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From Combat to Contract: 'What Does the Constitution Constitute?'

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A. Introduction

It would be perhaps advisable, at this turning point of history, to refresh our essential understanding of some of the basic tenets of Western legal culture. Much of the ugly reality, intended to be offset historically by the state as an institution, may have been forgotten. Such is the normal eclipse of the familiar *Zeitgeist*, the usual short sleeves/long sleeves generational exchange, and it is far too dramatic (and somewhat pretentious) to call this 'deconstruction' and 'reconstruction'.[1] It does not seem, for example, Hegel ever believed intellectuals *would* make revolutions and the dismal failure of the Communist experiment probably shows that they *should not*. The relationship between the state and the society may evolve to a higher level of liberty if, and only if, crudely and basically, anarchy is prevented.[2] How much

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1 Every culture seems to go, in this respect, through two typical stages. In the first it (re)establishes its cognitive and moral foundations and in the second it is mostly preoccupied with the applications. Every such 'shallow' stage requires in its sequence the 'deep' stage, once the former framework becomes too tight. Karl Deutsch, academic lectures, Kennedy School of Government, 1973–74. There are cybernetic explanations for this. *See* his famous *The Nerves of Government* (Free Press, New York, 1966, 2nd ed.). It might be noted at the outset that North America as a culture is 'shallow' in its colonial origin and that many of the current problems of the Western civilization derive from its 'pragmatism', i.e., its inability to resonate with 'deeper' cultural concerns. As to how this affects law, *see* Gordley, 'Mere Brilliance: The Recruitment of Law Professors in the United States' in (1993) 41 *Am. J. Comp. Law* and Weber, *Law in Economy and Society* (Rheinstein (ed.)).

2 This is perhaps one point of cross-cultural agreement in the science of state law (*Staatsrecht*). The traditional Chinese fear of *luan* (anarchy, war of everybody against everybody, disorder, disorganization) clearly exists in an entirely different jurisprudential context due to the reversed relationship between law (*fa*) and morality (*li*). The Weberian rationality of law was maintained on the feeling level (*li*) first and only if that did not work the resort was made to the thinking level of logical justice (*fa*). (The latter was considered to be unrefined and inflexible.) *See*, for example, Bond, *Behind the Chinese Face* (Hong Kong, 1997). Yet the basic relationship between the society and the state is seen in similar terms.

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violence is necessary to maintain this basic relationship between the state and the society depends on many things beyond the scope of our inquiry here.[3] But the constituent components of the relationship between the particular society and its state are both prescribed and described in its constitution.

Since the end of the Communist experiment, however, it has again become empirically clear that the simple and rudimentary relationship between the state and society should be understood as Hobbes in his *Leviathan*[4] described it to be. The rest of the civilization's 'superstructure' will collapse incredibly fast unless the 'infrastructural' relationship, based in the last analysis on fear, is forcefully maintained. The moment the state falls apart the society regresses to the anarchical war of everybody against everybody. From the defeat of the Communist ideology we have also learned that the state, which is not democratic and ruled by law, will not be able to engage the creativity of its subjects and, reversely, that the society prevented from engaging and catalyzing the full creativity of all its members will cause, in 50 to 70 years, the downfall of even the most powerful state and ideological structures.[5]

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3 Thus there are only two probable theories. (a) Force always comes first. We need never be at a loss as to the origin of the human state, since it is spontaneously engendered by the inequality of human gifts. In many cases, the state may have been nothing more than its reduction to a system. Or (b) we feel that an extremely violent process, particularly of fusion, must have taken place. A flash of lightning fuses several elements into one new alloy – perhaps two stronger ones with one weaker, or vice versa An echo of the terrible convulsions which accompanied the birth of the state, of what it cost, can be heard in the enormous and absolute primacy it has at all times enjoyed. We see this primacy as an established, indisputable fact, while it is assuredly to some extent veiled history, and the same holds good of many things, for a great mass of tradition is handed on unexpressed, by mere procreation, from generation to generation. We can no longer distinguish such things. Where the convulsion was a conquest, the primordial principle of the state, its outlook, its task and even its emotional significance was the enslavement of the conquered.

(The Scholium of Hybreas, *Oxford Book of Greek Verse in Translation*, at p. 246.) Burckhardt, *Reflections on History, Liberty Classics* (Indianapolis), at pp. 64–65. Since Burckhardt and Nietzsche were contemporaries and friends at the University of Basel it is all the more surprising that they would differ so radically concerning the contractual nature of the constitution.

4 Thomas Hobbes, *Leviathan* (C.B MacPherson (ed.)) (Penguin Books, 1968) originally published in English in 1651 (in Latin) in Amsterdam in 1668 and in 1670.

5 In the most basic sense the law itself is the first great equalizer. This pertains to the essence of law at least in view of the equality in physical powerlessness (prohibition of physical self-help). The law is a service of non-violent conflict resolution. The need for legal process (as a service) arises only after the violent mode conflict resolution (*bellum omnium contra omnes*) is forbidden by the Hobbesian state. In this elementary sense the primordial legal process (as a service) is a secondary response to the abolition of the use of force as a means of conflict resolution. This implies that law is a response to the equality in (physical) powerlessness. The proscription of the (physical) inequality as a factor in conflict resolution – *viz*. the privilege against-self-incrimination, *nemo contra se prodere tenetur* – has systemic implication for the legal process as a whole. Today this is reflected in the ever wider

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We understand now, better than ever before, that the creativity of an individual with his identity niche in the vast and complex global division of labour must be protected and nurtured if the entropy of human civilization is to be offset and the global problems from environmental pollution (created by progressive economic growth, disease, unemployment, *anomie,* etc.) continue to be solved. Only the individual, never the collective, can be creative. The individual's creativity, as has now been empirically shown, is only possible if the social, political and legal conditions for his moral growth (individuation, French: *subjéctivation*) are predictable and stable, if his privacy, i.e. his right to be fully and freely himself, is protected and expanded. For the rest it is clear that the society with the highest correlation between individual ability and creativity on the hand and the power and influence on the other hand, i.e., the society with the highest respect for individual qualities, will be the most prosperous, successful etc.[6]

The influence of the constitutional order and the legal system in maintaining the creative freedom of the individual is limited but crucial. In short, the legal system creates and maintains the basic barrier to violence, brutality, discrimination, insensitivity, stupidity and other ever present regressive tendencies. Constitutional and legal order create and maintain the social reality in which the creative individual can grow and flourish in his genuine identity, and remain true to it. Since there is no inner liberation without the systemic outer liberation, such as the freedom of expression, the guaranteeing rule of law is indeed now, perhaps more than ever before, an exalted postulate.

Here the progress that has been made in Western civilization, or the scientific and technological advances of the last century, would not have been even conceivable. It is proposed, in this article, that this is kept in mind and that in this sense there will be

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contd.
interpretation of the 'equality before the law'. The reasonableness (proportionality) tests applied by the constitutional and supreme courts in fact all widen the concentric circles of what the young Marx (in his Critique of the Gotha Programme) critisized as merely a 'formal equality.' The ideology of communism wanted to go one step further and reform the formal equality (non-discrimination) into the substantive equality: to each according to his needs. Thus little and short-term good was done to the lower classes and a great harm to the more creative members of society. Militant egalitarianism implied in substantive equality effectively made the more creative an energetic members of society withhold their creative contribution to the advancement and thus causing, in the long run, the economic downfall of communism. Since equality is always an inequity to the more powerful, energetic, able, etc., in the particular framework of competition too much equality, as Nietzsche put it somewhere, will stifle the life itself. An entirely different danger now lurks in the post-capitalist downfall of the salaried middle classes; their economic status has been reduced, for the last 50 years, by approximately one per cent every year. For implications *see* Thurow, *The Future of Capitalism* (1995).

6 Thurow's prediction is that the whole Western civilization is sinking into the Dark Ages due to the economic under-appreciation of the contribution of the salaried middle classes, the social carriers of science, scholarship, skills, etc. Thurow, *supra,* at note 5.

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reconsideration of some of the basic premises of legal organization that made all of this possible.

What is a constitution? Is it merely the hierarchically highest legal act, the queen bee of the legal system, as Kelsen had called it? If so, is this hierarchy to be politically justified and functionally defined in terms of the ultimate power of the supreme or constitutional court as the court of last appeal? *Vis-à-vis* the legislative branch of government and *vis-à-vis* the executive branch this would definitely seem to be one of the essential characteristics of the distribution of power in a modern democratic state, determining the limits of power, the checks and the balances between different branches of power. Yet such a *political* restatement of the position of the supreme or constitutional court does not explain – in the broadest, synthetically (not analytical!) legal terms – why would such an additional instance of power be needed in the first place? Merely because the executive branch is inclined to the arbitrary use and to the transgression of the legal limitations of its power? Or perhaps because the legislative branch also tends to conceive of its power in absolute terms, thus exceeding some loosely perceived criterion of 'reasonableness'? Or because the regular courts need an extra instance of appeal, correcting what all of the regular appeals were incapable of correcting?

Such merely 'functional' explanations fail to take into account the logically required deeper premise. This deeper postulate concerns the legal nature of the constitution. Even if the constitution is formalistically seen only as the tip of the pyramid of the *logical* hierarchy of legal acts, which it is, the mere functional requirement that there *is* such a tip does not explain where its primary *constitutive* nature originated. In other words, the fact that something in a system may be logically presupposed does not explain why is it there in the first place or, as Nietzsche put it, the fact that the hand is good at grasping does not mean that this is how it came to develop.

B. What does the Constitution Constitute?

It seems that this is the question to begin with in order to perceive more clearly the legitimate social, political and legal reasons for the jurisdiction of modern constitutional courts?[7] The answer to this question is as simple as its repercussions

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[7] Hereinafter we shall only speak of constitutional courts, i.e. of the jurisdiction of these semi-specialized courts which also function as the courts of last appeal. The unified jurisdiction of, e.g., the United States Supreme Court would, of course, be much more logical, precisely to the extent to which the function of abstract review is difficult to separate from the so-called 'concrete review'. We shall consider it natural for the legal order to decide specific issues in specific controversies and to endow the particular decisions with the precedential effect. But since the precedential effect of the Supreme Court's decisions

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are complex. It is obvious that the purpose of the constitution is 'to constitute', i.e. to found, establish, create and organize the state. It is also obvious that to a superficial observer this would seem to be an *ex post facto* legal fiction: the establishment of the state strikes us as a *fait accompli* of power having more to do with the bayonets (for the establishment of the state) and, as Rudyard Kipling put it, with the police clubs (for the maintenance of the state), than with the apparently secondary projection of the abstract and indefinite legal concepts contained in the various constitutions.[8]

It is, in other words, quite clear that the modern boiler-plate constitutions do not, in any original and elementary sense of the word, 'constitute' the particular new states. Many of the recent East European states, for example, have come into existence haphazardly through the contingencies of the disintegration of larger

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requires the switch from deductive formal logical legal reasoning to one based on analogy (analogical legal reasoning) and since this requires the kind of cognitive *metanoia* (change of attitude) the continental lawyers find it difficult even to entertain, this must be compensated for by the institutional set up of (constitutional) courts specialized in this kind of broader, more autonomous, politically more self-confident etc., constitutional courts. The result of the specific formal logical elaboration of the legal effects the decisions of the constitutional courts in Europe proves the centrality of the above-mentioned distinction between the deductive and the analogical legal reasoning. *See* Steinberger, Decisions of the Constitutional Court and their Effects, Collection – Science and Technique of Democracy, No. 10, The Role of the Constitutional Court in the Consolidation of the Rule of Law, Proceedings of the UniDem Seminar organized in Bucharest, 8–10 June 1994, Council of Europe Press, 1994. (Professor Steinberger was formerly a judge of the German Constitutional Court.)

[8] The hypothesis of the state founded upon an antecedent contract is absurd. Rousseau makes use of it merely as an ideal, an expedient. His purpose is not to show what happened, but what, according to him, should happen. No state has ever been created by genuine contract, that is, a contract freely entered into by all parties (*inter volentes*); for cessions and settlements like those between the trembling Romans and triumphant Teutons are no genuine contracts. Hence, no state will come into being in that way in the future. And if ever one did, it would be a feeble thing, since men could quibble for ever over its principles.

Jacob Burckardt, *Reflections on History* (Weltgeschichtliche Betrachtungen) (Hottinger, translation, Liberty Fund, Indianapolis, 1979), first published in Stuttgart in 1905, first English edition in 1943. Nietzsche's contrary views of the matter, expressed in his *Seventy-Five Aphorisms*, are probably no accident since he came to Basel as a professor of classics at the age of 24, attended Burckardt's lectures in 1870 and even developed a friendship with him. *See* Nietzsche's letter to Carl von Gersdorff of 7 November 1870 in Giorgio Coli and Mazzino Montinari, *Nietzsche Briefwechsel* (Berlin, 1977), Abt. 2, I, 155 as cited in the Introduction to Burckhardt's book by Gottfried Dietze, ibid., pp. 13 and 14. Burckhardt apparently never thought of the contract as an alternative, not to outer but to inner (civil) war and, of course, the fora for 'quibbling over the principles' of the contract are the constitutional courts of today. That such a democratic principle could possibly strengthen the (democratic) state, rather than weaken it, was apparently foreign to Burckhardt's authoritarian views.

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integrations. It was the nationalistic particularization, the 'pandemonium' as Moynihan has called it, which resulted in the proliferation of make-believe sovereignty and many copycat constitutions, and not vice versa.[9]

In order to get behind this common sense objection we must further retract to Nietzsche's famous explanation of the origins of law.

> Origin of Justice. Justice (fairness) originates among those who are approximately equally powerful: where there is no clearly recognizable predominance and a fight would mean inconclusive mutual damage, there the idea originates that one might come to an understanding and negotiate one's claims: the initial character of justice is the character of trade. Each satisfies the other inasmuch as each receives what he esteems more than the other does. One gives another what he wants, so that it becomes his, and in return one receives what one wants. Thus justice is repayment and exchange on the assumption of an approximately equal power position; revenge originally belongs in the domain of justice, being an exchange. Gratitude, too. Justice naturally derives from prudent concern with self-preservation; that means, from the egoism of the consideration: Why should I harm myself uselessly and perhaps not attain my goal anyway?[10]

Notions such as 'trade', 'repayment' and 'exchange' imply a contractual relationship, i.e. a relationship in which a promise is kept. The keeping of the promise, however, is secondary to the primary contractual logic: that it pays better to co-operate peacefully than not to co-operate and, in matters of constitutional dimensions, perhaps to regress to a destructive civil war. Thus, the rules of the political game are agreed upon in order to accommodate the different (structured) interests and these rules must be adhered to. Since the difference between civil war on the one hand and the rule of law on the other hand is the difference between anarchy and civilization, the modern constitutions also represent the concise restatement of the cultural attainments of the Judeo-Christian civilization: their substantive due process, their bills of rights, their provisions

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9 *See* Moynihan, *Pandemonium* (Oxford University Lectures, 1992). Moynihan maintains Woodrow Wilson had been forewarned not to endow the then current catch-phrase 'the self-determination of peoples' with an ideological aura. *But see* Masaryk, *The World Revolution* (Slovene edn, 1936). (The two professors, of law and of practical philosophy, had been friends.) Apparently, what has happened in Central and Eastern Europe is indeed a particularization as a consequence of re-emergent nationalism; it is expected that this will be followed by an universalization, i.e. by re-integration of these new states into larger economic and political associations such as European Union, NATO, etc.

10 Nietzsche, *Seventy-Five Aphorisms*, para. 92 and Nietzsche, *On the Genealogy of Morals*, Second Essay (Kaufmann, translation, Vintage Books, New York, 1967), at p. 169, section 92. Pashukanis, *Law and Marxism* (Barbara Einhorn, translation, Ink Links, London, 1978), at pp. 167 to 188, and especially at p. 170. Pashukanis, ibid. at p. 168, copied the passage from Nietzsche's 'The Wanderer and his Shadow', *supra,* Appendix, *Seventy-Five Aphorisms* from Five Volumes, pp. 179–182. (So much for the originality of the Communist theory of law!).

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concerning the separation of church and state etc. The state declares itself as civilized and it articulates the constitutional principles in a written form.

In other words, as with every other contract (in order to further the keeping of the promise) a written (or otherwise recorded) semantic fixation is made thereof. As with every other contract, the essential mental operation required to interpret it is the *ex post* reference to a semantically fixed promise, i.e. the re-interpretation[11] of the past agreement to resolve present disagreement: the past *form* was intended to govern the future *substance*.[12] Thus the semantically fixed *form* and its *antecedence* (anteriority, precendence) are two essential elements of everything legal, be it an *inter partes* contract or an *erga omnes* effective law. In this sense the contract is considered the paradigm of everything legal. The contract is a semantic fixation (the form) of the mutual agreement (the antecedent substance of the relationship) intended to govern[13], in view of the distrust between two parties, a potential future disagreement (the posterior substance of the relationship).

The parties, simply speaking, enter the negotiation of an agreement because it pays better to co-operate than not to co-operate. The total web of the division of

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[11] The German term *Konkretisierung* is perhaps better since it connotes 'making concrete' what was previously only abstractly (in principle) agreed upon.

[12] Distrust, therefore, and the anticipation of conflict lie at the base of everything legal. In contract law, typically, distrust is specified and made concrete in the clauses of present trust between the parties, but their very articulation is a testimony to the basic distrust: hence, the repugnance of the prenuptial agreements. But there is nothing distasteful in the distrust between the individual and the state (e.g. the principle *nullum crimen sine lege praevia* in criminal law and the privilege against self-incrimination). The constitutional separation of powers, more significantly, may be seen as the reversal of the Roman '*Divide et impera!*', i.e. 'Let the powers be divided so that they will not rule!'.

[13] In its essence this governance is a logical compulsion wherein the clause of the past agreement is taken as a semantic major premise representing the past (now fictitious) agreement. The proofs in science are similarly accomplished in seeking the next lower level of agreement and ultimately agreement upon axiomatic principles, i.e. in seeking the premises upon which both parties may agree. Logical compulsion is then only a watertight deductive or inductive logical operation. For more details on this, *see* Barry Stroud, 'Logical Compulsion', *Wittgenstein's Philosophical Investigations* (1977). Of course, this opens up numerous complexities ranging from the undetermined nature of the semantically fixed premises to the question of the extent that these premises are determined by shared values. Law is a cultural phenomenon and too large a cultural disparity, for example, may preclude the emergence of the logically required lower level of agreement. (The famous Australian case of *Regina v. Muddarubba,* illustrates this point.) Consequently, the constitutional safety of the subject *vis-à-vis* the state and other aspects of constitutional law are likewise a cultural phenomenon in the sense that there must exist, if the language game called 'constitutional adjudication' is to function, certain shared (democratic) values as firmly established major premises not to be questioned by anyone. This further indicates how difficult the role of the constitutional courts is in the cultural environments in which these values are not being shared, when the very existence of the constitutional court presupposes them.

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labour in society is made of essentially contractual relationships, from employment to marriage, from the laws concerning criminal culpability on the national level to conventions binding on sovereign states on the international level. The closest to the origin of the constitutional contract are the negotiations between the sovereign states if and once they realize that it pays better to *negotiate* than to do battle. In that sense, as we shall see, the constitution as a contract is an alternative to civil war.

Nietzsche maintained that the origin of law must be traced back to the situation in which two warring factions get themselves into a no-win situation. In this situation they are forced to negotiate and to compromise, i.e. to create a legal *modus vivendi* between themselves. It is not clear whether Nietzsche had the Magna Carta (1215) in mind when he wrote that, but it is historically clear that the mother of all constitutions is precisely the compromise (a contract!) stipulated between the two tired parties, King John and the Barons, in a no-win situation.

The compromise, i.e., the principles of the contract so stricken did, in fact, constitute, for the first time in history, the state based on the rule of law. For the first time in history the power had to be exercised *in reference to a legal document* governing its sharing. The future sharing of power seems to be at the core of this paradigmatic situation, the constitution being nothing else but a contract (a *compromissum*) projected into the general rules of the political, legal and power games played between the parties. In Wittgensteinian terms we could say that this is how, for the first time on the highest and most primordial level, the brutal power game becomes a legal language game. The checks and the balances of power which we understand today in terms of constitutional law were, at that time, a factual alternative to civil war and as such a prerequisite for the establishment of the state, constituted as a contract between the protagonists of power in the society. The legal logic of this situation is clearly based on an analogy with private contract in which the elements (the contractual criteria) of a present agreement are semantically fixed in order to prevent and to resolve future disagreements.

This is important to understand. For the constitution *is* essentially a contract, although the parties today are most often not as obvious as they were in 1215. But the alternative is also obvious and it is the alternative which proves the above logic. The alternative to a negotiated situation is civil war. This does not apply only to extreme situations on the brink of the dissolution of the state, although there it is clearly perceivable how quickly the language game of negotiation can regress into an experiment in which the brutal power of the two protagonists may be empirically tested. Today, more than ever before, the term 'society' connotes the co-existence of groups with mutually exclusive interests, i.e. the latent antagonistic substance of the potential outbreak of an open conflict is always there. Formal democracy with all its political parties representing the conflicting interests as well as all the checks and balances etc. is there to provide the needed institutional structure for the negotiated compromises intended to prevent the political breakdown. Once these structures give way, Klausewitz's formula concerning war being the logical extension of politics very quickly materializes and must then be reversed. So much at least we have painfully learned in South-Eastern Europe in the last few years.

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Thus it is not merely a metaphor to say that the basic societal arrangement contracted in the country's constitution is indeed an alternative to (civil) war. Moreover, in the long run if the contractual agreement breaks down, i.e. if the game is no longer played by the agreed-upon rules, the danger arises that the unilateral monopoly of power held by one political faction (the dictatorship), as was recently made obvious by what had happened in Albania, will itself disintegrate into a war of everybody against everybody.

Burckhardt's skepticism, for example, deriving from his persuasion that the brutal unilateral force is the cohesive mortar of state and consequently of society simply does not hold true any more, if indeed it ever did. Durkheim called it 'mechanical' as opposed to 'organic solidarity', the latter being an interdependence based on differentiated division of labour.[14] The substantive constitution as a contract and the continuous process of its (re)interpretation are part of that organic solidarity required by the progressively increasing differentiation of the division of labour in modern societies.

As opposed to sociological and political considerations, however, the elemental *legal* logic of contract does require the formalistic-positivistic reliance[15] of both parties upon the semantically fastened mutual promises (*compromissum*) to (a) govern their future mutual conduct and (b) to provide the criteria for the resolution of potential future disagreements in the contract delineated area of action. It is debatable whether there may be a better way to resolve social controversies (of constitutional dimensions) than the current resort to legal formalism. This has much to do with the general cultural level of a particular society on the one hand and with

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[14] *See* Durkheim, *Rules of Sociological Method* (Catlin (ed.)) (Solovoy and Mueller, translation, 1958). The term now in vogue is 'globalization', inasmuch as this implies the prevalence of interdependence over incompatibility of interests. But within the state itself the progressive rise of the division of labour too has created an economic and societal system of intense mutual dependence whose collapse would prove calamitous. In this sense anarchy is simply the instantaneous deterioration of the division of labour. Consequently, the role of the state and its government has changed from a self-serving pose of 'sovereignty' to the responsibility for the pragmatic economic and social management. Needless to say, the function of Weberian bureaucracy has also become central, to the extent that some are seriously questioning the rationality of the democratic process' 'popularity contest' as the mode of political election to power.

[15] This again is true substantively as well as procedurally:

> If we can expect legally and constitutionally trained lower court judges to subjugate their best professional judgment about constitutional interpretation to the judgments of those who happen to sit above them, then expecting the same of nonjudicial officials is an affront neither to morality nor to constitutionalism. It is but the recognition that at times good institutional design requires norms that compel decision-makers to defer to the judgments of others with which they disagree. Some call this positivism. Others call it formalism. We call it law.

Alexander and Schauer, 'On Extra-judicial Constitutional Interpretation' in (1997) 110 *Harv. LR* 1387.

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the intensity with which values are being shared on the other hand. The traditional Chinese juxtaposition of *li* (implying the friendly co-operation and settlement of disputes) and *fa* (the resort to legal formalism as the *ultimum remedium*) has perhaps much to teach us in this respect.[16]

But at the basis of the primordial Hobbesian logic there is an even deeper assumption to be understood. The primitive but natural way to resolve conflicts is indeed by aggression and combat.[17] Even today the instant regression to this *natural* way, *i.e.* the war, will occur between individuals or the states only if there is no greater threat coming to them from the sovereign state (to the individual) or from the stronger state (to the less powerful one). Hobbes' *bellum omnium contra omnes*, brutal and barbaric as this assumption may seem to be, is the ultimate way of resolving the differences between human beings. This, too, has recently been made obvious by the events in the territory of former Yugoslavia, by the anarchy in Albania, by the ethic cleansing in Rwanda etc. As Michel Foucalt would say, the moment the Leviathan of the state is toppled and there no longer hangs over the populus the permanent declaration of war by the state, the situation regresses to the war of all against all. There is no human society whose civilized immune system would make it impervious to this regression. Even the ordinary police strike may have similar effects in some well ordered Western states. Leaving aside the more sophisticated sociological considerations of *anomie*, disorganization, the legitimacy of the actual exercise of the state power, the impact of the rule of law on so-called normative integration etc. the simple and basic Hobbesian finding that it is the constant threat of greater harm which makes people, individuals and groups, refrain from resorting to the use of force as a means of resolving their conflicts shall be adhered to.

This, however, would imply that every state comes into being with the unilateral *coup d'état* to be challenged only by another *coup d'état*. And while it is clear that one can have such a series of dictatorships, this is not what is interesting here, because these are not what lawyers understand under concepts such as 'constitutional monarchy', 'the state ruled by law' etc.[18]

The cultural ascent from combat to contract is also a question of understanding for the parties involved. In other words, there must exist a situation in which the founding of the state, its stability and its continuity does not happen (and is not further guaranteed) by mere and simple unilateral seizure of power. The Magna Carta as a paradigmatic constitution had not been unilaterally imposed by King

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[16] *See infra* note 31.

[17] *See* Konrad Lorenz, *On Aggression* (1972). There are two elements built into this. First, the regression to aggression is perhaps biologically natural; but, secondly, mutual aggression is then a natural experiment for the testing of two mutually exclusive hypotheses concerning the respective powers of the two protagonists.

[18] The German term *Rechtsstaat* was introduced only in 1829 by R. von Mohl in his *Das Staatsrecht des Koenigsreich Wuertemberg* (The State Law of the Kingdom of Wuertemberg) 1829 and 1831. Some trace of *droit government* is to be found in Bodin's *Les six livres de la république*, published in Lyon in 1588 (Book I, chapter I).

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John. It was, as we have said, a product of negotiation. The Magna Carta as a negotiated political settlement, too, was a consequence of a *force majeure*. The parties, in other words, were not willing to perform the experiment of the civil war. They perhaps realized that this would not, in the longer run, guarantee the stability of the political situation. The blood would have been shed to no purpose and they had understood that *rebus sic stantibus* they must or as would be said today, 'cohabitate'. This may have been a historical accident, a mere contingency or a manifestation of their political savvy and intelligence. In any event, they understood that they may negotiate a contract to govern the future conduct of the 'executive branch', a prenuptial agreement of a kind, foreseeing the eventualities of the long-term cohabitation.[19]

The cognitive aspect of the situation is essential. If the parties are not sufficiently rational to see what is in their own best interest, say in the typical circumstances of the activation of the collective unconscious, there will be no rational negotiation and no contract and in the end no rule of law.[20] The ascent to the more civilized prevention and resolution of conflicts (by criteria previously contracted between the same parties) will only happen if the mutual collaboration of parties is *understood* to be preferable to mutual destruction. This situation, however, arises only if both parties *understand* that the very costly experiment of combat would not even yield a clear result. This, of course, is to say that the sustained division of labour in society is to be preferred to an anarchy and war. In the end this is the intent of the Hobbesian state.

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[19] We must keep in mind, however, that this had happened in 1215 and that it established the basic politico-legal difference between the Island and the Continent. Certain 'human rights' already came into existence through the 'bilateral' constitution of the Magna Carta, e.g. the principle of legality etc., which took another 500 years to emerge in 'unilateral' states such as France, Germany, Italy etc. The above principle, for example, was established there only through Enlightenment writers, more specifically through Beccaria's small book *On Crimes and Punishments* (Dei delitti e delle pene) in 1764!

[20] In 1925 the concept of the activation of the collective unconscious was introduced, perhaps in (an unstated) juxtaposition to Durkheim's conscience collective, by Karl Jung in his famous Tavistock Lectures (published in 1926 as *Analytical Psychology*. Notes on the seminar given in 1925 (McGuire (ed.)) (Bolingen Series XCIX, Princeton University Press, 1989)), pp. 24, 38, 50, 52, 65–66, 112, 115, 122, 129–132, 139, 142. At that time Jung correctly predicted what would happen in Germany under Hitler's mad influence, i.e. the activation of the primitive archetypes. Goldhagen, *Hitler's Willing Executioners, Ordinary Germans and the Holocaust* (Abacus, London, 1996), surprisingly enough, does not draw on this theory of great explanatory power. The same activation of collective subconscious happened in Yugoslavia under Miloeviæ schizophrenic influence. I have myself, drawing on Jung's teaching, been able to predict this as early as in 1988, except that no one was either willing to listen or would have been able to do anything about it. It was too late. The ravine of the mass psychosis triggered by Miloeviæ has already been moving. Later, in 1990, when I confronted the French ambassador to Yugoslavia with this, he only said: '*On le sais qui est méchant ici...*'. The American establishment, perhaps due to the then Secretary of State Eagleburger's influence, continued to believe Miloeviæ was 'a reasonable person, keeping his word,' etc.

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The state maintains order by imposing the general threat under which the war of everybody against everybody is stopped. If the division of labour in society is thus developed and if generational collaboration (civilization) is preferred to what the Chinese call *luan* and what we call anarchy, *bellum omnium contra omnes*, civil war etc., then this rational and productive state of affairs must continue under some conceptual, albeit artificial order. The constitution may not always *de facto* establish, constitute, the state – *ex factis ius oritur* – but it definitely does constitute the basic principles of this order. In this context, of course, the concept of 'order' applies to all sorts of things; but in essence it is such maintenance of predictability in human relationships that will prevent the conflicts and resolve them logically if they arise. Since material goods are by definition scarce, conflicts are bound to arise as to their distribution. If the legal order maintains at least a modicum of correlation between what the sociologists call contribution and retribution, for example, then this has economic repercussions on the well-being of the society as a whole. But we must keep in mind that this is in the end a precarious state of affairs. Those who lose by the meritocratic criteria will in all likelihood resort to the more primitive means of retribution the moment the general threat deriving from the Hobbesian state is no longer there. In the last analysis, as Freud pointed out in his *Totem and Taboo*, the whole civilization is based on the external (and the internalized, sublimated) fear.[21]

Thus, there are two figurative stages in the establishment of a state. In the first stage the greater power (of the future state) establishes its absolute prevalence in society, stops the war of everybody against everybody and introduces peace. Since the essence of this peace is the categorical prohibition of the private resort to arms and combat, in the second stage the state must offer an alternative mode of conflict resolution on all different levels from private controversies, to the conflict between the individual and the state (as in criminal law) to the political conflicts between the different structured interests in the state.[22] The legal order, in the end constitutional, does just that.

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[21] *See also* Freud, *Civilization and its Discontents* (W.W. Norton & Co., 1961). Freud's views were implicitly, although he was careful enough to never fully articulate them, pessimistic. His basic assumption was that the fear induced by the state aids the suppression of instincts (*Id*), helps create the primitive internal moral instance (*Superego*) and results in the compromise of self-image (*Ego*). The state's induction of fear is transmitted to the family though the father's conditional love and the final result is the civilizational neurosis epitomized in the contradiction between the individual's instinctual (biological) drives one the one hand and the needs of societal coexistence as articulated in the state and its repressive mechanisms. It never occurred to Freud that there could be a moral evolution (of individual and of society) such as hypothesized later by Jean Piaget and empirically demonstrated by Kohlberg, Kegan etc. In this respect Freud was more a successor to Burckhardt than an heir of Nietzsche whose philosophy he cherished.

[22] I have tried to demonstrate this in detail, *see infra* note 39 '[T]he sporting theory of justice, the idea that judicial administration of justice is a game to be played to the bitter end, no doubt has its roots in Anglo-American character and is closely connected with the individualism of the common law'. Pound, *The Spirit of the Common Law* (1921), at p. 127.

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Philogenetically, this probably implies that the establishment of the legal system as the alternative conflict-resolution service offered by the state as the surrogate to combat has probably itself evolved in two stages. In the first stage the state could not have offered a differentiated set of substantive criteria ('justice') for the resolution of all conflicts. It could, however, offer a procedural forum of artificial legal equality in which the parties could verbally articulate their grievances and generally 'have their day in court' before the decision resolving the conflict between them was made by a state appointed official backed by the threat of the state itself.

Only after this procedural stage of implementing the rule of law had lasted for hundreds of years, will the casuistry have sufficiently accumulated to provide standard answers to standard controversies. Thus the substantive law emerged and grew in its empirical volume, the level of differentiation, logical consistency and generally what Weber calls 'legal rationality.' Today this developmental sequence is often forgotten because 'law' is *prima vista* considered to be these (developmentally secondary) substantive criteria of justice.

The point here, however, is not that the procedure is primary and substantive law secondary. The point is that it was this primary establishment of the procedural framework of legal equality which was the first and the natural source of (substantive) law.[23] In other words, the issue never was so much the secondary substantive rationality and logic of legal decisions because the primary surrogate function of legal procedures intended to offset the use of power as a means of conflict resolution.[24]

While the 19th century continental codifications undoubtedly infused the legal system with Weberian rationality and predictability they also insulated the legal system from the empirical contact with real-life issues. To the extent this is true, the legal system does not perform its primary appointed task, i.e. it does not promptly and efficiently resolve controversies which people have the right to have resolved in view of the general prohibition of self-help. The sociological increase in

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contd.
As it turns out, especially if one reads von Savigny in this connection, this is no original peculiarity of Anglo-American culture. Rather, legal conflict resolution replacing the logic of force by the force of logic is an essential characteristic of all law; codification merely obscured this. Think, for example, about reasons for the artificial separation of substantive law criteria and procedure, which do not exist in sporting events, wars and all other *natural* forms of conflict resolution.

23 von Savigny, the famous German legal philosopher, opposed the codification because he was afraid this would 'cut the umbilical cord' between the 'life of the nation' and the law, meaning that the empirical contact with the world of real-life controversies would be lost if the past law would once and forever be crystallized in the code. von Savigny, *Zur Gesetzgebung unserer Zeit: Of the Vocation of our Ages for Legislation and Jurisprudence* (Haywoard, translation, 1975).

24 The same conclusion, although in an entirely different context, is implied in the brilliant article by Alexander and Schauer, *supra* note 15.

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disorganization and *anomie* is the logical consequence, if only because the law-abiding citizen is, thus, actually discriminated against the citizen who disregards the law and uses illegal means of protecting his interest. It was the codifications which sealed the division of powers between the parliament and the courts along the Cartesian distinction between the abstract (laws) and the concrete (specific decisions made by the judges).[25] The specific solutions to specific legal problems introduced by the judges were reduced to the so-called 'legal practice,' i.e. they are not considered a *de jure* source of law although every practising lawyer knows that *de facto* they are because the appellate courts will adhere to them. Since the legal solutions no longer grew organically out of specific precedents the continental legal system, although sustained by sometimes brilliant academic theoretical contributions, has in a sense lost its ability to learn from its own experience.

The issue of concern here, however, is that the constitution, too, was for the same reasons insulated, except in the broadest lines of state regulation, from the social and political reality (not to speak of human rights) it was supposed to govern. At first there was no direct constitutional adjudication at all and then it was limited to abstract review. It was the late arrival of the constitutional complaint (*certiorari, Verfassungsbeschwerde*) which brought up the question of the precedential effect of the respective (concrete) constitutional decisions. As Professor Steinberger has brilliantly demonstrated there are three levels on which these decisions can have their effects: as *res judicata*, as *erga omnes* decisions and as the true source of law.[26]

This fortunate development, of course, has everything to do with the previous establishment of the constitutional fora in which the individual citizen finally

[25] This archaic and dysfunctional distinction between the abstract and the concrete persist in the modern continental constitutions. The jurisdiction of constitutional courts used to be limited to the so called 'abstract review', whereas 'concrete review', i.e. what the Americans would call the *certiorari* procedure, deciding the specific cases and controversies (constitutional complaint, *Verfassungsbeschwerde*), has only lately emerged as part of the constitutional courts' jurisdiction. The new issue arisen, namely to what extent should these 'concrete' (*inter partes*) decisions have an 'abstract' (*erga omnes*) effect, i.e. to what extent should the constitutional decisions have the effect of a true legal precedent. The issue has re-emerged, as technically complex, in the characteristic 'rational' continental way. *See* Steinberger, *supra* note 7.

[26] Steinberger, *supra* note 7. There is not much to add to Professor Steinberger's exhaustive, in the best continental academic tradition, overview of the problem. My point is simply that it is symptomatic that the issue must be treated in this way in the first place because it seems natural for the law to evolve out of the concrete cases and controversies. However, great damage has been done to the continental legal systems because whole areas of law have for more than a century been insulated from this empirical contact due to the unfortunate impact Bentham's 'Principes de legislation' have had on Napoleon von Savigny, *supra* note 23.

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acquired equal[27] standing to sue all three branches of power. It is this procedural equality which first opened the eyes of the law to the whole new world of (constitutional) controversies. These controversies, of course, existed all along. Yet, there was no framework of equality permitting them to surface legally and be recognized as such, which is what I meant above when I said that the constitution used to be 'insulated' from the underlying social and political reality. The law can deal with substantive conflicts and controversies only if the legal framework of equality permits the issues to surface. Since legal equality is an artificially maintained procedural framework, the controversies will not surface unless the institutional and the procedural structure providing this primordial legal equality is first provided. The constitution as a social contract remains a dead letter unless this institutional framework and the consequent standing are also provided. The individual, at least legally, becomes equal to the state.

It used to be that the contractual logic was conceived to be valid only between the individual subjects of the state. Today Durkheim's mutual interdependence of markets due to the high level of division of labour makes this logic more and more preferable even between the sovereign states. Only in rare cases do they resort to combat and war as the 'natural' regressive way to resolve their differences.

If the differences between the sovereign states are perceived as (the Charter of the United Nations, international law) at one extreme of the scale and the differences between the individual subjects of the state at the other extreme, then the differences between opposed political interests, say the political left and the political right in the state, are the middle ground between these two extremes. Either the constitution as a contract binding on the opposed political factions within the state is respected or there will, in the end, be a regression to civil war. The famous Klausewitz's cliché according to which the war (international or civil) is only the natural extension of politics should, in fact, be understood the other way around.

The game of ordered politics is a natural extension of civil war once the parties in combat understand that it is preferable to negotiate and respect the contract of

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[27] Every conflict by definition requires two elements, of which only the first (incompatibility of interests) is *prima vista* obvious. The second element of every conflict is the approximate equality in power. If the difference in power is too great, we speak of prevalence, not of conflict. The state, therefore, by eliminating physical prevalence as the criterion *eo ipso* creates among its subjects the equality in power(lessness). This equality is then the first factual precondition for legal adjudication as a surrogate of self-help. Yet, the legal system, too, must create additional institutional, procedural and substantive conditions permitting all kinds of incompatibilities of interests, which would otherwise not surface at all, to legally manifest themselves. Often, paradoxically enough, the greatest inequities, those now considered violations of constitutional and human rights, never manifested themselves legally, although these rights were substantively enumerated in the constitutions, because the procedural framework of legal equality (the constitutional forum, standing to sue, constitutional jurisdiction, etc.) for these basic grievances was not provided.

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constitutional dimensions. As we have recently seen in some states of Eastern Europe, without this ascent to negotiation and the contractual logic society would be destroyed, the civilization annihilated and the division of labour made impossible.

Clearly, this ascent to contractual logic must yield a most general contract, a basic law, as the Germans call it, defining the most fundamental relationships between the groups and the individuals in the society. This contract legally constitutes the future state as a factual (and legal) entity; it defines both the basic rules of the political game and the rights of the state's subjects (the human rights, the bill of rights). All other 'contractual logic' in the state (the public laws, regulations, the contracts etc.) must for this reason be in principled accordance with the most basic contract constituting the state as a legal entity (*Rechtsstaat*), as ruled by law, *lex terrae*. If other instances of legal production in the state are conceptually, value-wise or otherwise in conflict with the constitution, they invariably violate the basic rights of one of the parties, individual or collective, deriving from the basic social contract. Such aggrieved individuals or collective entities must, therefore, have the standing to challenge the constitutionality of the general rules and regulations (abstract review of constitutionality) as well as the particular legal decisions (judicial, administrative etc.) and even particular actions such as police brutality, torture etc. (concrete review of constitutionality).[28]

C. The Constitution as a Contract

It follows that the constitution is essentially a social contract binding on everyone in the state and especially binding on the ones in power *vis-à-vis* the ones out of power.

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[28] Without the recourse to constitutional judicial review these aggrieved individuals remain without remedy in the situation described by Plato in *Apologia*. Socrates believed he had to subordinate himself to the laws of the Athenian state, irrespective of the fact that the 'rules' making him guilty (of seducing the Athenian youths) were conceived *ex post facto* (*see Shaw v. Director of Public Prosecutions* [1962] AC 220 (HL)) and regardless of the fact that the body (*Areios Pagos*) applying them was identical with the body which conceived them after the fact in the first place. Even at that time this would have been quite illogical. The point is that if there was a court of appeal before which this due process issue could have been raised, the legislative-cum-judicial injustice done to Socrates would not have had taken place. Socrates as an individual entitled to the basic logic of the due process, however, was left at the mercy of the lynch logic of the *Areios Pagos*, i.e. there was no framework of legal equality in which the issue could have been raised. Once the white sail of the ship coming from Delos had been seen from the Acropolis, he drank his poison. The essence of that situation, therefore, is hidden in the fact that the basic logic of legal order in society demands a forum before which the perceived incompatibility of the particular decision with this basic logic may be raised. If the aggrieved individual perceives his elemental (constitutional) human rights to have been violated, the basic (substantive) social contract must entitle him to his (procedural) day in court.

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In this practical sense the constitution is a contract between the people and their established state.

Since every contract presupposes both the initial agreement as well as the subsequent disagreement, the constitution as a projection of the criteria for the prevention and the resolution of conflicts also presupposes, in cases of their perceived violation, the impartial third party applying these criteria. If it is true to say that every contract presupposes a judge who will eventually interpret its clauses and who will, in turn, have the (state backed) power and the authority to enforce his interpretations, then the constitution, too, would be a dead letter unless there was an authority in the state to interpret it.

The jurisdiction of this authority, be it the supreme court (in unified jurisdictions), a special constitutional court (in dual-track jurisdictions) or any other independent judicial authority derives logically from its own *raison d'être*: the content of the contract constitutes the limits of the jurisdiction and the extent of the justiciability of the perceived violations.

The issue of constitutional jurisdiction may be better understood if we consider the situation in which there would be no such jurisdiction. In countries in which there is no separate and independent judicial authority to interpret and to apply the constitution the legislative branch is free to pass any law and the presumption of its 'constitutionality' is irrefutable, i.e. it is *de facto* (politically) presumed that any law whatsoever passed by the political legislature appropriately makes concrete (or at least conforms to) the abstract provisions of the constitution. This, of course, amounts to the unlimited power of the legislative majority and of the particular political faction (party) then in power. Neither the aggrieved individual nor the executive branch or the judicial branch of power can challenge any aspect of legislation, the assumption being that the whole sovereignty of the nation resides in the parliament. Because it is accessible only through its concretized form (the legislation) the constitutional contract cannot be directly cited, cannot be the basis of a legal action and is at least one degree removed from judicial interpretation and social reality. Thus, the constitution may effectively be insulated, by at least one layer of laws with the irrefutable presumption that they conform to the constitution, from the social reality it is supposed to govern. The constitution without a forum in which to invoke it is like a contract one has lost and cannot rely upon.[29] Such a constitution is a mere recommendation.

[29] It is, therefore, a distinct characteristic of the modern dictatorship, claiming international legitimacy, that there be a legally insulated 'constitution' without the possibility to invoke it directly, the issue of constitutionality being left to the abstract logical conformity *presumably* adhered to by the legislation. The next step in democratization is to grant the preventative abstract review of constitutionality and in turn the limited *ex post* abstract review. A further step is to grant specific control (constitutional complaint, *certiorari, Verfassungsbeschwerde*) of constitutionality of concrete decisions (administrative, judicial etc.) to a specialized constitutional court of last appeal. The only logical solution, although it may not be practically feasible in the legal systems unused to the independent exercise of

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Consequently, since it is left entirely to the legislative branch to judge the constitutionality of its own laws, the constitution figures merely as a programmatic act, an abstract proclamation: the contract is there, but there is no legal way[30] to see to its implementation, enforcement and the sanctioning of its violations. The clear (abstract and concrete) breaches of the constitutional contract by the executive branch *vis-à-vis* the citizen as well as *vis-à-vis* the other two branches of power must, in the absence of a separate constitutional jurisdiction, remain unchallenged unless they are also violations of specific legal (not constitutional!) provisions and may be challenged before the regular courts. The hierarchy of the regular courts makes it far less likely that they would themselves do something explicitly in breach of the constitution. Yet, their own interpretations of the laws may indeed be blatantly unconstitutional especially in jurisdictions in which law is perceived as a formal logical (positivist, formalist) enterprise and the citizen has no constitutional recourse or remedy.

Another basic aspect of the judicial review of constitutionality must be mentioned. As stated earlier, the democracy as a political process is run, a little like a free market supply and demand (of political ideas), by the logic of the lowest common denominator. After all, both Hitler and Miloeviæ were elected with the popular acclaim and the mass activation of the collective unconscious; this is an ever-present danger. Today this is true more than ever, in view of the intensity of mass indoctrination through the media and the consequent hegemony of the dominant social consciousness. The assumption behind the idea of the legitimacy of the absolute sovereignty of parliament, however, is that the people are the independent variable and the politicians the mere dependent variable in the assumed transformation of the popular will of the people into the specific legislative acts. In reality this has never been simply and entirely true. But even if it were, this would not justify the unlimited dictatorship of the politically established parliamentary majority. The out-voted political and other minorities as well as concrete individuals and everybody else in society – even the animals! – must in any event have their existential interests protected, they must retain their basic constitutional rights. In

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contd.
judicial power, however, is to grant the judicial review of constitutionality to all the courts in the judicial system. Only such a solution guarantees the logical omnipresence of the observance of the principles embedded in the constitution. Kelsen, *Pure Theory of Law*, originally published in 1925 in German as *Reine Rechtslehre* (precursor: *Hauptprobleme der Staatslehre*, 1911), amended in the English version entitled as *General Theory of Law and State* (Cambridge, Massachusetts, 1945), and the French translation of the first edition *Theorie pure de droit* (Paris, 1953). (University of California Press, Berkeley and Los Angeles, 1967, 1978), pp. 267–278.

[30] Of course, if the legal ways are not available there are always factual ways of attempting to enforce the basic human rights and other aspects of the basic social contract. The revolutions and other forms of social upheaval, while leading to instant anarchy, have in the end for their purpose the enforcement of basic social justice, i.e. the ideal of the rule of law.

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the name of what? If the political majority, whatever its claim to political legitimacy, were to be granted the unlimited mandate to run the society, then the majoritarian anomalies would stand uncorrected. The value judgement needed to perform these corrections and to maintain justice is built into the constitution. This clearly requires a forum in which the objections to the rule of political majority may be raised and the remedy for constitutional injustice requested.[31]

The jurisdiction of the constitutional adjudicative authority must therefore cover all these anomalous departures from the basic law of the state. But the constitutional

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[31] An extremely important practical aspect of this is the election of the judges performing this constitutional control of democracy. We know, for example, that the alliance between the parliamentary majority and its own government often makes a mockery of the checks-and-balances assumption as existing between the legislative and the executive branch of power. If the judges of the constitutional court were to be elected directly by the people, this would be the simple reiteration of the majoritarian logic they are supposed to control (in reference to the constitution) in the first place. Constitutional review requires a different way of thinking and a different value judgement as far away from the majoritarian day-to-day politics as possible. The problem is, of course, to some extent replicated if they are elected (by a simple or even two-thirds) majority in the parliament. Such courts may, as some claim, represent the values of the 'political rainbow'. But this is precisely what ought not to be represented if they are to represent something which is, as a governing contract, prevalent political value orientations. The political reproach to the constitutional (and supreme) courts that they are 'politicized' may be entirely to the point, but the issue remains unresolved precisely to the extent the very selection of the judges is 'political'. Much, therefore, depends on the attained political and legal level of culture in a particular state. It would be detrimental, for example, at least in East Europe to surrender this selection (in the name of the independence of the judiciary) to the judicial branch, saturated as it is with legal formalism, since the latter represents a large portion of the problem offset by the constitutional courts. In defining the law itself Aristotle's and Aquinas' central notion of the just man (*spoudaios*) coincides with the modern findings by evolutional psychologists (Kohlberg, Kegan) concerning the so-called inter-individual level of moral and cognitive development. *See*, Finnis, *Natural Law* (Oxford, 1985), *s.v. spoudaios* (pp. 15, 31, 101–103, 128–129, 366); Kegan, *The Evolving Self* (1982) and Šugman, *The Moral Life of the Law (Cognitive Evolutional Theory, Feminist Theory and Criminal law)* an unpublished LL.M. Thesis in Slovene language (Ljublijana, 1996). 'The "spoudaios" in Aristotle . . . He it is who *is* the standard and measure [*kanon kai metron*, in Latin *regula et mensura*]: Aquinas will take these terms into the heart of his definition of *lex*, law. . . . "Those things are actually valuable and pleasant which appear so to the *spoudaios* . . . and the central case of the polis is the *spoudaia polis*."' *Finnis, supra*, at pp. 128–129. This central position of the subjective criterion, i.e. *spoudaios* as *kanon kai metron* of what generally is just and right has to do with the positive metaphysical notion of Being (e.g. *Sein* in Heidegger's sense or *Tao* in Taoism) as an indivisible Whole in which what is good, just, beautiful etc. cannot be defined. The Good (e.g. justice, health, happiness etc.) is one and undefinable because it transcends the antinomy between universal and particular. The departures, however, from the Good are many and they do lend themselves to definition because they are divorced from the universal and they occur as particulars. *See*, for example, '*Chang We-Jen*, Traditional Chinese Legal Thought, Part II, (III) Legal Thought' in Lao Tzu, the third of the ten lectures on Chinese jurisprudence, delivered at Harvard Law School in the Spring Semester, 1990 (unpublished manuscript).

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review does something else. The jurisdiction of the constitutional court provides, cybernetically speaking, many channels of negative feedback. These feedback channels inform the legal system of its own functioning, they provide the necessary corrections of its general course and to some extent provide for the day-to-day homeostasis, namely for the legal and the political stability of the state.

The constitutional jurisdiction also provides an essential framework of equality. Rousseauian fiction concerning the individual's partnership in the social contract becomes a reality precisely to the extent that every aggrieved citizen is given standing to challenge everything in the legal system he deems incompatible with the social contract. He can challenge the legislative branch for the perceived unconstitutionality of its laws, the executive branch for the unconstitutionality of its regulations as well as the modes of enforcement of otherwise constitutional laws and he can challenge the judicial branch, if he believes its interpretations of the laws to be incompatible with the clear intent or the letter of the constitution.[32] Only through all this does the constitution become a living contract between the people and their government, and the people are then empowered to demand that their government strictly adheres to the contract.

D. Why should the Decisions of the Constitutional Adjudicative Authority be Binding?

This seemingly plethoric and simple question becomes relevant when we know that there is in the transitional states of Central and Eastern Europe a strong resistance to the authority of the new constitutional courts. Surprisingly enough, this resistance is coming from quarters where it would be least expected. It does not come from the new legislatures or from the executive branches of power; it comes from the rest of the judicial branch, from the regular courts. The supreme courts of at least three of these states have explicitly pronounced that they do not feel bound by the interpretations of the respective constitutional courts. However, lurking behind the immature questions of prestige etc. there is a real question concerning the Central European (*Mitteleuropa*) perception of the function of law in society and more

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[32] Many laws defining the jurisdiction of constitutional courts in different countries give standing (*actio popularis*) to challenge the (abstract) constitutionality of particular legislative acts to every aggrieved citizen. 'Everyone can, if he can show the existence of his legal interest, file a written initiative to begin the procedure [of abstract review of constitutionality]'. Art. 24(1) of the Slovene Constitutional Court Act (1994) 15 *Official Gazette of the Republic of Slovenia*, p. 823.

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specifically the poor understanding of the relationship between law and democracy.[33] Some in fact maintain that it is primarily the countries lacking in democratic tradition which are in need of semi-specialized judicial authority such as a constitutional court.[34] While this has clearly something to do with the direct constitutional protection of constitutional (human) rights, it is also clear that in all such jurisdictions the regular courts themselves are supposed to apply the constitution directly, and that they are either reluctant[35] to do it or that they simply refuse to do it.[36]

The problem, therefore, is real, not imagined. As I have already said, apart from the questions of prestige there are several systemic explanations needed to understand why this is happening. First, the continuity of the regular courts established in the previous regime also contains the continuity of the particularly defensive formalistic approach to law. 'Defensive' here means that the regular courts under the Communist regime, which emphasized the desired 'withering away of the law' were understaffed, under-financed, etc., to the extent that the judicial branch in all these countries practically atrophied. This was the long-term political effect of the Communist ideology on law.[37] An even longer term effect, however, derives from what Max Weber explained as the idiosyncrasy of the English judicial independence stemming from the Magna Carta and from the fact that law in England was practised by the landed gentry whereas, for example in Germany, Frederick II attempted, with his *Landesgericht*, to eradicate the scourge of lawyers and forbade

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[33] I am alluding to Central (rather than Eastern) Europe because the East European legal traditions continue to be under the unfortunate authoritarian influence. As to the latter, *see* Goldhagen, *supra* at note 20. The clear proof of that, if proof is needed, is the historic fact that practically all communist countries, including China, followed the German legal tradition. The connection between democracy and constitutional judicial review is also obvious, but it could be spelled out in terms of the framework of equality provided for the ordinary citizen by the constitutional courts *vis-à-vis* the different branches of government. *See* my '*Ustavni okvir enakosti kot novi vir prava*' (The Constitutional Framework of Equality as the New Source of Law*), Prvine Pravne Kulture* (*The Cultural Elements of the Rule of Law*) (FDV, Ljubljana, 1995).

[34] A high governmental official of South Africa, a country which has recently introduced constitutional judicial review, has said this to me at the session of the Venice Commission in 1996. Recently, I was told in Beijing that the Peoples' Republic of China, too, will soon introduce the constitutional court and replace with it the People's Congress' Standing Committee on Constitutionality.

[35] One of my former students who had clerked for the Supreme Court of Slovenia has told me the following story. At the session of one of the various panels of the Supreme Court the question arose as to whether the Court ought to apply the Constitution directly (as it ought to have done) and release the person from the patently unconstitutional pre-trial detention. One of the judges then said: 'I think we'd better not expose ourselves! [*sic*: presumably to public criticism]. Let us leave this to the Constitutional Court!' Which is what they did.

[36] Particular judgments to this effect could be cited coming from the Supreme Courts of the Czech Republic, Croatia, Slovenia etc.

[37] *See*, for example, Pashukanis, *supra* at note 10.

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under the penalty of the forfeiture of all possessions any comment on the Code.[38] In other words, there is a great difference between the Anglo-Saxon rule of law tradition deriving from the 13th century the Magna Carta and the German *Rechtstaat* tradition which only emerged in the 19th century. So much, therefore, for the democratic tradition. This is important to emphasize because of the often naive self-projecting perception of the English-speaking readers who fail to understand the deeper reaches of the authoritarian psychology.[39]

The question 'How does law (and lawyers) fare in an authoritarian system?' has never been really asked except perhaps indirectly by brilliant writers such as Maurice Duverger, Neuman, Hayek etc., but since the separation of powers, the checks and balances, too, are inextricably bound with the democratic (power sharing) concept of what the state is all about. The rule of law itself really is at the core of the democratic politics: *Rex non debet esse sub homine, sed sub Deo et lege,* as Bracton put it in 13th century. The rule of law is, to put it simply, in reference to the semantically fixed promise and premise irrespective of whether we speak of contracts or of constitutions: substantively, whereas procedurally it, of necessity, requires the third party to interpret it.

This requirement raises certain problems inasmuch as the third party's (the constitutional court's) empowerment does not derive, as everybody else's, from democratic day-to-day politics, neither is it electorally responsible. Its mandate has more to do with the inherent moral trust and authority derived from the constitution itself, i.e. from the belief that the constitutional court's interpretation, as in any contract!, will be rendered impartially and persuasively. More important is perhaps the fact that the decision is final (*res judicata pro veritate habetur*) and that it puts an end to societal uncertainties. Democratic politics, for better or for worse, is determined by the logic of the lowest common denominator. Its psychology is capable of everything[40] and it needs a non-egalitarian corrective, with reference to the constitution, as the power above all actors in the political game.

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[38] For analogous developments in France *see*, Cohen and Cappelletti, *Comparative Constitutional Law, Cases and Materials* (1979), chapter 3, at pp. 25–71, especially at pp. 25–27. Cappelletti explains the Enlightenment formula pertaining to the judges being mere 'mouthpieces of the law' (Montesquieu), with an aversion to the judges the French had adopted because of the arbitrary use of judicial power under the *ancien regime.*

[39] *See* Zupančič, 'The Crown and the Criminal: The Privilege against Self-Incrimination (Towards General Principles of Criminal Procedure)' in (1996) 5 *Nottingham LJ*, at pp. 32–55 or (Spring 1997) 9 *European Review of Public Law,* at pp. 11–40. *See also* Goldhagen, *supra* at note 33.

[40] Goldhagen's explanations, *supra* at note 20, of the general willing co-operation of Germans in the massive killing of Jews are many and sundry. He, preoccupied as he is with the specific victimization of the Jews, however, is not willing to consider that what the Serbs did to Croats (and vice versa) and what Hutus in Rwanda did to Tutsies, is in terms of mass psychology very similar to what the Germans had done to the Jews. Few seem to be aware that Karl Jung in his *Analytical Psychology (Tavistock Lectures)* had accurately predicted in 1934(!) what would happen in Germany. He foresaw the primitive activation of the collective unconscious as usually happens under the influence of the mad leader (Hitler,

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The rule of law, therefore, places limits upon totalitarian tendencies in the state. Is it, therefore, surprising that the judges (and other lawyers, too) who had for 50 years practised law under a totalitarian regime fail to understand that their formalistic posture is entirely defensive, i.e. that their timid reliance on the illusion of formal waterproof logic, formerly their only defence in case the decision proved to be politically unpalatable, has in fact become unnecessary and counter-productive? Their painfully developed art of defensive positivistic legal formalism, the blind and often also reckless reliance on the deductive logic irrespective of the final result, is too heavily invested with the past frustrations to be easily abandoned. The bureaucratic indifference of the inbred profession, deprived for so long of the legitimate responsibility pertaining to its office, will take generations to change. It is primarily this indifference which also accounts for the large judicial backlogs in the former communist countries, as the judicial system, in transition when it would be most needed, performs inadequately.

This inadequacy of the legal and judicial system is like an impaired immune system of the body politic, sustained for too long on massive doses of Party antibiotics. No wonder it now fails to respond to defend the society from Durkheim's *anomie* and disorganization,[41] as it habitually fails to resolve promptly the conflicts presented to it for decisive resolution.[42] It must not be forgotten that in

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Milosevič). In purely technical terms such leaders are elected by a landslide and thus formally possess the true democratic mandate *par excellence*, which only an empowered non-democratic authority such as constitutional court, could have stopped both at a sufficiently early stage of the descent to collective madness. *See supra* at note 21. Ely, *Democracy and Distrust* (Harvard, 1980), at p. 181: '[T]he general theory is one that bounds judicial review under the Constitution's open-ended provisions by insisting that it can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack.' This is Ely's basic conclusion and he goes on to ask whether this would enable the courts to find the Holocaust unconstitutional or not. This, rather anti-climatic 'conclusion', reached after a whole book's worth of ink spilled over the issue of the limits of judicial review, is the typical instance of Kant's 'blind intuition'. The question is properly asked, but the answer is not forthcoming because Ely, typically, fails to ask himself the more basic conceptual question concerning the legal nature of the constitution: if it is a contract then the next question is not whether or not its substance may be interpreted. The issue does not occur in space, it occurs in time because in contracts the past form (agreement) is intended to govern the present substance (disagreement). Is this too sophisticated? *See*, for example, von Ihering, 2 II *Der Geist des römischen Rechts* (von Mehren, translation, 1883), at pp. 478, 479 and Deutsch, *supra* at note 1. The question, therefore, is not in the name of who but in the name of what!

41 *See generally* Durkheim, *supra* at note 14, especially at pp. 65–73.

42 The 'speedy trial' issue, therefore, comes up repeatedly before constitutional courts and especially in criminal cases where the preventive detention in certain Central and East European jurisdictions will often last up to 28 months. The UN Committee against Torture in Geneva has recently begun to consider such prolonged detention as a form of inhuman and degrading treatment sometimes amounting to torture. Some East European countries, as well as the Peoples' Republic of China, whose criminal procedure was until recently

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the last analysis the legal system as a whole and the judicial system in particular have only one task to perform. To offer an effective alternative mode of conflict resolution. If the law fails in this basic function, if the alternative conflict resolution service is not available, disorganization and *anomie* will set in as a systemic reaction to the pervading injustice in which the law abiding citizen gains the impression he lives in a state run by mafia. The next step is, logically enough, the regressive reliance on one's own dishonesty, cunning and physical power as a means of defending one's perceived rights and interests. In this context it is most important to understand that the state must offer an effective service, i.e., that the exercise of judicial power is above all a service, much as the medical system is a service, whose task is to provide effective, predictable and logically defensible conflict resolution decisions. *Mutatis mutandis* the same holds true for the service provided by the constitutional courts.

Due to the lack of democratic tradition in Central and Eastern Europe the legal mentality (legal culture) itself has failed to transcend the pandectistic fetish while the myth persists that law is not experience, but sheer deductive logic.[43] It seems, however, that there has been an evolution from the mere cognitive attitude of the hypertrophied legal formalism as the lawyer's normal defence, namely the clinging to the semantic form[44] as the empty shell of former agreement, to the cynical attitude

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modelled upon the German 'mixed' (but preponderantly inquisitorial) system, permit up to six months of pre-trial detention pending investigation and another 24 months after the so-called finality of indictment, i.e. before and during the actual trial. Since European constitutions (with the exception of Portugal) have no *habeas corpus* procedure, some more enlightened constitutional courts have taken the unprecedented step of releasing the prisoners directly on the basis of the speedy trial provision in the constitution and in the European Convention. *See* the decision of the Slovene Constitutional Court, No. 18/93 – V Odl. US 40 (11 April 1996). *See also* decisions of Sl. Const. Ct. Up 75/95, Up 57/95, Up 74/95 dated 7 July 1995. Reference in these decisions is also made to the *European Convention for the Protection of Human Rights and Freedoms*, Art. 5, para. 3, which provides for the release of the detained prisoners if the judicial delay is unreasonable.

[43] Holmes, 'The Path of the Law' in (1997) 110 *Harv. LR*, at pp. 991–1009, originally published in 1897. In a recent conversation with an American visiting professor of jurisprudence the question was raised as to whether the current positivistic formalism is 'simple foggy-mindedness' (his expression) or whether it is an intentional 'smoke-screening', i.e. pretense (my expression). In the end we both agreed that the two attitudes seem to permeate one another. Many (regular and constitutional) judges are capable of self-deception to the extent they will *ex post* 'logically' rationalize any decision, even if patently incompatible with the letter as well as the spirit of the law in question.

[44] The famous and truly perceptive 19th century German legal theorist von Ihering maintained that such formalism lies in the very essence of the law itself:

> The professional philosopher, who has no understanding of the peculiar technical interests and needs of law, can see nothing in formalism but ... a clear derangement of the relationship between form and content. Precisely because his vision is directed to the core of things, ... this anguished, pedantic cult of symbols wholly worthless and meaningless in themselves, the poverty and pettiness of the spirit that the whole

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characteristic of the members of the whole legal profession in certain Central and East European countries today. It is only natural that at some point extreme legal formalism should evolve into a 'selective legal formalism'. This is no longer simply a 'professional' cognitive approach. Legal formalism is then no longer naively 'prescriptive'. It becomes an 'instrumental' means of semantic manipulation to achieve preconceived political results having nothing to do either with the letter or with the spirit of the law. The cynical habit of using law as a smokescreen for politically palatable decisions is the natural next step for the morally disoriented members of the legal profession.

The assumption of the cynical priest that there is no God, however, may simply prove that his understanding of theology is very poor. It seems that the narrowness itself of the formalistic deductive positivism naturally leads, first, to the adequate cognitive realization that (such a conception of) law is too narrow to even address real social antagonisms. From there it is not too far from the conscious realization that formalism can cynically be used as a language game into which extraneous hidden political agendas can readily be translated, the parochial assumption being, as I said, that the formalistic is the only possible view of the law. The end result of this is the schizophrenic discrepancy between what is being said and what is really meant. In other words, legal formalism then becomes the high art either of intelligent deception in one extreme or self-deception in the other (less intelligent) extreme. In most cases, however, the two cognitive extremes converge and overlap. The reason for this is simply that a moderately unintelligent and under-educated lawyer will thus be able to bridge the cognitive dissonance which might otherwise cause him the loss of sleep. This is especially so since the 'hard cases' are rare, whereas in the 'routine

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> institution of form and results therefrom – all this, I say, must make a disagreeable and repugnant impression on him. ... Yet we are here concerned with a manifestation which, just because it is rooted in the innermost nature of law, repeats itself, and will always repeat itself, in the law of all peoples.

von Ihering, *supra* note 40, at pp. 478, 479 *See* Duncan Kennedy, 'Legal Formality' in (1973) 2 *Journal of Legal Studies*, at pp. 351, 355. Of course, it is no accident that such an articulation, brilliant as it is, emerged in Germany and not, say, in England or even in France. The continental private law theory, when examining the form of the contract, however, does refer to its *causa* (*contrahendi*), i.e. it goes beyond the written letter of the contract. The concept of *causa* has sometimes been, albeit inadequately, compared to Anglo-American 'consideration', but the causal theories of contract typically contain some sublime legal speculation necessary to bring the formalism to its senses. The language game here is different from the precise extent to which it needs to depart from formalism in order to deal with the real, as opposed to formal, issues of private law. In essence this is a teleological interpretation of the true intent of the parties *tempore contrahendi.* But unfortunately these theories remain inapplicable, except in a broadest sense of the word, to the constitution *qua* contract. Here, the parties are not as simply definable neither is their intent as focused as it is in private law. Broader 'considerations' must be employed in constitutional law to understand what is just or unjust in a particular case of judicial review.

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cases' the formalistic reasoning offers the comfortable cognitive line of least resistance. In this fashion there occurs a dialectical reversal wherein the ostensibly most autonomous formalistic mode of legal reasoning becomes the least autonomous, since it falls prey to politicized considerations. Under the conditions of a totalitarian regime this is almost certain to happen. If the regime lasts for 50 years, the silent and cynical *ex post facto* instrumentality, as opposed to prescriptivity, of legal formalism becomes the mode of legal reasoning.

This is not to say that the political autonomy of the judicial branch, say in the United States, does not, for different reasons sometimes generate similar deformations.[45] However, what Professor Gordley describes as 'mere brilliance' of American legal academia,[46] and which easily degenerates into 'legal phrenology',[47] is an entirely different cultural problem generated mainly by the conceptual insufficiency of legal education in the American law schools in which Kant's saying that intuition without concept is blind (whereas concept without intuition is empty) should be inscribed on their library walls.

What the two situations have in common is the loss of autonomous legal reasoning and there appears to be no legal system where its autonomy and its legitimacy would successfully be maintained. Whether it is the law reduced to hidden political agendas in the transitional states in Europe or the American reduction of law to 'pragmatic policies', law is fast losing its social and ethical legitimacy everywhere. The ensuing defeatism of legal writers, especially in the West, i.e. comparing law to phrenology etc. is misplaced precisely to the extent to which it generalizes specific American cultural problems and projects them upon the rest of the Western world.There is, of course, always the danger of this becoming a self-

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[45] Chief Justice Rehnquist of the US Supreme Court, for example, in a series of decisions first reduced the privilege against self-incrimination (the exclusionary rule) from a prescriptive to an instrumental rule and then proceeded to 'apply' the cost benefit analysis and the economic marginal utility theory in order to undo what Douglas and Brennan and others of the previous Court have painstakingly established in a series of decisions from *Mapp* to *Miranda*, *Brewer*, etc. *See* Zupančič, *supra* note 39.

[46] Gordley, *supra* note 1, at pp. 367–384. *See also* Weber, *Law in Economy and Society* (Rheinstein (ed.)), at p. 316: 'All these circumstances [Weber is referring to judge-made law] are tied up with the fact that the degree of legal rationality is essentially lower than, and of a type different from, that of continental Europe. Up to the recent past, and at any rate up to the time of Austin, there was practically no English legal science which would have merited the name of "learning" in the continental sense'. This, I venture to say, has been a rather typical continental view to some extent made obsolete by the clear historic evidence to the effect that the deductive, formalistic rationality of the type referred to by Weber is clearly not the only one possible. Today, despite its academic deficiencies Anglo-American law is patently superior (more differentiated!) in practically all the areas of legal life. As for the purely academic analysis, however, Weber's view seems to remain essentially correct. 'Thus we may conclude that capitalism has not been a decisive factor in the promotion of that form of rationalization of the law which has been peculiar to the continental West ever since the rise of Romanist studies in the medieval universities'. Ibid., at p. 318.

[47] Schlag, 'Law and Phreonology' in (1997) 110 *Harv. LR* 877.

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fulfilling prophecy. Yet, research by Kohlberg[48] and other moral evolutionists[49] seems to show that higher levels of moral development do generate higher levels of cognitive development. The constitutional courts could become the place where the required breadth of legal reasoning would not, on the contrary, displace the essentially legal attachment to both the form and the substance of the verbally fixed promise.

If one keeps in mind the hectolitres of blood spilled for practically every line included in the modern boiler-plate constitutions, say separation of church and state, privilege against self-incrimination, freedom of speech etc., one cannot doubt the moral obligation of the courts to interpret such prescriptive lines of constitutions with utmost seriousness. The cognitive breadth, on the other hand, required for such a mode of interpretation[50] cannot be, as a problem of cognitive development, entirely separate from the 'evolving self' of the judges.

E. The Morally Autonomous Constitutional Reasoning

While this is clearly not the place to open the moral/cognitive development psychological debate I may be permitted to say that as a judge I have, and irrespective of any political affiliation, occasionally experienced such moral/cognitive differences with my fellow judges both in the factual perception as well as in the constitutional apperception of various situations. I no longer suppose, because I now know, that we live in (very) different moral/cognitive universes. The lateral developmental differences, say in terms of cultural disparities, although they may exist, are, in my opinion, not really crucial. What is crucial are the vertical moral/ cognitive developmental differences between different modes of legal reasoning. As in Kohlberg's and Kegan's tests of moral/cognitive development so in my own observation the moral autonomy of the individual judge will determine his cognitive autonomy. The level of the attained moral autonomy, i.e. the individual judge's ability to withstand and contain the pressures from the environment and to sustain consistently the development of his own judgement, can differ a great deal on different vertical levels of development. There are many judges, especially in the lower regular courts, who have not separated themselves from the interpersonal matrix, i.e. the collective conscience, say one form or another of what is now called

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48 *See* Šugman, *supra* note 31.
49 Kegan, *supra* note 31.
50 European judges cannot learn this mode from the anti-intellectual tradition of their American brethren. They can, however, learn from them about the political autonomy of the judicial branch required for the true autonomy of legal reasoning of its judges. The former, however, is far from automatically implying the latter: education, alas, has something to do with it. *See* Gordley, *supra* note 1.

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'political correctness', of their respective community. Their legal studies have provided them with the conceptual tools (principles, doctrines and rules) such as law actually employs precisely in order to make the logical judgement itself of particular classical issues (contracts, torts, criminal law) more independent of what is 'politically correct' at any particular time or place. What the psychologists call 'the institutional phase' of moral/cognitive development is just the logic of law where the balances between certain values (life, property) have been worked out in advance. Most of the routine cases before the regular courts fit quite well in the pre-existent conceptual moulds since the careful preparation of these models, say the American Model Penal Code, is what systematic legal theory and doctrine is all about. In the cognitive sense the legal system is intended to do just that, to provide its judges with the elaborate conceptual matrix which, if well understood, can certainly extricate the judge, who has not done that for himself, from the over-determining interpersonal matrix. It was described above how even extreme legal positivism/formalism was capable of defending the judges against the 'dictatorship of the proletariat' in the former communist countries.

However, above the institutional level of moral/cognitive development, i.e. above the purely logical autonomy of legal reasoning which suffices for the ordinary and routine legal cases, there arises the need to consider broad legal questions which cannot be answered by a deduction from a given major premise, as in the continental mode of legal reasoning, nor can this major premise be inductively (re)created based on an analysis or synthesis of previously decided cases. Having taught law myself in the United States for ten years and having dealt with a particular line of cases in constitutional criminal procedure, I have, as a European, inevitably arrived at a point at which the seemingly eclectic (post-modern) approach to understanding the otherwise disconnected cases yielded some basic theoretical questions.[51] Once these

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[51] I think of this as the primary task of a legal scholar. But Duncan Kennedy, *A Critique of Adjudication* (Harvard University Press, 1997), at p. 295: 'What we need is a general theory. You can't beat something with nothing. It's easy to critique – the hard part is to create a theory. The critical project is finished; now it's time for recreation.' Duncan Kennedy in his self-proclaimed modernist/post-modernist style really operates from the fashionable CLS (Critical Legal Studies) premise that all legal theory is oppressive and over-determining. Yet, were it not for the American legal-academic narcissism, he and other CLS writers would transcend the characteristic self-object transference and would observe that natural science is being constantly faced with the precisely identical challenge. Or, to put it in Kantian language, since intuition without concept is blind (and concept without intuition empty), it follows that we have no choice but to employ (legal, scientific) concepts to deal with (social, natural) reality. Neither natural nor social reality is directly accessible to us! Kennedy's dilemma whether 'deconstruction' should, or should not, be followed by a 'reconstruction' is patently false since in every rational 'scientific discovery', to use Karl Popper's idiom, deconstruction of the transcended theory is a natural side-product of the construction of a better theory, i.e. of an apperception that better explains the new perceptions and is, therefore, better able to predict the new perceptions. Only a schizoid mind with an ideological bent will destroy (deconstruct) first and then ask itself, whether 'reconstruction' is possible or necessary. Ask yourself what would happen in physics in

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questions are addressed and a theoretical proposition worked out and published, they should be considered for their explanatory value. For example, the American academic scene has explicitly admitted that the Fifth Amendment constitutional privilege against self-incrimination strikes them as intuitively correct, but that they do not find a theoretical explanation for it.[52] In order to offer a logical explanation for it I have gone back to the Hobbesian definition of the state and, of course, back to Roman law in which the idea first appeared: *Nemo contra se prodere tenetur*. The Supreme Court cases dealing with this privilege and with the exclusionary rule, which is its alter ego, since one does not incriminate oneself in front of the police but rather in front of a jury, are for many reasons royally confusing.

One of these reasons is that judges are paid to deal with legal particulars (cases) and scholars are paid to deal with legal universals. Now, when a theory with an explanatory value is published and becomes the *communis opinio doctorum,* it should find its way into decisions, even if it takes the generation of today's law students to become tomorrow's judges. It seems that the consistent application of the deeper understanding of what the privilege against self-incrimination is all about would have more of a deconstructionist impact on the current constitutional concept of criminal procedure than Miranda,[53] or for that reason all CLS writings combined.[54]

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1905 had Einstein *only* proven that Newtonian physics were inadequate. This is the position in which CLS tried to put, and it succeeded to some extent, the American legal world. The actual causes of such mischief, however, as Professor Gordley has brilliantly demonstrated, lie precisely in the above mentioned narcissism cum anti-intellectualism. *See* Gordley, *supra* note 1. But Unger, *Knowledge and Politics* (Free Press, 1975), at p. 138. If Unger's *antinomies*, they all derive from the central existentialist antinomy between universal and particular, should be pointed out as something that cannot be transcended, then my answer is that law is an epiphenomenon. Its internal contradictions (antinomies) cannot be resolved in purely legal terms. For those who would like to explain the world differently, the advice comes from the British Museum, that it ought to be changed first. *See* Isaiah Berlin, *Karl Marx, His Life and Environment* (Thornton Butterworth, London, 1939).

[52] Ellis, 'Vox Populi v. Suprema Lex: A Comment on the Testimonial Privilege of the Fifth Amendment' in (1970) 55 *Iowa LR* 829.

[53] Kennedy, *supra* note 51, at pp. 270–271: 'The New Jersey Supreme Court was no more able to simply impose its "fair-share" requirement for affordable housing in the suburbs than the US Supreme Court was able to abolish the third degree by handing down the Miranda decision.'

[54] For details *see* Zupančič, *supra* note 39. The theory derives from a few very basic premises. If the state is established to prevent the use of self-help (Hobbes' *bellum omnium contra omnes*), then law is logically a service offered by the state to satisfy the need for an alternative conflict resolution. The use of police's self-help (third degree) in the inquisitorial setting of the custodial interrogation in the conflict between the individual and the state destroys the basic legal claim to legitimacy of procedural decision making. It follows logically that such evidence cannot be the legitimate basis for legal verdict, i.e. it must be excluded from the jury's consideration. This is all there is to it. However, this ought to have immense repercussions on many other issues of self-incrimination, since all that is now covered by privacy and all other intrusions into body, home, in short all Fourth

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Returning to the question of the autonomy of the judicial cognitive/moral reasoning, it seems appropriate to reiterate the premise that it endures only in the conceptual context and that it is not being suggested that the constitutional legal reasoning should in any way depart from it. It does seem, however, that the conceptual context in judicial review of constitutionality depends on broader considerations than the usual legal reasoning, yet it is for this reason no less predictable or determined, and that this reasoning requires the personal attainment (by the judge) of a higher level of cognitive/moral development. It should be emphasized that the cognitive aspect is inseparable from the moral-developmental one. The issue here is central for at least three different reasons. First, the reproach is constantly being levelled against the courts with constitutional jurisdiction that they are 'politicized' (on the Continent) or that they usurp the legislative function (in Anglo-American legal systems). Secondly, since the assumptions implicit here is that electorally unaccountable judicial bodies decide the cases arbitrarily this implies that they do not feel sufficiently bound by the constitutional text they are interpreting. Thirdly, this raises a fundamental philosophical and epistemological question, insufficiently elaborated in modern jurisprudence, of how does the *lex certa* (principle of legality) apply to constitutional adjudication.

Since the basic function of all law is to bind the parties to the given promise (in contracts *inter partes* and in general laws *erga omnes*), the formalistic (positivistic) component is central to legal reasoning. The dialectic of form and substance (contract and the subsequent change in the underlying relationship) is the dynamic contradiction in everything legal. This dynamic contradiction between form and substance is the motor of all purely legal evolution. Yet it must be obvious to everyone that the semantic binding force of an ordinary contract is quite different in its nature from the binding force of a constitution. On the other hand even the strict interpretation in substantive criminal law sometimes allows for the teleological interpretation and in contracts reference is being made to *causa contrahendi* (consideration) as the embedded substance of the formal contract. Thus no interpretation in law is purely automatic and mechanical. If it was, the job of judging could be better performed by the computer. But when we speak of *lex certa* on the constitutional level where the court must deal with principles rather than semantically fixed rules, the question of arbitrariness and politicization arises since, clearly, the spirit of the law cannot bind in the same way the specific rules can bind.

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Amendment considerations, should likewise be affected by this *theory*. Since no such theory has ever been seriously considered, the Reagan appointees to the Supreme Court were able to undo much of what previous judges had painstakingly established a generation before.

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F. Can the Spirit of the Law be Binding?

If the question is phrased in this fashion then the moral/cognitive aspect is immediately brought to the forefront of our inquiry. If, in a particular controversy of constitutional dimensions, the judge is to follow faithfully the spirit of the constitution, he must be sincere about it (the moral component) and he must understand both the broad legal meaning and the specific intent of the principle he is applying (the cognitive component). Sincerity without the understanding is naiveté. Understanding without sincerity is cynicism.

Yet the 'understanding of the constitutional principle', much more so than judges' mental reservations and hidden political agendas, may occur on many different levels of cognition. This will be better understood if the extreme case of the totally anomic situation in which no explicit or implicit values are being shared by the parties and the judge in any judicial situation, is compared with the situation in which (in both the moral and the cognitive sense) the difference between good and evil is perfectly clear and, consequently, agreed upon by the parties.

If the values were morally shared, the difference between good and evil would appear cognitively clear. Disagreements would be (instantaneously) resolved on the same cognitive level on which they would arise, i.e. they would not arise in the first place. In such a situation there would be no conflicts and law would be superfluous and inapposite. There would be no longer be any need for adjudication.[55]

If the former, anomic, situation is generalized, i.e. if no values whatsoever are

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[55] The basic Marxist idea concerning the 'withering away of the state and law' derived from the similar premise, except that the absence of conflicts in a non-antagonistic society was supposed to be a consequence of the saturation of material needs. The irony here is, of course, that capitalism with its (materialistic) ingenuity proved more materialistic and more scientific than the 'scientific materialism' of the orthodox Marxism. Pashukanis, *supra* note 10. Piaget's and Kohlberg's idea of moral evolution, however, does imply a stage of moral development (the highest one) on which the ever increasing consumerism appears as a poor compensation for spiritual deprivation. There is an inkling of this understanding in Marx's formula 'the more developed the product, the more alienated the worker' as is, for example, in the references to the 'spiritual crisis' or the 'eschatological crisis' (William Buckley) in the Western civilization, in the speeches the leading politicians (Clinton, Herzog, etc.). These references are usually made in the plaintive context concerning the economic non-performance. This perhaps indicates that the real problem of alienation will only surface politically once it manifests itself in an economic crisis. This will happen when alienation begins to affect creativity in statistical proportions. One should, therefore, ignore neither the social indicators of *anomie* (ritualization, resignation and rebellion) nor the ever rising Western demand for instantaneous revelation. *See* Hegel, 'The Phenomenology of Spirit', *Selections* (Inwood (ed.)), at pp. 168–180; Zupančič, *Bitje in hrepenenje* (*Being and Yearning*) (1989); Maritain, 'Preface to Metaphysics', *Seven Lectures on Being*, at pp. 48–65; Bergson, *The Creative Mind* (1946); Norbu, Dzogchen, *The Self-Perfected State* (Clemente, translation, 1989); Maslow, *The Farther Reaches of Human Nature* (1971), at p. 277 and especially the Introduction by Geiger, pp. xvi–xvii, and Kohlberg *infra* note 57.

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being shared, there is suddenly an overwhelming need for formal legal bonds to replace the absent moral bonds.[56] Since neither of the situations, unfortunately or fortunately respectively, exists in social reality legal decision making always operates in situations in which values (and interests) are not sufficiently shared to prevent the conflicts from arising.

This, however, also implies something important for the current discussion. If it is true to say that the cognitive differences, say, in the interpretation of contracts, arise as a consequence of the insufficiently shared moral values, then the formal legal interpretation of the contract by a judge in such a controversy represents, to say the least, an attempt to substitute the lack of moral commitment with the formal cognitive interpretation. The underlying assumption here is that the logic is separable from morality and that it can supplant morality.

If this is translated to the situation in which a constitutional decision is being made, then the different cognitive levels at which different perfectly sincere judges operate may in practically every case result in contradictory opinions of these different judges. The question raised here is what is the single most important variable determining these differences. The only available answer so far is precisely the one given by psychological evolutionists such as Kohlberg and Kegan.[57] The

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[56] Unger, *supra* note 51, at pp. 100–103. In the extreme, the total sharing of values would amount to a society without moral disagreement: the cognitive difference between good and evil would, therefore, be perfectly clear. In the other extreme Durkheim's technical term of *anomie* describes the total absence of shared values. *See* Zupančič, 'Criminal Law and Its Influence Upon Normative Integration', *Acta Criminologica*, (Montreal, 1974).

[57] Kohlberg is using the US Supreme Court judges' reasoning on death penalty in *Furman v. Georgia* (1972) 408 US 238, as an example of showing the hierarchical organization of moral reasoning and the better adequacy of higher stages of moral reasoning in legal arguments. Kohlberg argues that cognitive components are determined by developing moral standards and that it is the level of moral reasoning that makes the difference between judges' different opinions in the case, one of them being more adequate and highly developed than others. In order to show the difference between two levels of moral reasoning (conventional and post-conventional) Kohlberg compares Lord Denning's testimony before the British Royal Commission on Capital Punishment (as representative of stage four reasoning) and Justice Marshall's opinion in *Furman* (as representative of stage five reasoning).

> The difference between Lord Denning's position and Justice Marshall's are moral and philosophical. ... The statements of these two jurists do not merely represent two competing principles of justice; they are hierarchically related, in two senses. First, the structure of Justice Marshall's position presupposes the structure of Lord Denning's position, although the converse is not true. Second, everyone who expresses a view that is structurally similar to Justice Marshall's view has already passed through the stage during which he or she took a position structurally similar to the one stated by Lord Denning; once again the converse is not true.

See Kohlberg, *The Philosophy of Moral Development (Moral Stages and the Ideal of Justice)* (1981), at pp. 252–253. *See also* analysis of some further US Supreme Court's decisions in Šugman, *supra,* note 31.

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issue is not whether there is a single correct answer to the constitutional question. Neither is the assumption being made to the effect that all that is being dealt with is the single dependent and single independent variable since there is a self-referential element present in all constitutional adjudication, i.e. the constitutional case law changes the very legal and social reality it supposedly only interprets. And vice versa. In prescribing the solution to specific case and controversy, the constitutional decision really says much about (describes) the cultural range both of the judges and the society in which they operate.[58]

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[58] Sociologically, the issue may be phrased in terms of shared values. In sociology the extent to which values are shared and the intensity of the commitment to these values in a particular society have been dealt with in two general perspectives. In Durkheim's teaching *anomie*, i.e. the extent to which values are *not* shared, depends on the discrepancy between values that would be functionally appropriate at a particular stage of development and the institutionalized values (of the dominant social consciousness) such as are, for example, also manifested in the constitutional decisions. The greater the discrepancy, the wider the gap between the two, the lesser the chance that the values will be shared, i.e. internalized. Since values are shared only in human relationships and since the latter, sociologically speaking, exist only to the extent the (moral) communication is possible between individuals, the society with no shared values (*anomie*) is, in Durkheim's language, the atomized 'dust of individuals'. For details *see* Zupančič, *supra* note 56. The constitutional judges are in this sense selected for their values, i.e. presumably for their rational (professional) ability to render specific value judgements in specific controversies. The higher the level of *anomie* in a particular society, the greater the need for such judgements. (Hence the suddenly central political role of constitutional courts in Central and Eastern Europe.) Yet, paradoxically, the higher the resulting need for legal articulation of values, the lesser the probability that this will be possible since every level of disagreement can only be resolved by reference to a deeper level of underlying agreement about the premises, i.e. the criteria for the decision. *See* Wittgenstein, *On Certainty* (Anscomb and von Wright (eds.)) (1969) and Barry Stroud, 'Wittgenstein and Logical necessity in Wittgenstein', *The Philosophical Investigation* (Pitcher (ed.)) (1996) The constitution, presumably, embodies these premises and it verbally articulates them. Yet there is a level of value disagreement (*anomie*) at which semantic articulation of values is no longer capable of compelling the (deeper level of) agreement about the underlying value premises. On that level of *anomie* constitutional decisions will be cynically assumed to be purely political. Their effect will not be to further normative integration. Rather they will catalyze the further disintegration of values. In the last analysis, as we have pointed out at the beginning of this article, the general re-consideration of societal values is indicated. The greater the above discrepancy, the more violent this reconsideration is likely to be since every re-integration is preceded by the disintegration and, possibly, to regression to the war of everybody against everybody.

Another issue may be mentioned here. Since social *anomie* is not something that can be separated from the human relationships, quite the contrary, valuelessness will be psychologically internalized just as values may be internalized. This internalized *anomie* will manifest itself as a psychopathic cynicism such as described, for example, by Ellis in his *American Psycho*, or it will result in schizoidity such as described by R.D. Laing (*Divided Self*, *Self and Others*, *The Politics of Experience*, etc.) by Deleuze and Guattari (*Anti-Oedipus, Capitalism and Schizophrenia*) and, more generally, by existentialist writers such as Dostoevsky, Kafka, Sartre, Camus etc. Since one of the protagonists of the Critical Legal Studies once described CLS as 'the Kafkaesque perspective on law' I think it fair to say that

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The issue is the level of moral/cognitive autonomy attained by the particular judge. This implies at least two negative aspects and one positive aspect. On the negative side it is clear that no judge incapable of extricating himself from the pressures, including the political ones, exerted by the interpersonal matrix of which he is a part, should sit on a court dealing with constitutional questions. However, a judge caught in the formal conceptual matrix of legal doctrines to the extent he is willing to mechanically apply them is also by definition incapable of making a sound constitutional judgment. What these two levels have in common, however, is insufficient moral and cognitive autonomy of the person in question.

In this article the fundamental hypothesis has gone beyond the usual separation-of-powers cum checks-and-balances constitutional doctrine which assumes legal reasoning to conform to a solid, internally undifferentiated model. We have, on the contrary, maintained that constitutional adjudication requires a higher level of moral/cognitive legal reasoning. One implication has been that the principled, less pre-determined nature of constitutional premises requires a different kind of 'judicial restraint' in order both to remain faithful to the spirit of the constitution as well as to creatively[59] contribute to the progressive development of the legal system as a whole.

The issue is actually not 'judicial restraint' as such at all, but the syntagm does imply the binding (restraining) effect the fundamental legal text is supposed to have upon supreme judicial interpretation. Without this the constitutional adjudication

contd.
the whole CLS movement intended to externalize their own anomic psychology in the hope that new values would emerge from this process. But while it is safe to assume that the societal crisis will be resolved on the backs of (suffering) individuals, it has in the last 20 years become painfully clear that the 'psychological proletariat', i.e. those with existentialist *Angst*, are not capable of espousing new values. This is the reason for the ultimate defeat of CLS. Many forms of individual pathology (exogenous schizoidity, psychopathy, pathological narcissism, borderline conditions) as well as social pathology (rising crime rates, divorce rates, child abuse etc.) in so far as the two can be separated at all, are really the consequences of the eschatological vacuum ('spiritual crisis'), i.e. of the fact that the democratic process caught in the institutionalized social structure is incapable of generating new, *more adequate* (Durkheim's term) socially and individually relevant values people would be able to embrace. For details and additional reading *see* Zupančič, *supra* note 56. *See also*, Kernberg, *Pathological Narcissism and Borderline Conditions* (1989). On *anomie* generally, *see* Merton, 'Anomie', *Crime and Justice*, Vol. I, *The Criminal in Society* (Radzinowicz and Wolfgang (eds.)) (1971), at pp. 442–476, originally published in Merton, *Social Theory and Social Structure* (1953), at pp. 161–194.

[59] We fall prey to a false dilemma if we concentrate, as many writers do, upon the question whether this implies judicial law making. The radical views of Rantoul on judicial law making, for example, were well known and before him those of Bentham. The debate has been raging for almost a century without yielding any productive understanding of the underlying issues. *See Memoirs, Speeches and Writings of Robert Rantoul* (Mailton (ed.)) (1854).

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will quickly degenerate into policy making[60] and law making. This would be especially true of the continental constitutional courts without the *stare decisis* tradition and without the accumulated and binding case law. Elsewhere it has been demonstrated how the deeper understanding of the constitutional privilege against self-incrimination, for example, abolishes all constitutional problems concerning the extent of the application of the exclusionary rule, if only the court would understand (the cognitive component) that the privilege is the exclusionary rule since the criminal suspect does not incriminate himself before the police who have no power to issue a guilty verdict. If the exclusion of the evidence means that the jury does not come into contact with the tainted evidence, then the constitutional privilege will not have been violated.[61] But the moral component is also essential inasmuch as the idea requires the ethical commitment to the prescriptive nature of the constitutional privilege, whereas Justice Rehnquist has reduced the exclusionary rule (and by the same token the privilege against self-incrimination) to an instrumental rule guided by the marginal utility of the cost-benefit 'criminological' considerations. These decisions, following *Leon v. United States,* 468 US 897 (1984), clearly illustrate why such moral/cognitive incapacity will lead to total confusion. In this eclectic 'case law' the *stare decisis* principle has played the useful (but unintended role) of unmasking the intellectual dishonesty required to make the case-to-case differential diagnosis required for the Reagan Court to be able to depart from (the insufficiently articulated) doctrine of the Warren Court.

In other words, the two things required, i.e. the moral commitment to the true meaning of the constitutional prescriptive command and the cognitive capacity of understanding its logical repercussions, are truly inseparable. In fact they generate and regenerate one another in the sense in which only the higher levels of moral/cognitive development are generative of creativity.

G. Conclusion

Democracy as a social, political and legal (e.g., legislative) phenomenon occurs in the present; it is derivative and secondary in the sense that it, too, legally speaking, derives from the basic social contract, the constitution. This contract was established in the past with intent to govern the future of its subject matter, including the

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[60] For details *see* Gordley, *supra* note 1. He explains how and why the atrophy of genuine legal theorizing leads to policy considerations as the preponderant meta-juridical considerations. Clearly, this implies judicial policy making, for example Chief Justice Rehnquist's general preventative impact of the exclusionary rule, due to the lack of the moral/cognitive commitment to the fundamental and prescriptive nature of the privilege against self-incrimination. *Supra* note 35

[61] *People v. Briggs,* 709 P2d 911, Colorado Supreme Court 1985. (Opinion by Justice Neighbors.) The Colorado Supreme Court, at least, seems to have adopted the doctrine.

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present. In this sense the constitution is a legal phenomenon *par excellence* no different from any other elementary contract.

It follows logically that the future binding nature of the constitution *qua* long-term contract requires continuous interpretation of the past form governing the present substance and requires a forum, i.e., an instance authorized to perform this interpretation.

Two questions remain. The first concerns the method, i.e., the extent and the modus in which the past form will bind the future content: 'In what way should the open-ended provisions of the constitution, derived from the past, bind the present decisions of the courts?'. The second question is: 'Why is the authority of those who make constitutional decisions, especially in view of the fact that their function is to limit the (excesses of) democracy, i.e., the extent of legislative arbitrariness, the majoritarian prevalence etc., not simply illegitimate?'.

The question of fidelity to the letter and to the spirit of the open-textured constitutional provisions is indisputably a matter of erudition and creative intelligence because constitution is in reality the tip of a vast hermeneutic spiral of civilizational proportions and it is a matter of sincerity and honesty of the judges. *Nihil novi sub sole* since, methodologically, these questions are since Roman law[62] really just high-class replicas of the legitimacy of the interpretation of the substance (*causa*) and form of every contract. But while the constitution is the quintessential legal contract in its form, in its substance the constitutional provisions, inevitably prescriptive and open-textured as they must be, since they are the cultural succus of civilization formulated in legal terms, do not lend themselves to reductively logical and simply teleological interpretation. If the constitution says that the church and the state are separate, for example, this is not a one-dimensional logical major premise; it is a principle derived from the painful historical experience, a vast correction of the course of Western civilization as established at the time of Enlightenment and the French Revolution of 1789 on the one hand and a practical question if the issue be brought before the court as to whether the theological school can be a member of the state-financed university on the other hand. Clearly, the judge who has not read Voltaire will differ in his opinion from the judge who knows the factual origins of his adage *Ecraséz l'infâme!*[63]

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[62] As the famous German Romanist (Roman Law scholar) Schultz has said, one can have in the legal system either perfect laws (logically watertight and yielding one correct answer to every question) or perfect (perfectly honest and perfectly intelligent) judges. If one could have the latter one would not need the former. Thus, the more open-ended, open-textured and prescriptive the long-term rules to be interpreted by the judges, the greater the need for their honesty and intelligence.

[63] If the supreme judges derive their authority from their ability to discern the true meaning of the constitution *qua* civilizational essence and if the constitution as a civilizational contract limits the power of all three branches of power, then it would follow that their nomination ought not to be the result of the usual, politically tainted democratic process, whose excesses the constitution-interpreting judge is to limit in the first place. If such judges were only to arbitrate in the antagonisms between the three branches of power, one could

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The *differentia specifica* of the constitution *qua* contract is that it does not derive its sanction from the state as it is. On the contrary, at least in the long run it is the state itself, this is the essence of the rule of law, which derives its authority (legitimacy) from the constitutional limitations placed on the reasonableness of its own exercise of power. It is empirically clear, and the matter for historians and political scientists to ascertain to what extent this is so, that the consistent rule of law will do just that. The functional finality of the decisions of the courts interpreting the constitution, then, is the ultimate manifestation and the ultimate test of the true rule of law.

The question, too, of the legitimacy of the power of the supreme judges interpreting the constitution is a question subordinate to the first one. They should be appointed and their power and authority should derive directly from the authority of the contract they interpret. This is clearly not an ordinary democratic mandate, especially since its purpose is to offset the excesses of the majoritarian (legislative) politics. But in the absence of a meritocratic criterion of selection, ensuring that the judge's mandate be substantively in function of the constitution *qua* past contract binding on the present political life, the nomination of the judges should be 'democratic' yet heavily invested with the professional judgment concerning their honesty (sincerity) and understanding.[64]

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contd.
propose that they be nominated, as in arbitration, by the prospective parties to these conflicts. But this is clearly not the only aspect of constitutional judicial review. Anthropologically and historically the situation reminds us of the fact that every culture appointed its priests whose authority derived not from the profane realm of power struggle but rather from the substance of what they were presumably interpreting. But while this is apparently a self-referential situation in blatant contradiction to democratic conventional wisdom to which all values are relative, the empirical fact remains that the position of these judges in the political context of the state is in the above sense 'self-referential' and that the actual authority of the court interpreting the constitution rests on its moral reputation. To paraphrase an American writer, 'thus a process might be set in motion to whose culmination in an ultimate broader judicial judgment, at once widely acceptable and morally elevating, we might look in the calculable future'. *See* Bickel, *The Least Dangerous Branch, The Supreme Court at the Bar of Politics* (Bobbs-Merrill, Indianapolis, New York, 1962), at p. 243. However, owing precisely to the political nature of the appointment of the Supreme Court justices in the United States, i.e., due to what the Reagan appointees have so far done to constitutional law in America, this paraphrase sounds much less prophetic now than the original did in 1962!

[64] For the (s)election of the Supreme Court judges in a unified jurisdiction in which all the lower courts, too, have the power of constitutional judicial review, as in the United States, it is somewhat easier to adhere to the above substantive test criteria of selection. These judges, if nominated by the President to become justices of the Supreme Court, have their entire previous judicial record to show as an indication of their ability to tackle the full constitutional dimension of issues, as was, for example, clearly demonstrated in the non-election of Justice Borke. In continental European jurisdictions, however, where the regular courts practically never tackle the constitutional dimension of cases before them, this substantive test is not available. Moreover, if they bring their formalistic baggage to the constitutional court, the results are often absurd.