social media. Since *appearing moral* is more important than actually *being moral*, the cost of not jumping on the moralistic bandwagon is high. But the price to pay is even higher: sacrificing tolerance, reasonable disagreement, critical thinking, and, above all, moral principles, which, today more than ever, are important for criticizing the great injustices experienced by the most vulnerable people, groups, and countries. This is not a price I am willing to pay. No pursuit of capital or moral prestige is worth more than defending universal moral principles that allow us to take a step toward a better society.

We live in a time when we are more aware of injustices of all kinds. Moral scepticism, with its lack of commitment, has given way to various social movements that demand an active stance. For this reason, I believe it would be disastrous if various identitarian movements took their claims to moralistic extremes, as the far-right lurks in the shadows. Being left-wing, now more than ever, requires a commitment to plurality of ideas and public debate.

Being woke, a canceller, a digital warrior, or hypermoral are not anti-establishment positions, as is commonly believed. Nor do they contribute to transforming the world. Genuinely opposing local and global injustices requires more than just appearing to be a beautiful, punitive soul with a social media profile. It requires an active commitment, without being a perfectionist, to minimal universal moral principles and institutions, regardless of the place, person, or theory from which they were enunciated. Ultimately, this active commitment also plays a role in answering the old question of being moral without being moralistic.

# BEING LIKE A GOD – WEALTH AND IMAGINED DIVINITY

Attilio Alessandro Novellino<sup>1</sup>

## ABSTRACT

This article analyzes Guido Alfani’s *As Gods Among Men* and its interpretation of wealth concentration as a structural feature of Western history. Combining economic, political, and cultural analysis, Alfani traces the evolution of wealth from medieval landownership to modern finance and digital capitalism, showing how elites accumulated power and sought social legitimacy through religion, philanthropy, patronage, and taxation. The article highlights the enduring link between wealth and political influence and argues that contemporary inequality reflects the weakening of traditional mechanisms of redistribution and civic responsibility. Ultimately, the study presents extreme wealth as both a source of power and a recurring threat to democratic cohesion and social stability.

**Keywords:** wealth inequality, economic history, political power, elites, capitalism, redistribution, legitimacy, Guido Alfani

## I. Introduction and Theoretical Framework

*As Gods Among Men* (Princeton University Press, Princeton 2023) by Guido Alfani – professor of economic history at Bocconi University and author of comparative studies on the intersections between epidemics, economic crises, and wealth distribution – contributes to a historiographical current that, over the past two decades, has seen a renewed interest in the history of economic inequality and the long-term analysis of wealth-holding elites. A combination of quantitative methods and close attention to historical phenomena’s symbolic and cultural dimensions marks Alfani’s work, as he asks: “Who then are the rich? An intuitive answer would be: those who have considerable wealth. However, how considerable and, more importantly, what do we mean by wealth?”<sup>2</sup>

The book first section, *In the Hands of the Few*, looks at how wealth has been defined and distributed, and what it means – practically and conceptually – to call someone “rich.” It also deals with historians’ difficulties when measuring inequality across different periods. The second section, *The Paths to Affluence*, traces the trajectories from medieval aristocrats to industrial entrepreneurs and tech billionaires, while also examining the emergence and evolution of finance as a parallel force shaping wealth, power, and inequality across centuries. The third section, *The Rich in Society*, looks at philanthropy, political influence, social crises, and the role of regulation.

Covering a period from the Late Middle Ages to the present, Alfani traces a long history of extreme wealth in the West, examining how it has been accumulated, how it has been justified, and how it has been

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<sup>2</sup> G Alfani, *As Gods Among Men* (Princeton:Princeton University Press 2023) Introduction, 7.

challenged. The title, drawn from a remark by the medieval thinker Nicole Oresme, reflects the book's main argument: great wealth is not simply about owning material goods, but about occupying a position that alters social relations, giving those who hold it a kind of elevated status beyond imagination, while also making them a potential threat to political stability. For Alfani, the concentration of wealth is not an occasional distortion. It is a structural feature of how societies work. Traumatic events – wars, revolutions, pandemics – can erode it, but rarely break its underlying mechanisms. From the very first pages, Alfani makes clear his intention to go beyond the boundaries of economic history in the strict sense, adopting “a *historical* approach”<sup>3</sup> in which wealth is simultaneously an economic, social, and cultural phenomenon, with significant political implications. His aim is not moralistic – “This is not a book ‘against’ the rich but one ‘about’ them”<sup>4</sup> – but analytical: to understand the long-term logics of reproduction and legitimation of wealth in order to shed light on today's political and social dilemmas.

The title *As Gods Among Men*, as mentioned, is taken from a passage by Nicole Oresme, advisor to Charles V of France. Writing in a time of political turbulence, Oresme warned against the influence of the very wealthy, who could rise as quasi-divine authorities – “as God is among men”<sup>5</sup> – and in doing so, threaten social cohesion and the political community. In medieval thought, the imbalance between economic and civic power was viewed as a structural danger, accumulation beyond necessity was seen to disrupt the harmony of the “social bodies” and to open the way to hybris. It is no coincidence that Thomas Aquinas, in the *Summa Theologiae*, included greed (*avaritia*) among the capital vices, seeing it as capable of corrupting both natural order and the justice rooted in it. Wealth accumulation, especially in Latin Christendom during the medieval period, was met with deep scepticism. Against the growing fortunes of merchants and bankers, pauperist movements, such as the Franciscans, proposed an ethical model based on *imitatio Christi* through voluntary poverty. Suspicion toward excessive wealth often took legal form. Across medieval and early modern Europe, many cities introduced laws to regulate outward signs of affluence, banning certain fabrics, jewellery, and forms of public display, including feasts and ceremonies. Such rules were not only about morality, they reinforced political hierarchy. The purpose of these norms was to fix social boundaries. The display of wealth was allowed only when one's social rank was consistent. The aim was to make distinctions visible, but not provoke disorder.

In the medieval period, being rich primarily meant owning land and receiving feudal rents; with the industrial age, productive capital became central, and today, the focus has shifted to intangible assets such as data, algorithms, and patents. The non-noble rich of the Middle Ages were forced into a “strategy of discretion”: accumulating without flaunting and taking part in public life only within the socially accepted boundaries.

Medieval Christianity, however, offered pathways for symbolic reintegration through religious charity. The emergence of the doctrine of Purgatory offered the rich a theological mechanism to rebalance their position<sup>6</sup>, as pious donations and bequests were understood as a form of moral credit, a means through which economic capital could be transformed into spiritual and reputational capital and thus invested in the afterlife. Alfani's analysis shows that the non-noble rich in medieval society were perceived as anomalous figures, lacking dynastic or feudal legitimacy yet possessing means far above the average, and tolerated only so long as they conformed to the social and religious norms that circumscribed their status. In this sense, the image of a “God

<sup>3</sup> G Alfani, *As Gods Among Men* (Princeton:Princeton University Press 2023) Introduction, 2.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, 12.

<sup>6</sup> *Ibid.*, 215.

among men” reflects a powerful and unstable position. Wealth could certainly bring influence, but without political legitimacy, that influence was always vulnerable. Outside the nobility, wealth rarely translated into real freedom of action. There were always legal and informal boundaries on how far it could be made visible. The concern was not appearance; it was control. Showing too much risked disturbing a fragile social balance. Things began to shift in the Renaissance, when wealth on display – through grandeur, gifts, patronage – started to work as a claim to social standing, not just a source of suspicion.

## II. Historical Paths of Accumulation and Legitimation

One of the book’s main strengths lies in how it addresses a question that seems simple: what do we mean by “wealth,” and how can it be measured historically? The definition is never absolute, but always context-dependent: “Across history, wealth has always been unevenly distributed, and it is by looking at the unequal access to its different components that the rich can be properly defined in relative terms”<sup>7</sup>.

In the medieval period, wealth was mostly tied to landownership, the material foundation of noble power and a guarantee of stable rents. In more recent times, wealth has come to rest less on land and more on financial assets, company shares, and intellectual property. That said, across different periods, the crucial distinction holds: what marks out the rich is not the absolute value of what they own but how far their assets exceed what most people have.

Alfani insists on separating wealth from income. Wealth means stable assets, land, property, and financial holdings. Income is the flow that comes from work or investment. Income rises and falls. Wealth does not just sit still, it lasts, and in many cases it grows primarily when laws and institutions work to protect it or, for example, through saving, one of the main strategies and social dilemmas of the wealthy<sup>8</sup>. That is why the difference between wealth and income matters so much. Without it, it is hard to see why economic power keeps getting passed down, generation after generation. Often lost in public discussion, this distinction is key to understanding why economic power persists over time.

Before the emergence of modern fiscal states, sources on wealth distribution were often irregular and incomplete. Property surveys and tax records were typically compiled in response to specific fiscal needs, often in moments of financial strain when governments sought to impose exceptional levies, as in the case of the 1613 Piedmontese *census*, which was likely linked to a subsidy requested by the central authorities. (“the city residents were required to provide details about each and every component of their wealth – and, by and large, they complied”<sup>9</sup>). These sources were rarely part of a systematic administrative effort and varied widely in scope and quality. Even so, one pattern remains clear: despite the fragmentary nature of the sources, wealth tended to cluster at the top, in the hands of a small group. To overcome these limitations, Alfani uses the wealthiest 5%, 1%, or even 0.1% threshold to examine how assets were distributed in different periods.

As he puts it: “A crucial finding is that the underlying historical tendency towards increasing wealth concentration is not simply a by-product of economic growth. This leads us to focus on human agency and particularly on the behaviour of the economic elites”<sup>10</sup>. Alfani shows that only exceptional events have had a lasting impact

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<sup>7</sup> G Alfani, *As Gods Among Men* (Princeton:Princeton University Press 2023) Introduction, 17.

<sup>8</sup> *Ibid.*, 178.

<sup>9</sup> *Ibid.*, 18.

<sup>10</sup> *Ibid.*, 8.

on distribution patterns. The Black Death (14th century) temporarily increased workers' bargaining power by reducing the population. The great wars of the modern era destroyed capital and brought extraordinary taxation, narrowing the gap. The decades after 1945, shaped by the rise of the welfare state and steeply progressive taxes, pushed inequality down even further. This fits with what Walter Scheidel argued in *The Great Leveler*<sup>11</sup>, that real reductions in inequality haven't come from reform, but from catastrophe (wars, pandemics, total collapse).

Without such shocks, wealth concentration tends to return, sustained by inheritance, privileged positions, and political influence. In *Capital in the Twenty-First Century*<sup>12</sup>, Thomas Piketty formalized *the principle  $r > g$* : returns on capital outpace economic growth, inevitably leading to concentration. Alfani engages with Piketty's framework, but extends it beyond the last two centuries. "This is a limitation that this book intends to overcome, placing the preindustrial period on a par with more recent epochs"<sup>13</sup>. His long-term perspective spans nearly a millennium, showing that this pattern is rooted in the more profound logic of historical economies, not solely in industrial capitalism.

Branko Milanović, in *Global Inequality*<sup>14</sup>, has described this pattern as a series of "Kuznets waves"; inequality falls only temporarily, then rises again. Alfani problematizes this reading adding a cultural layer by showing that economic systems are never "neutral" in their distribution in how they allocate wealth, as they are shaped by norms, values, and underlying power relations. His definition of wealth, in this sense, also has strong methodological weight. Defining what counts as "wealth" involves both economic as well as political and cultural criteria. The comparison is based on relative position, on where individuals stood within their own society, rather than on absolute sums of money. This makes it possible to compare periods that used completely different monetary systems and still say something meaningful about inequality.

Alfani's work revolves around three central insights. First, wealth extends beyond numbers, as it is measured in relation to others and filtered through the lens of its time. What counts as "rich" depends on the cultural and social norms of the moment. Second, the concentration of wealth at the top is not an anomaly. It is the historical norm, occasionally interrupted by major crises like wars, plagues, or revolutions. Third, economic power by itself has never guaranteed legitimacy. For wealth to be accepted, something more is needed: a place within the moral and social order, a story people can recognize. He also identifies three main routes through which wealth has been built in the West: land ownership, business enterprise, and finance. These often overlap, creating elites that were – and still are – able to adjust as political and economic systems changed. Land remained the primary foundation of wealth and political authority for centuries. In feudal and post-feudal societies, landownership was a source of income and a structural reserve of power. Agrarian rent came with rights, to impose levies, exercise jurisdiction, and regulate access to shared resources. "... preindustrial fiscal systems were regressive: the effective tax rates paid by those at the top of society were lower (and considerably so) than those suffered by those at the bottom. This was the consequence of a regime of systematic privilege, enrooted in law and institutions as well as in a culture that favoured nobles over commoners ..."<sup>15</sup>.

<sup>11</sup> W Scheidel, *The Great Leveler: Violence and the History of Inequality from the Stone Age to the Twenty-First Century* (Princeton: Princeton University Press 2017).

<sup>12</sup> T Piketty, *Le capital au XXI<sup>e</sup> siècle* (Paris: Éditions du Seuil 2013); English trans.: *Capital in the Twenty-First Century* (Cambridge, MA: Harvard University Press 2014).

<sup>13</sup> G Alfani, *As Gods Among Men* (n 1) 6.

<sup>14</sup> B Milanović, *Global Inequality: A New Approach for the Age of Globalization* (Cambridge, MA: Harvard University Press 2016).

<sup>15</sup> G Alfani, *As Gods Among Men* (n 1) 55.

From the fifteenth century on, plenty of noble families moved their money into other sectors such as shipping, manufacturing, and finance. Holding land was no longer enough; staying in power meant learning to adapt, and those who failed to adapt lost ground.

With the Industrial Revolution, entrepreneurship emerged as the second major path to wealth accumulation. The move toward large-scale production, reinforced by technological advances, vertical integration, and monopolistic control, gave rise to coal and steel magnates, the trailblazers of the English textile industry, and the so-called Robber Barons of the United States – Carnegie, Rockefeller, Vanderbilt. Their stories showed how quickly wealth accumulation could be converted into political power.

The third path, and perhaps the most debated, is finance. As early as the fourteenth century, Florentine families such as the Bardi and Peruzzi, by financing monarchs and popes, took on roles similar to those of state actors in military campaigns and religious missions. What we would now call “plutocracy” was already visible in Medici’s transformation of banking power into political control in the fifteenth century. This overlap between economic and political power became even more extensive between the sixteenth and seventeenth centuries, with the control of silver mining, and the political support the Fuggers of Augsburg provided to Charles V<sup>16</sup>. This development has been seen as an early model of global finance. At the same time, the founding of the Amsterdam Stock Exchange<sup>17</sup> (1602) marked the start of a transnational financial economy based on joint-stock capital. In the nineteenth century, the Rothschilds poured money into wars and large-scale infrastructure projects. By the early twentieth century, figures such as J.P. Morgan stepped in during national crises, mobilizing private capital when governments could not. His role in the Panic of 1907 made clear that private finance could act as a stabilizing force in moments of systemic danger, but just as easily, it could tip the balance the other way. One of the main features of finance, Alfani notes, is its dual capacity to secure order or to undermine it. It enabled a high level of concentration of power in the hands of a few families and individuals.

Those who financed wars, infrastructure, and institutional change also assumed the role of savers of last resort. From the fifteenth to the seventeenth century, elites frequently turned to patronage to legitimize their position. Families like the Medici invested vast resources in churches, palaces, libraries, and civic works, converting material wealth into cultural capital and social prestige. Art and architecture worked as signs of authority.

At the same time, views on wealth were changing. Poggio Bracciolini, in *De Avaritia* (1428), wrote that the rich could be helpful in the community in times of crisis. This idea became a real practice. Rulers demanded forced loans, special taxes, and extraordinary contributions during war or famine. Even if not voluntary, these payments became part of an unspoken deal: the rich kept their privileges, but were expected to step in when needed.

The Industrial Revolution brought new ways to justify inequality. In *The Gospel of Wealth* (1889), Andrew Carnegie argued that the rich had a moral duty to give back for the improvement of mankind. Meanwhile, states introduced progressive taxation. In the United States, during World War II, the top marginal tax rate reached 94%<sup>18</sup>, a level unprecedented in American history, presented as essential for national survival. In the United Kingdom, the rate climbed even higher, peaking at 97.5% in the same period. That model didn’t last. Since the 1980s, financial deregulation and falling top tax rates have slowly weakened the idea of redistribution.

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<sup>16</sup> G Alfani, *As Gods Among Men* (n 1) 143.

<sup>17</sup> *Ibid.*, 139.

<sup>18</sup> In 1944, for example, the United States applied a top marginal income tax rate of 94% on earnings above \$200,000, illustrating the extent to which high earners were expected to contribute to public finances. *Ibid.*, note 33.

### III. Wealth and Politics

One of the most productive interpretive threads in *As Gods Among Men* is Alfani's analysis of the structural relationship between wealth and the exercise of political power. Wealth is not merely an economic resource with incidental effects on public life; as Alfani argues, it operates within an inherently political dimension, one that follows its own logic and can shape institutions, cultures, and modes of governance. Being rich entails possessing a wealth significantly greater than that of other citizens. To be rich has never meant simply having more money than others. It has meant holding a level of resources so far above the norm that it granted influence, the ability, and at times the power, to shape collective decisions, often more effectively than official institutions. One of Alfani's most important contributions is his reconstruction of a long-term typology of how economic elites have exercised political power. He distinguishes three main patterns.

- 1) *Direct access to institutions.* In many periods of history, wealth provided direct access to government, enabling elites to occupy seats within the very structures of power and to secure representation for themselves at the highest level. Nor was this dynamic limited to the landed or mercantile aristocracies of the past. However, it extends into modern settings, where immense private resources continue to facilitate entry into legislative and executive office.
- 2) *Enrichment through politics.* Public office has served both as a space for exercising authority and as a channel for personal accumulation. Contracts, concessions, prebends, colonial ventures, and later privatization processes have turned political engagement into a means of material gain. Far from being a relic of the past, this logic – often intertwined with corruption – remains central to contemporary forms of “political capitalism,” in which proximity to decision-makers generates privileged access and economic advantage.
- 3) *Indirect influence.* Economic elites have frequently shaped political outcomes independently of official titles or formal offices. Over time, the wealthy have bankrolled political factions, shaped opinion through control of the press, and, in today's world, extended that reach by owning the digital platforms where public debate unfolds. This has allowed them to steer decisions while keeping the appearance of staying outside the formal political arena. A real strength of the book is how it shows the ways in which these different forms of influence are not separate but overlap and reinforce each other. They function as overlapping mechanisms that continually reinforce one another, giving rise to hybrid forms of domination. Digital capitalism offers the clearest example; today's prominent tech entrepreneurs operate simultaneously as privileged investors in public infrastructure, as direct political actors, as government advisors, or as owners of global communication systems. To grasp the full implications of this dynamic, Alfani urges readers to look beyond the idea that private wealth merely overlaps with public authority. In some cases, it may function as a substitute for it. This perspective helps us see the “rich-politician” not just as a powerful entrepreneur or aristocrat, but as a kind of Seigneur, someone who builds private networks of protection and authority that rival the functions of the state. From this angle, the legitimacy of wealth is never a matter of scale alone. It rests on its use. Wealth can generate recognition and support when invested in infrastructure, public goods, or philanthropy. However, when it closes in on itself as pure privilege, cut off from any broader social role, it takes on an alien quality, like a foreign body lodged within the civic fabric.

What emerges from Alfani's account is a long-term pattern, in which extreme wealth has always sought some form of political or cultural justification. Without it, its hold on power becomes unstable. Patronage, charitable endowments, religious donations, nineteenth-century philanthropy, and, eventually, the rise of progressive taxation in the twentieth century have functioned, in different ways, as mechanisms for legitimizing the concentration of wealth through selective and partial redistribution. According to Alfani, the breakdown of these mechanisms themselves marks the present as distinct. The gap between elites and lower-income groups, already widened by financial deregulation and the steady rollback of top income tax rates, has deepened further in the wake of the 2008 financial crisis.

The COVID-19 pandemic intensified this rupture. While large segments of the population were exposed to the economic fallout, the ultra-wealthy saw their fortunes increase. For Alfani, this dynamic threatens to undermine the very foundations of democratic citizenship, replacing shared civic horizons with a hardening divide between the "few" and the "many." This diagnosis is echoed in more recent analyses, such as that of Naomi Klein and Astra Taylor on what they call "end times fascism"<sup>19</sup>, which point to the political consequences of extreme inequality in contexts marked by overlapping ecological, economic, and institutional crises. Klein and Taylor argue that contemporary elites no longer merely exploit crises; they sometimes help generate them, using moments of rupture as opportunities for social restructuring. So-called "fortress cities" and projects of space colonization embody a form of power that no longer seeks legitimacy through consent, but through radical separation: the rich no longer act as guarantors of collective stability, but as actors who construct private zones of immunity, insulated from common obligations. The link to Alfani's argument is clear. For centuries, elites sustained their position by balancing privilege with symbolic or material forms of redistribution. Today, that equilibrium seems to unravel as extreme wealth grows ever more detached from any sense that it must be justified. This is the moment in which the metaphor of the "god among men" becomes most apt, not as a figure who legitimizes power through generosity, but as one who lives "outside the world," in separate, inaccessible enclaves.

In this light, *As Gods Among Men* significantly contributes to economic history and the political understanding of inequality, grounding its analysis, as said, on three main dimensions. The first point is the long view, showing that wealth has always tended to pile up at the top in Western societies. Wars, pandemics, and major crises could break that pattern for a time, but once the turmoil passed, concentration quickly returned. The second is methodological integration, as the author combines quantitative reconstruction – drawing on tax, cadastral, and patrimonial sources – with political and cultural analysis, demonstrating that forms of legitimation are central to the historical dynamics of wealth. The third is contemporary relevance, since despite its broad temporal span, the book speaks directly to current debates, offering tools to interpret the transformations of global capitalism, from the rise of digital billionaires to the crisis of progressive taxation.

According to Alfani, the present era is marked by a historically unprecedented erosion of the social legitimacy of extreme wealth. In the past, the wealthy often felt compelled to justify their position through religion, civic responsibility, or taxation. That impulse has largely disappeared. Today's elites set themselves apart and show little concern for grounding their wealth in any broader justification. The idea that wealth carries obligations has, in many respects, receded. What used to be a shared civic framework is becoming harder to sustain. Talk of a democratic contract remains, but it often feels more symbolic than real.

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<sup>19</sup> N Klein and A Taylor, 'End Times Fascism' in *The Guardian*, 12 March 2025, <https://www.theguardian.com/us-news/ng-interactive/2025/apr/13/end-times-fascism-far-right-trump-musk>

## IV. Conclusions

If the concentration of wealth has been such a persistent feature of history, should we expect anything different in the century ahead? Can other outcomes still be imagined?

The history traced by Alfani makes one point inescapable: wealth has always embodied the paradox of immense power resting on fragile ground. The rich, and especially the super-rich, have struggled to find a stable role in society, admired for their resources yet distrusted for their distance from the common good. As the book shows, this tension runs deep in Western history. What history teaches is that the rich are bound to face criticism and that societies have always looked to them for more than private accumulation. In times of crisis, the wealthy were expected to open their reserves and carry part of the collective weight, most often through taxation and visible gestures of redistribution. As that expectation collapsed, anger spread quickly, trust in institutions eroded, and the social fabric strained. In our own age, when wealth is more tightly concentrated than at any moment in living memory and new crises seem to arrive without pause, the retreat of elites from this responsibility is no small matter. The challenge is to curb that power and to anchor it within society's fabric. Wealth drifting free of that anchor leads, as history makes clear, to rupture—conflict—collapse, and the burden never falls on elites alone.