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NEOCONSTITUTIONALISM, RIGHTS AND NATURAL LAW

Juan Cianciardo*

I. Abstract.....	591
II. Introduction	592
III. Rights and Their Acknowledgement	593
IV. The International Scope of the Acknowledgement and Protection of Rights	594
V. Rights and <i>Ius</i> -Fundamental Principles	596
VI. The Justification and the Scope of the Principle of Proportionality	597
VII. The Justification and Content of the Principle of Reasonableness	598
VIII. The Search for a Solution: Rights Taken Seriously	600

I. ABSTRACT

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

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We will specifically examine the connection between the assertion that there exist natural law principles of justice and the following characteristics of our culture of rights: a) the recognition of rights; b) the reference of state or national legal systems to supranational legal systems; c) constitutions as a result of a network of principles and rules; d) the principle of proportionality; and e) the principle of reasonableness. While the first three characteristics constitute the structure of any neo-constitutional practice, the two latter ones are features of the processes of legal reception and legal allocation of rights in such a legal practice. This paper aims to show that, ultimately, identifying, explaining, and understanding each and all of these five characteristics of contemporary legal culture depends upon the existence of a normative resort that goes beyond the legal culture itself.

II. INTRODUCTION

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

In order to highlight this general statement, I will address today the conceptual connection between natural law and the following features of neo-constitutional practices: a) the recognition of rights; b) the relationship between state legal systems and supra-state legal systems; c) constitutions resulting from a framework of principles and rules; d) the principle of proportionality; and e) the principle of reasonableness.

The first three features are dimensions to the overall structure of neo-constitutional states, while the two latter are features of the legal determination and judicial enforcement of human rights. This paper aims to show that identifying, explaining, and understanding each and all of these five characteristics of contemporary legal culture depends upon the existence of a normative instance which is beyond the legal culture itself.

III. RIGHTS AND THEIR ACKNOWLEDGEMENT

In an article written thirty years ago, Javier Hervada made some observations that, with the passage of time, have gained interest.¹ Hervada noted that: a) the whole of the International Conventions, Declarations and Treaties on human rights explicitly stated that they “acknowledged” or “recognized” the rights there enumerated, and b) that this explicit “recognition” posed “problems” for the philosophy of law of his time. Hervada was correct in both cases. First, human rights are *acknowledged*, as is shown in the explicit language used in all legal texts concerning them. This language aims at distinguishing these rights from other kind of rights, whose proximate ground or root is the fact that a competent legal authority has made a decision. Secondly, Hervada maintained that this language of “recognition” posed problems for the philosophy of law, especially for legal positivism which was widely present in Spanish legal philosophy at the moment in which that article was written. If, as positivism asserts, law is fundamentally and exclusively positive law, and if the obligatory nature of positive law is fully based upon its mere existence as a social practice, then there is no room for pre-existing rights. The whole of positive law and therefore of positive rights would be the product of the choice of the person or of the group of persons

1. Javier Hervada, *Problemas que una nota esencial de los derechos humanos plantea a la filosofía del derecho*, 9 PERSONA Y DERECHO 243, 256 (1982).

socially empowered with the authority to do so, with no further limit than their imagination.

Therefore, if the positivist approach to the study of law was the only one possible, we would be forced to choose between two alternatives: a) either the assimilation of human rights to positive rights, which is a conceptual contradiction; b) or the assertion that rights are pure fiction and cannot be rationally based. Both ways pose multiple difficulties which cannot be discussed here.² Yet, it is worth noticing the existence of an alternative solution, consisting in connecting the concept of human rights with basic human good,³ and simultaneously preserving the determinative or positive dimension of human rights law (both in the area of legislation as well as in the adjudication process).

IV. THE INTERNATIONAL SCOPE OF THE ACKNOWLEDGEMENT AND PROTECTION OF RIGHTS

In the last thirty years, we have witnessed a process of recognition, promotion, and protection of human rights, both within the boundaries of national states and in the international field. Although these national and international processes are generally converging movements, they sometimes conflict between each other. What should be done when these conflicts emerge? Which of the two should take preeminence? Three answers have been set forth in the history of public international law: for national monism, priority is given to state law; for international monism, on the other hand, priority is given to international law; whereas, with dualism, each system has its own independent criteria for validity or recognition.

2. PEDRO SERNA BERMÚDEZ, POSITIVISMO CONCEPTUAL Y FUNDAMENTACIÓN DE LOS DERECHOS HUMANOS (EUNSA 1990); Pedro Serna Bermúdez, *El derecho a la vida en el horizonte cultural europeo de fin de siglo* in EL DERECHO A LA VIDA 79 (Carlos I. Massini Correas & Pedro Serna eds., EUNSA 1998).

3. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 59 (2d ed., Oxford Univ. Press 2011).

In the case of Argentina, those who support state monism usually cite two texts from the Constitution itself to support their stance: article 27, which establishes that international agreements should conform to constitutional public law principles, and article 31, which refers to the “Supreme Law of the Nation,” and states its content in the following order: “this Constitution, the laws of the Nation that in its consequence are dictated by Congress, and the treaties with foreign powers.”⁴

Those advocating for the other two perspectives, international monism or dualism, argue on the basis of international law texts. For example, they look at the Vienna Convention on the Law of Treaties, which establishes in article 27 that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁵ As Carlos Nino accurately noticed, “the interesting thing about this controversy is that both positions are completely circular, since those who defend the priority of the constitution support their arguments by the constitution itself, and those who defend the precedence of international conventions support their arguments by international conventions.”⁶ This shows, the author continues, “that the validity of a specific legal system cannot be founded on rules coming from that same legal system, but should instead be derived from principles which are external to the system. Judges or legislators debating these monist or dualist positions, therefore, cannot flee from extra-legal principles of a moral nature in the wider sense in order to support their positions.”⁷ While monism will accentuate sovereignty, dualism in its two variations would prefer to emphasize the

4. Art. 27 and art. 31, Const. Arg. (author’s translation), available at: <http://www1.hcdn.gov.ar/dependencias/dip/congreso/Constitucion%20sola.pdf>.

5. Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969); available at: http://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01p.pdf.

6. CARLOS SANTIAGO NINO, DERECHO, MORAL Y POLÍTICA. UNA REVISIÓN DE LA TEORÍA GENERAL DEL DERECHO 62 (Ariel 1994).

7. *Id.* at 62.

universality of rights. This allows for concluding that neo-constitutional legal systems do not provide for a “closed system of justifiable solutions.”⁸

V. RIGHTS AND *IUS*-FUNDAMENTAL PRINCIPLES

The constitutionalist and philosopher of law Ronald Dworkin, towards the end of the 1960s, brought to everyone’s attention the fact that the United States’ legal system enclosed two categories of norms: principles and rules.⁹ According to Dworkin, the positivist approach to the study of law had concentrated its analysis on the rules, without taking into sufficient account the existence of principles, nor the role they played within constitutional legal practices. This deficient attention to principles strongly conditioned, in his opinion, the plausibility of the description of law proposed by the work of Herbert Hart and his followers.¹⁰

The main argument posed by Dworkin against Hart was that the rule of recognition, proposed by Hart as criteria for identifying valid positive law and distinguishing it from other normative systems, was incapable of detecting principles, whose existence in a legal system like the North American one is unquestionable. This is because the existence of principles within legal systems is not primarily grounded on the fact of their having been positively or explicitly acknowledged by legal institutions but, instead, on the fact of having been recognized by these same institutions as “intrinsically reasonable,” using an expression coined by Joseph Esser.¹¹

Avoiding the further and divergent debates raised by this line of reasoning, especially after the publication of Hart’s most famous

8. *Id.*

9. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 46 (1967), reprinted in DWORKIN, *TAKING RIGHTS SERIOUSLY* (Harvard Univ. Press 1977).

10. See H.L.A. HART, *THE CONCEPT OF LAW* (Oxford Univ. Press 1961).

11. JOSEF ESSER, *PRINCIPIO Y NORMA EN LA ELABORACIÓN JURISPRUDENCIAL DEL DERECHO PRIVADO* 87 (Eduardo Valentí Fiol trans., Bosch 1961).

work, *Postscriptum*,¹² the truth is that the acceptance of “intrinsically reasonable” principles only makes sense if these refer to (that is to say, have as reference) goods whose character, as such, does not depend upon the legislator or judge who applies the principles.¹³ In other words, the presence of principles with these characteristics can only be explained through references to realities that exist beyond the scope of the positive law which acknowledges them and the constant effort of interpreting them according to the specific case at hand.

VI. THE JUSTIFICATION AND THE SCOPE OF THE PRINCIPLE OF PROPORTIONALITY

The recognition of human rights in constitutions (as fundamental rights or constitutional rights) has gone hand in hand with the spread of the practice known as “judicial review.” The latter is a creation of the United States Supreme Court, which allocates to judges the power to invalidate laws which they deem contrary to constitutional rights. While not denying the existence of important differences with that which different constitutional systems have previously incorporated, it cannot be questioned that judicial review is present in every constitutional practice.¹⁴

Now then, how is this judicial review put into practice? In other words: how do judges determine that the statutory regulation of a fundamental or constitutional right violates what has been established as lawful in the constitution? Constitutional Law practice has responded to these questions with the principle of

12. Published posthumously in the second edition of Hart’s *THE CONCEPT OF LAW*; see Scott J. Shapiro, *The “Hart-Dworkin” Debate: A Short Guide for the Perplexed*, Univ. of Michigan, Public Law and Legal Theory Working Paper Series, No. 77 (2007), available at SSRN: <http://ssrn.com/abstract=968657> and <http://dx.doi.org/10.2139/ssrn.968657>.

13. See Carlos I. Massini Correas, *Razón práctica y objetividad del Derecho. El debate contemporáneo acerca de los principios jurídicos*, 64 *SAPIENTIA* 224-41 (2004).

14. Juan Cianciardo, *The Principle of Proportionality: The Challenges of Human Rights*, 3 *J. CIV. L. STUD.* 177-86 (2010).

proportionality.¹⁵ According to this principle, a statutory norm is considered constitutional if it suits three sub-principles: a) it should be adequate and therefore capable of producing its own point or end (sub-principle of adaptation); b) it should be necessary and, therefore, the least restrictive of the equally efficient ones (sub-principle of necessity); c) lastly, it should be proportional *stricto sensu*, that is to say, it should express a proportionate deliberation concerning the benefits and prejudices which might result from the enforcement of the norm.

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

VII. THE JUSTIFICATION AND CONTENT OF THE PRINCIPLE OF REASONABLENESS

A second feature of the dynamics of the “culture of rights” in which we are immersed is the principle of reasonableness. In the 19th century, the dominant trend concerning the description of legal interpretation was “legal formalism.” This, in a very short

15. ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 69, 414 (Julian Rivers trans., Oxford Univ. Press 2002); *see also* CARLOS BERNAL PULIDO, EL PRINCIPIO DE PROPORCIONALIDAD Y LOS DERECHOS FUNDAMENTALES (Centro de Estudios Políticos y Constitucionales 2003).

synthesis, could be described as a theory which attempts to reduce the adjudication of law to deductive logic. In the 20th century, however, it was soon perceived that in order to establish the facts in each of the cases a judge must resolve and determine the applicable norms, requiring a decision to be made between various alternatives that are, *prima facie*, formally correct.¹⁶

In effect, legal operators are compelled, on the one hand, to reconstruct the facts in a case, and this implies choosing: a) the legally relevant facts within a framework of facts, b) the legal means of evidence, and c) the most convincing evidence. On the other hand, judges and lawyers are faced with the need to: a) choose the applicable norms, b) choose the method or methods of interpretation with which they will apply the norms, and c) choose the results towards which these methods of interpretation lead.¹⁷

These factual and normative choices raise the obvious question about the right criteria according to which they should be decided. While legal theories in the past century oscillated between, on the one hand, the practical conflation between discretion and unreasonableness,¹⁸ and, on the other hand, the practical negation of discretion or reasonableness,¹⁹ comparative constitutional analysis has come gradually to answer this question with the principle of reasonableness, as a counterpart to arbitrariness, expressly proscribed by some constitutions, as is the case, for example, of article 9.3 of the Spanish Constitution.²⁰

16. See ALEKSANDER PECZENIK, *ON LAW AND REASON* (2d ed., Springer 2009).

17. In effect, "the notion of 'reasonable' is also used . . . at every stage of judicial reasoning: the determination of the facts, the qualification and interpretation of the applicable laws, the use of various rhetorical and logical formulas." Oliver Corten, *The Notion of "Reasonable" in International Law: Legal Discourse, Reason and Contradictions*, 48 INT'L & COMP. L. Q. 613 (1999).

18. HANS KELSEN, *TEORÍA PURA DEL DERECHO* 353 (2d ed., Porrúa 1993).

19. Dworkin, *supra* note 9.

20. Article 9.3 of the Spanish Constitution states:

The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal statutes, the non-retroactivity of punitive provisions that are not favorable to or restrictive of individual

In accordance with this principle, each and all of the decisions taken by a legal operator must demonstrably surpass the test of “reasonableness.” This means that a legal operator is obliged to give reasons and, particularly, to justify the reason for choosing a certain path from all the alternatives he is faced with. A decision without motivation is considered unreasonable, arbitrary, and thus a violation of the due process of law, or in the terms used in European Constitutional Law, a violation of effective judicial tutelage.²¹

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

VIII. THE SEARCH FOR A SOLUTION: RIGHTS TAKEN SERIOUSLY

A few years ago, Robert Alexy explained that a normative system is not a legal system unless it formulates a “claim of correctness.”²² This occurs when governmental authorities act with

rights, the certainty that the rule of law shall prevail, the accountability of public authorities, and the prohibition of arbitrary action of public authorities. (Author’s translation)

21. This allows the importance of the study of reasonability to be seen from the very beginning of a lawyer’s training. See Suzanne R. Painter, *Improving the Teaching of School Law: A Call for Dialogue*, 2001 BYU EDUC. & L. J. 213 (2001).

22. See ROBERT ALEXY, BEGRIFF UND GELTUNG DES RECHTS (The Concept and Validity of the Law) (Karl Alber 2005); and Robert Alexy, *On the Concept*

the assumption that what they are doing is correct, regardless of whether it is actually entirely so. According to Alexy, when this assumption is not formulated, and when those who govern only take a personal or a class advantage with their power, practice of the law does not amount to a legal system.

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

What does this mean? When does a State recognize, identify, protect, and promote rights? When does it put forth its "politics of rights" as imposed by its constitution?²³ Or, in other words, how can human rights be consistently conceptualized, indexed, justified, and interpreted? In the preceding account, each of the problems being dealt with has directly involved these questions. The answer to such questions necessarily requires appealing to instances beyond the legal texts where rights are recognized, as I have attempted to demonstrate here in general terms.

It could be thought, together with Norberto Bobbio, that the suggested element is a consensus,²⁴ in which the basis of human rights could be found and the place where semantic indecisiveness could be resolved when interpreting them. Yet there is an argument

and the Nature of Law, 21:3 *RATIO JURIS* 281,299 (2008). See also Eugenio Bulygin, *Alexy's Thesis of the Necessary Connection between Law and Morality*, 13:2 *RATIO JURIS* 133, 137 (2000); and Robert Alexy, *On the Thesis of a Necessary Connection between Law and Morality: Bulygin's Critique*, 13:2 *RATIO JURIS* 138,147 (2000).

23. ANTONIO-LUIS MARTÍNEZ PUJALTE, *LA GARANTÍA DEL CONTENIDO ESENCIAL DE LOS DERECHOS FUNDAMENTALES* (Centro de Estudios Constitucionales 1997).

24. Norberto Bobbio, *El fundamento de los derechos humanos* in *DICCIONARIO CRÍTICO DE LOS DERECHOS HUMANOS* (Ramón Soriano Díaz, Carlos Alarcón Cabrera & Juan Mora Molina dirs. and coords., Universidad Internacional de Andalucía 2000).

which destroys all the appeal of this alternative: human rights discourse has been presented historically as the limit to what is “able to be settled by agreement,” or to paraphrase the German Constitutional Court, the “limit of limits” that consensus (including democratic consensus) can legitimately impose upon the freedom of human actions.²⁵ In other words, if the meaning of rights depends on consensus, these rights are devoid of meaning. The solution, thus, must be found elsewhere.

The question, however, is *where*? What has been presented here so far supports the proposal of a possible answer that lies in the following: all current legal systems formulate not one but two assumptions. On the one hand, the claim to correctness as postulated by Alexy, and on the other hand, a claim to moral objectivity, found implicitly in the defense of principles.²⁶ Without one or the other, the discourse of rights turns into self-reference and, for this reason, becomes groundless and unintelligible.²⁷

25. See BVerfGE 19, 342, 348.

26. PILAR ZAMBRANO, LA INEVITABLE CREATIVIDAD EN LA INTERPRETACIÓN JURÍDICA. UNA APROXIMACIÓN IUSFILOSÓFICA A LA TESIS DE LA DISCRECIONALIDAD (UNAM 2009; published as no. 142 in the ESTUDIOS JURIDICOS series).

27. As pointed out recently, it is noteworthy that the acceptance of the presence of moral elements in legal reasoning by neo-constitutionalists and inclusive positivists has not brought about further and more profound reflection on moral objectivity. Above all, a negative response to this last question would imply the negation of legal objectivity. See JUAN B. ETCHEVERRY, EL DEBATE SOBRE EL POSITIVISMO JURÍDICO INCLUYENTE. UN ESTADO DE LA CUESTIÓN (UNAM 2006), and ETCHEVERRY, OBJETIVIDAD Y DETERMINACIÓN DEL DERECHO. UN DIÁLOGO CON LOS HEREDEROS DE HART (Comares 2008; published as vol. 20 FILOSOFÍA, DERECHO & SOCIEDAD).