doispontos:
Revista dos Departamentos de Filosofia da Universidade Federal do Paraná e da Universidade Federal de São Carlos

Frankenstein and the moral vanguard: From the empire of law to the dominion of the judiciary*

Alessandro Pinzani
Universidade Federal de Santa Catarina – UFSC
alepinzani@gmail.com

Abstract: This paper offers some considerations about the so-called constitutionalism of effectiveness or neoconstitutionalism, however limiting itself to discussing its theoretical aspects, instead of analyzing concrete cases. First, it briefly presents the main principles of neoconstitutionalism, particularly in the formulation of Luis Prieto Sanchís; then, it presents some considerations based on the observations of some of its critics, particularly Juan García Amado. The arguments of these two authors are complemented by some observations by the author and by other authors, who insist on relevant aspects for our discussion.

Keywords: neoconstitutionalism; constitutionalism of effectiveness; judicial activism; Prieto Sanchis; García Amado; constitutional courts.

*This article was translated by Renata Guerra, doctoral student in Philosophy at the Universidade de São Paulo. renataguerra@usp.br

In this article, I would like to make some considerations on a phenomenon that is among the most discussed in the last decades and that has been defined in various ways, some of which are almost derogatory (decisionism or judicial activism), while others are more neutral or even positive (constitutionalism of effectiveness or *neoconstitutionalism*—a term that indicates not only a legal theory but a judicial praxis). Since this is indeed a phenomenon already widely debated, I will limit myself to a few considerations that, however marginal they may be from the point of view of legal theory and practice, have a certain relevance from the perspective of political philosophy. Therefore, I will limit myself to discussing theories and will not analyze concrete cases, although I may use concrete examples occasionally. My preference for discussing a theory instead of carrying out a diagnosis of the present time is because, on the one hand, there have already been authors who have taken on this task and, on the other hand, the circumstance that the theory in question, in my view, played a fundamental role in the attitudes held by a significant part of Brazilian judiciary in recent years, having been used by ministers of the Brazilian Supreme Court to justify some crucial decisions, such as the one on President Lula's request for a writ of *habeas corpus*.

First, I will briefly present what, in my view, are the core principles of neoconstitutionalism, and then make a few remarks based on observations made by some of its critics. Among the numerous formulations of neoconstitutionalist positions (Comanducci, Barroso, Zagrebelsky, Carbonell), I draw on that offered by Luis Prieto Sanchís, which gave rise to an interesting debate with Juan García Amado (CARBONELL, 2007). Thus, in a brief analysis of both positions, we will be able to understand what is at stake. At the same time, I will complement the thesis of the two Spanish authors by some observations of mine and of other authors who insist on important aspects of our discussion.

1) What is neoconstitutionalism?

The concept of a constitution is disputed as much as any political concept. The very jurisdictional activity depends directly on how judges understand it. For that reason, it is problematic to consider that activity as if it represented a unified phenomenon or as if it were an action that obeyed a single intention, i.e., as if there were a single subject called "the judiciary". In the last decades, however, there has been the prevalence in Brazil of a certain way of understanding the action of judges, which has found its most robust theoretical basis in neoconstitutionalism. Even though this legal theory (and practice) is not the only one, nor even the most widespread in the Brazilian judicial sphere, it seems to me that it encompasses all the aspects that have most strikingly characterized the activity of Brazilian judges who have tried to free themselves from the reins imposed on them by a narrow positivist reading, which was dominant for a long time in Brazil.

However, before discussing the core features of neoconstitutionalism, it is worth taking into consideration the different ways of thinking about the concept of constitution itself. For this, I will turn to a neoconstitutionalist author, precisely to better comprehend what this theory understands by this term. The author in question is Paolo Comanducci. He identifies four models, that is, four ways to conceive what a constitution is; each one of them corresponds to a different mode of thinking about the judiciary action and the activity of constitutionality control, but I will not deal with that here.

The four models distinguish themselves along two central issues: the constitution can be seen as order or as a norm; the model can be descriptive or axiological. This results in the following four possibilities:

Model type Constitution as	Descriptive	Axiological
Order	Descriptive model of the constitution as order	Axiological model of the constitution as order
Norm	Descriptive model of the constitution as norm	Axiological model of the constitution as norm

In the descriptive model of the constitution as order, the constitution is seen as a set of social phenomena that defines the fundamental structure of society and the State without possessing any intrinsic value or capacity to generate norms. It expresses how the public powers are organized and what are their relations with citizens and civil society actors. In Michel Troper's words (quoted in COMANDUCCI, 2007, p. 49), the constitution does not belong to the world of *sollen* (that which ought to be), but to that of *sein* (that which is).

In the axiological model of the constitution as a norm, the social phenomena in question possess intrinsic value and generate norms. Comanducci cites as examples Carl Schmitt, for whom the constitution consists of a "total decision about the species and form of the political union" (quoted in COMANDUCCI, 2007, p. 46), and Constantino Mortati, who introduced the idea of material constitution to distinguish it from the positivist formal one. In this view, the social order possesses an intrinsic normativity, which is mirrored in its norm-producing activity. The constitution expresses the culture and *values* of a people. This is the typical view of traditionalists or counterrevolutionary authors such as Burke or de Maistre, but also of Nazi jurists, who in their anti-positivist zeal grounded their decision, which often ran against the existing laws and the Weimar constitution, on supra-positive moral principles such as the 'sound ethical character' of the German people (cf. PAUER-STUDER & FINK, 2014; MAUS, 2018).

The descriptive model of the constitution as a norm takes the constitution as a specific normative text, the so-called formal constitution: a set of norms that regulates the juridical production of laws or organizes the political institutions, etc. This is perhaps the most widely used model in constitutional literature, particularly, but not exclusively, by legal positivism in its different currents, from Kelsen to Hart.

The axiological model of the constitution is characteristic, among others, of neoconstitutionalism. In this model, "all legislation is understood as a realization of the constitution and is interpreted in the light of the constitution" (COMANDUCCI, 2007, p. 52). Above all, however, in this model the distinction between *sein* and *sollen*, between what is and what ought to be, is weakened to the point of disappearing.

To better understand this fourth model, which is what interests us, let us consider the following theses that, according to Carlos Bernal Pulido's (2007, p. 290) reconstruction, characterize neoconstitutionalism in Luis Prieto Sanchís' version:

1. The constitution is material, that is, it has a "dense substantive content" (PRIETO SANCHÍS, 2007, p. 213), which expresses itself primarily, *but not exclusively*, in the linguistic content of the constitutional text. In short, it is not a text that limits itself to establishing formal rules for the legitimate production of positive law, as in the descriptive model of the constitution as a norm.
2. The constitution is guaranteed, that is, it is protected by judges. In some countries, this occurs through a specific court, such as the German Federal Constitutional Court; in others, through a court that does not only performs the activity of constitutionality control but serves as the highest judicial instance; in some others, by the action of judges at every decision-making levels, including the lowest in the judicial hierarchy, such as the courts of the first instance; finally, in other countries, the constitution is guaranteed by the joined action of the

judiciary and legislative powers, or by the legislature itself, as in the United Kingdom. This plurality of options hampers the elaboration of a unified theory and points to the pragmatic character of neoconstitutionalism. It is worth noting that the countries in which constitutional control is expected to be exercised by a specific judiciary body are generally those which have emerged from a totalitarian or dictatorial experience, such as Italy, Germany, or Brazil. The incorporation of this kind of control into the constitutional text, however, was primarily conceived to defend the fundamental rights of individuals against possible State excesses, that is, as a "passive" protective task, not as an "active" task of defining, implementing, or expanding the existing ones. The Italian Constitutional Court, for example, is much less "active" or proactive than the Brazilian Supreme Court.

3. The constitution is omnipresent and spreads throughout the legal system: "there are no exempt spaces for the legislator because all spaces appear under regulation" (PRIETO SANCHÍS, 2007, p. 218). Using Riccardo Guastini's (2002) expression borrowed by several authors, the constitution is *invasive* or meddlesome, because it invades several spheres (social, political, economic, etc.). Or, to paraphrase a classic dictum, *quod non est in constitutione, non est in mundo* (JESTAEDT, 2011, p. 87).

4. The constitution establishes a principle-based regulation and, therefore, admits the possibility of conflicts or collisions among its norms. It produces, in short, a plurality of "constitutionally possible worlds" (J. J. Moreso, quoted in PRIETO SANCHÍS, 2007, p. 218). For that reason, the constitution is considered a living, continuously changing thing.

5. The constitution is made effective through weighting, which makes it possible to establish a hierarchy among principles that come into conflict.

6. This conception rejects the "geographical" model of the relationship between constitution and legislation, which claims that there is a clear-cut boundary between the two: either a case is legal (regulated by existing laws and to be judged by ordinary courts), or it is constitutional (not explicitly regulated by existing laws and to be evaluated by specific courts). Instead, this conception defends an argumentative model of the relationship between constitution and legislation whereby "there is no juridical problem that cannot be constitutionalized, which means that the existence of a political world separate or immune from constitutional influence must be ruled out" (PRIETO SANCHÍS, 2007, p. 221).

Another essential point of neoconstitutionalism, stressed by Prieto Sanchís, concerns the transformative character of law, which he sees as a way to achieve a "transformative constitution that intends to significantly condition the decision of the majority, but whose fundamental role does not belong to the legislator, but to the judges" (PRIETO SANCHÍS, 2003, p. 127). In the words of Brazilian neoconstitutionalist Eduardo Moreira, this implies a "greater judicial presence in the place of the legislators' autonomy" (MOREIRA, 2008, p. 38). Therefore, "we have gone from a law in which norms dictate what to do to a law in which principles indicate what can be done" (MOREIRA, 2008, p. 18). Neoconstitutionalism is thus "a theory of law concerned with transforming what should not be and with the claim to correct what rationally can be perfected (the idea of 'what can be done')" (ibid.) or even with the claim to achieve a specific intended result, although it is not always clear by whom it was intended: whether by the constitution itself or by the judges. On this point, neoconstitutionalism distances itself from Dworkin's position, which is considered one of its guides. For Dworkin (2010), the judiciary power should deal exclusively with matters of principle that arise in the context of a specific problem, leaving teleological issues, i.e., questions of broader goals, to be resolved by governing bodies through public policies. When the judiciary claims for itself the competence to carry out more general goals (which may range from lessening social injustice to fighting corruption), it would be overstepping its competence. Neoconstitutionalists, however, might reply that sometimes the goals are explicitly stated in the constitutional text, as in the case of the Brazilian constitution promulgated in 1988, which in the preamble and some articles claims to aspire to the creation of a more just society.

Finally, neoconstitutionalism argues that there is something like a "surplus in law", to borrow an expression used by the German Federal Constitutional Court: "The law is not identical with the totality of the written law. Under certain circumstances, there may be a 'surplus' in law [*Mehr am Recht*] concerning the positive statutes of State power, which has its source in the constitutional juridical order as a totality of meaning and may serve as a corrective for the written law [...]. The task of the court may require it to find and implement in its decisions through an act of evaluative knowledge, in which there is no lack of decisionist elements [as Schmitt already stated, as we have seen—A. P.], values which are immanent to

the constitutional legal order, but which have not come to expression in the texts of written laws or have only been so partially" (BVerfGE 34, 269ff. and 287; original text quoted in MAUS, 2018, p. 118).

2) García Amado's criticism of neoconstitutionalism

Wewill now discuss some of the criticisms directed at neoconstitutionalism, in particular those formulated by García Amado. As I have already stated, I intend not only to present such criticism, but also to expand on them. They can be collected into three thematic groups that concern, respectively: a) the omnipresence of the constitution or its invasive character, b) the antipolitical and antidemocratic character of neoconstitutionalism, and c) the metaphysical character of the constitution, i.e., the abolition of the separation between law and ethics.

a) *The omnipresence of the constitution*

García Amado's first criticism of Prieto Sanchís is that he is confusing what the constitution states with what its interpreters say it says. The constitution merely states what its words say. Accordingly, there are only three categories of things: "a) things that the constitution states clearly to demand, prohibit, or allow them (for example: that the death penalty is prohibited in peacetime, as article 15 of the Spanish Constitution states); b) things about which it does not state absolutely anything (for example: how many domestic animals one can have in theirapartment); c) things about which we do not know whether it states something or not and, eventually, *what* it states, because it depends on how we interpret its terms and statements (for example: whether an unmarried or homosexual steady couple is 'family' or not, therefore deserving protection by public authorities as required by article 39 of the Spanish Constitution" (GARCÍA AMADO, 2007, p. 238).

Prieto Sanchís or any other neoconstitutionalist could retort that, since the constitution is omnipresent, it regulates also the kind of issues presented in b) and c), even if it does not do so explicitly (cf. BERNAL PULIDO, 2007, p. 292). It is the task of judges to find in it the principles that make explicit the juridical norms that regulate such issues. It is precisely this thesis that García Amado (2007, p. 238) objects to when he raises the question of "how a concrete mandate might be present in a constitutional statement that is semantically indeterminate". According to him, who holds a positivist view, there is nothing more in the constitution than what is already contained in its words. This does not include pre-linguistics contents (for example, values or principles that are not explicitly mentioned in the constitutional text), as the neoconstitutionalists think. These end up projecting into the constitution values and principles that its authors never thought of.

On the one hand, this projection can make sense, particularly when it comes to constitutional texts written in other times, as in the case of the US Federal Constitution of 1787. The risk embedded in an "originalist" reading of such texts (whether in the textualist or intentionalist sense) is that of condemning present generations to organizing their juridical order according to values they deem to be outdated or inadequate to their demands. It would be the ruling of the dead over the living, of which Thomas Jefferson had already spoken (cf. CONSANI & PINZANI, 2013). Jefferson thought of much narrower time lapses, namely, of the space that separates one generation from the next: for him it would have been impossible to think of the issue in terms of centuries.

On the other hand, the risk of originalism is limited to a few constitutions and it is not as relevant for more recent constitutions such as the present Brazilian one. Besides that, when there is a conflict of values—on the definition of what is a family, for example—, it is always possible to amend the original text by legislative means, thereby introducing an explicit reference to a value or principle that was not

present in it, or to a value or principle that was present, but in a form considered unacceptable today. After all, the constitutional text is not a sacred text (the 1988 Brazilian Constitution has already been amended more than a hundred times). Neoconstitutionalists seem to wobble between the view of the constitution as a living being, as an open text that is susceptible to modification, on the one hand, and on the other hand, the tendency to stylize themselves as the only trustworthy and authorized interpreters of the constitutional texts, which in this case has a closed character. This is why Ingeborg Maus, taking up an expression by Jürgen Seifert, speaks of a "constitutional theology", in which the constitutional text is seen as a sacred text along the lines of the Bible or the Koran from which expert scholars "directly derive the right values and behaviors" (MAUS, 2018, p. 29). In sum, according to the idea of the omnipresence of the constitution, every juridical case would already be foreseen in the constitution, explicitly or implicitly; it is up to its interpreters (the judges) to bring out the norm or principle (written or supra-positive) that allows it to be settled once and for all.

b) *The antipolitical and antidemocratic character of neoconstitutionalism*

García Amado's second critique is directed against the antipolitical and antidemocratic character of neoconstitutionalism: if the constitution leaves no free spaces and if such pervasive regulation, when not explicit, depends on the judges' interpretation of the constitutional texts and their weighting of implicit values, then, concludes García Amado, "there will be no room left for society to act politically, and we will all become subjects to a supreme political and non-democratic body, namely, to the judiciary (quoted in BERNAL PULIDO, 2007, p. 294). The judiciary power, and not the democratically elected parliament, would be the actual legislator.

To understand why García Amado attributes anti*political* character to neoconstitutionalism, we must remember that politics means first and foremost conflict and that what characterizes democratic politics is the peaceful pursuit of an agreement between diverging interests. This happens without affirming the "truth" or "rightness" of some interests against the supposed false or unjust character of others. Democratic politics does not deny the non-composable divergence of interests; rather, it feeds on such divergence and only tries to prevent the conflict from becoming destructive of the social fabric. Neoconstitutionalism, on the contrary, seeks to create social unity and harmony between interests, both of which do not and cannot exist in reality. In trying to harmonize what is with what ought to be, neoconstitutionalism ends up sacrificing the first—or rather: it ends up imposing a unilateral resolution on the complex conflicts of social reality; Therefore, it ends up favoring one of the competing interests, which then becomes the winner in the conflict and is considered to be the only legitimate one. In the neoconstitutionalist totalizing logic, according to which law must be understood in a broad sense, i.e., including presumably objective moral principles, for every conflict there is namely one and only one resolution, which must be found either directly in the constitutional text or by weighting principles that may not be explicitly present in it. In line with this logic, in case of conflict between diverging interests, only the reasons given by one of the many sides can be taken to be fully justified and must therefore prevail. Thus, the judicial resolution of conflicts through the ascription of "reason" to one of the parties prevails over the formation of political consensus through the agreement of conflicting interests. The judicialization of politics does not represent a new way of doing politics, but the death of politics itself.

In this process, the judge becomes a kind of enlightened despot who imposes both on the other powers and on society a social peace that only he is supposed to see clearly. The figure of the judge becomes thus central—not only for his position within the system of checks and balances but also because he represents the moral consciousness of society. This presupposes he possesses a moral personality that is superior to that of other institutional representatives, particularly the members of the legislative and the executive power. An interesting inversion takes place here: it is not his superbly righteous personality that endows

him with the label of the moral consciousness of society; rather, it is his position as a judge that elevates him above other representatives and vouches for the moral integrity of his person, regardless of whether this is true or not. He is morally righteous because he is a judge, not a judge because he is particularly morally righteous. I will return to this point when discussing the relationship between law and morality in neoconstitutionalism.

The antipolitical character of neoconstitutionalism manifests itself specifically in the priority he ascribes to the weighting method as an instrument for resolving juridical conflicts. According to García Amado (1996/97, p. 71), weighting is an irrational procedure because it lacks a clear structure and there is no weighting parameter, i.e., "an intersubjective criterion for determining when a principle is to be preferred over another in a concrete case" (BERNAL POLIDO, 2007, p. 296). The weighting ends up providing an "appearance of legitimacy to a judicial activism" that breaches "legislators' competencies and ordinary jurisdiction and is incompatible with both democracy and the rule of law" (BERNAL POLIDO 2007, p. 296). Ernst-Wolfgang Böckenförde, who served as judge of the German Federal Constitutional Court, stated an analogous idea when he said we are going from one type of State to another, namely, "from the State based on the parliamentary legislative power to a State based on the judiciary power, which is then charged with implementing the constitution" (BÖCKENFÖRDE, 1981, p. 402).

This raises a legitimation problem that does not exist in the parliamentary procedures. The problem has two aspects. The first and more obvious has to do with the fact that members of parliament are democratically elected, whereas court judges who have the power of constitutional control are not. Members of constitutional court may even be appointed by elected political bodies—a president, senate, or parliament—and therefore their appointment can be seen as an indirect expression of the political will of the majority of citizens. But this does not apply to judges whose activity pertains to lower levels and who, in some legal systems (such as the Brazilian one), can call into question the constitutional character of a law. Even when judges are appointed by elected political bodies, their positions are normally for life and not revocable. This arrangement, which is intended to make them immune from political pressures and to guarantee the independence of their judgments, ends up making them, at the same time, free of any accountability to the sovereign people, who cannot replace them if they do not like their decision, as in the case with governments and parliaments. While elected politicians take full responsibility for their decisions and can thus be punished by the citizens, judges are never held accountable for the outcome of their weightings, despite the high economic and social costs they may have as consequence. The only ones who could reconsider such decisions are the elected representatives, i.e., the parliament: either by issuing a law that regulates the matter ruled on by judges in a different manner or by amending the constitution in such a way as to undermine the juridical basis of the decision. Then the problem is that this legislative action can be subjected to the constitutionality control exercised by the judiciary, as it happens in Brazil, giving the last word to the latter. In a way, this reinforces Böckenförde's diagnosis: we have moved from a type of State in which the last word was that of the parliamentary legislator to another type in which it belongs to the judiciary power, which thus becomes the real sovereign (in the traditional sense of *potestas superiorem non recognoscens*). The judiciary ceases to be merely the guarantor of the law, the defender of fundamental rights, and the guardian of the separation of powers inscribed in the constitution. This is what I call the dominion of the judiciary.

One might note that this is not a necessary consequence, since the judiciary power would be acting precisely to guarantee a broader and more radical implementation of the legal protections warranted by the constitutional text. However, this holds for guaranteeism (e.g., in Ferrajoli's version), which does not coincide with neoconstitutionalism. Indeed, neoconstitutionalists are generally prone to guaranteeism because they consider the fundamental rights listed in constitutions as expressions of principles and values that should potentially be applied in each concrete juridical case. Nonetheless, the weighting of principles

can lead a judge to curtail a constitutional right in the name of a value or principle that he deems superior. The presumption of innocence, for example, which is warranted by the 1988 Brazilian constitutional text, may be considered by a neoconstitutionalist judge as a mere principle instead of being seend as a right or a rule. In this way, the corresponding right can be preempted in favor of another principle, such as that of the trust in the legal system, even though this principle is much vaguer and more difficult to define—which reinforces García Amado's observation that there is no such thing as a weighting parameter and that the weighting method risks leading to arbitrary results linked to judges' subjective views on what counts as a principle and on its presumed superiority over other principles. As Ingeborg Maus states: "The limitations of fundamental rights are established in each case by weighting values and always in consideration of the particular circumstances, i.e., in other circumstances they could also be defined differently" (MAUS, 2018, p. 43). Thus, one of the cornerstones of the rule of law, namely, juridical certainty, turns out to be shaken once rules or principles explicitly stated in the constitutional text become objects of weighting by a judge. In this case, written principles might be preempted in favor of unwritten principles.

Against this charge, neoconstitutionalists turn to the idea of defeasibility (cf. MOREIRA, 2008, p. 94): exceptionally, the rule can be defeated without losing its value as a rule. If the judge, in assessing the effects of a rule (for example, the presumption of innocence) concludes that, in the specific case under consideration, the effects are deleterious or infringe one or more principles that he takes to be valuable, then he would be authorized to deem the rule as being "defeated" by such principles, although it would retain its value as a rule for other cases.

Once again, this opens space for arbitrary results, particularly in cases in which judges make their decisions, not in the context of an open debate with other judges, but instead reach their conclusions in isolation (monocratically) and restrict themselves to communicating them to other court members when they read or expound their votes, as happens in the Brazilian Supreme Court. Weighting takes place with the judge himself as the only interlocutor, i.e., without debate with peers. Hence the inevitable impression of discretion, which results from different judges invoking opposing principles or the same ones but inverting their hierarchy as the motive for judges' dissenting votes.

Neoconstitutionalists acknowledge that, though. In Zagrebelsky's words: "discretionality is an unavoidable fact" (2006, p. 6) in judiciary decisions as well as in political ones, and therefore it does not pose a problem. However, this would be true only if discretionary decisions taken by judges could be modified as easily as the equally discretionary decisions taken by governments and parliaments. But, as we know, this does not happen so easily.

The second aspect concerning the already mentioned legitimation problem is less obvious than the first and is connected to the judicial procedure's exclusive character (MÖLLERS, 2011, p. 318 ss.). Judges decide on an individual case hearing only the parties involved, but their decision may affect the entire legal community, all the citizens, without a broad discussion that represents all possible positions, as usually happens in parliaments. This exclusive character manifests itself most clearly in cases in which court judges decide monocratically or, in the case of collegiate decisions, do not even deliberate among themselves, but simply manifest their opinions when making their decision public, as we have seen. Moreover, a political decision can be revised, e.g., in the event of a change in the legislative majority. A judicial decision reached based on principled arguments that are supposed to be rational is unlikely to be modified. For if it were, this would provoke a crisis of confidence in the ability of the court to rationally ground its decisions or affects its impartiality and good faith.

These legitimation problems point to the anti-democratic character of neoconstitutionalism that, as we shall see, some of its proponents not only acknowledge but also explicitly defend. Mainly, however, they

reveal that neoconstitutionalism proceeds from a view of social conflicts merely as juridical conflicts or as conflicts between different moral principles—therefore conflicts that could be solved through a univocal judicial decision. Once again: if one of the parties comes out as the winner of the legal procedure, if its interests are recognized as those which are the only ones that have sufficient juridical and moral ground, then the defeated interests are declared *eo ipso* legally and morally illegitimate—as opposed to what occurs when the resolution of the conflict is political and takes place through the legislative activity of parliament. Social conflict becomes in the former case a zero-sum game in which one party wins and the other loses, without the possibility of a mediation agreement, in which the parties move closer to each other. This changes if one resorts to arbitrage or to other alternative dispute resolution methods that nonetheless seem to be to run against neoconstitutionalist intentions and insights, since they rather signal a tendency to treat all legal issues as non-constitutional law matters, but instead move them into private law or Tort Law—a tendency which may, in turn, result in the use of law as an instrument to oppose democratically reached decisions (as it is well known, the term *lawfare* was coined to indicate precisely this use).

c) *The metaphysical constitution and the end of the separation between law and ethics*

Finally, going back to García Amado's critique of Prieto Sanchís, by presupposing that the constitution forms a "whole and coherent axiological system that underlies the constitutional text and is independent of it", neoconstitutionalism takes the constitution as a metaphysical entity that "would prescribe a single answer for every possible case", which makes the positive constitutional text superfluous (BERNAL POLIDO, 2007, p. 97). The risk, then, is that of the separation between the idea of a universal constitution and the specific constitutional text—an idea that reveals itself in the increasing tendency of constitutional courts to draw on decisions reached by analogous courts in other countries, which have different constitutions. This phenomenon has even led the United States to emanate a bill (the Constitution Restoration Act) that would prohibit the use by US judges of juridical documents, laws, and rulings originated in other countries.

From this point of view, what critics of neoconstitutionalism consider to be extremely problematic is the inclusion of moral principles into law, as this would result in the disappearance of free spaces for legal regulation in a stronger sense than what already happened with the affirmation of the omnipresence of the constitution (MAUS, 2018, p. 15). Since any and every sphere of human action can be subject to moral principles, if these were included in the law, *everything* becomes a possible object of juridical regulation. As an extreme example, I recall the case of a judge in Rio Grande do Sul who condemned a father for not having loved his son enough, as if paternal love could be subjected to juridical norms and coercion (the father was ordered to pay compensation to his son). Thus, the judiciary becomes the supreme moral instance of society and therefore places itself once again above all other public powers. To borrow Maus' (2008) expression, the judiciary has turned into a kind of society's superego, or, to use Posner's (2005, p. 99) derogatory words, the judges come to see themselves as the "moral vanguard" of society—an expression echoed by the best known Brazilian neoconstitutionalist, Luis Roberto Barroso, when he uses—affirmatively!—the term "enlightened vanguard" (BARROSO, 2015, p. 42).

Neoconstitutionalism advocates might claim that the principles and values that constitute what German Federal Constitutional Court calls "surplus in law" or supra-positive law are not universal and absolute, but are peculiar to a specific society, or rather to a specific legal and political community. The problem, however, consists in identifying such values. What is the relationship between the moral convictions that are empirically dominant in a given society, on the one hand, and judges' moral convictions, on the other hand?

We know this is the *punctum dolens* of theories that hold the inclusion of moral principles in law, as in the case of Dworkin's theory. I will give an example: adoption rights for homosexual couples. If the Brazilian

Supreme Court were called upon to judge on the matter and its judges decided to settle the issue based on a purely principled weighting, drawing on moral principles, would they invoke universal principles such as the inadmissibility of discrimination based on sexual orientation? Or would they rather guide themselves by the moral sentiment of the majority in Brazil, which would probably consider this form of adoption unacceptable? Do we obey universal moral principles or local moral convictions, practical reason or the *sensus moralis communis* of a certain legal community? If judges opt for the latter, they would be defending an axiological model of the constitution as order—the classic model for conservative or reactionary thinkers, who uphold the view that social, political, and moral *status quo* is an expression of national culture, which then possesses an intrinsic value (fundamentally, the argument with which the legitimacy of placing Christian symbols in public spaces such as classrooms and courtrooms has been defended in several European countries). If our judges were to opt for the first possibility and guide themselves by universal principles, then they would be defending the axiological model of the constitution as a norm, which is typical of neoconstitutionalism, but at the price of distancing themselves from society's dominant moral opinion. This is not necessarily bad, especially in cases in which what is at stake is the expansion of rights to individuals who have so far been excluded from them. At the same time, however, this option would reinforce the idea that judges seek an antidemocratic solution by adopting an antipolitical attitude and above all elevating themselves as the supreme moral authority for society.

The moral superiority attached to judges seems to be an inevitable assumption of neoconstitutionalism. Referring to constitutional justice, Gustavo Zagrebelsky (2006, p. 6) states the following: "its strikingly supra-structural nature, an expression of demands that separate themselves from immediate popular sentiment and the interpretation that political bodies make of it, always exposes the courts to contestations regarding the legitimacy of their decisions, composition, and even existence, in case of strong contrast". What interests me is that Zagrebelsky positively stresses the gap between popular sentiment and judges' decisions. Zagrebelsky, who was—it is worth remembering—a member and president of the Italian Constitutional Court, defends indirectly the need to maintain such a gap when he points to the republican and non-democratic character of constitutions, including the Italian one of 1948. What distinguishes a republic from a democracy is that, in the former, people's decision-making power is not unlimited. In Robert Jackson's words in West Virginia Board of Education vs. Barnette (1943), quoted by Zagrebelsky, "the authentic purpose of a constitution [...] is to remove certain issues from the vicissitudes of political controversies [one senses here a certain antipolitical polemic—A. P.], to place them beyond the reach of majorities and public officials, to sanction them as legal principles that courts can apply. Each one's right to life, liberty, property, freedom of speech and press, freedom of worship and assembly, and all other fundamental rights cannot be put to vote; these do not depend on the success of any vote" (quoted in ZAGREBELSKY 2006, p. 11). From this perspective, Zagrebelsky claims that "the constitutional justice is a republican, not a democratic function" (ibidem).

In fact, these claims could also be shared by those who hold the descriptive model of the constitution as a norm and even of a descriptive model of the constitution as order, since after all, most—if not the totality—of the constitutions drafted in the second post-war period explicitly remove fundamental individual rights from majoritarian decisions, even though this does not always happen automatically: instituting a referendum to abolish gay marriage or to prevent that it becomes legal, as has happened in several countries in recent years, is a sad example that not all rights are defended against the will of the majority and that not all citizens are considered legally equal. On this point, neoconstitutionalists have an easy game in pointing to the need to remove decisions concerning fundamental rights from the popular will and assign them instead to the courts.

The problem is that this solution does not guarantee that the same discrimination will not take place in court. After all, a decision reached in constitutional courts is not always unanimous. Particularly in

politically and morally controversial cases, the decision is taken by a majority, which is more often than not a very narrow majority: depending on the number of judges, it results in tight outcomes like 5 to 4, 6 to 5, etc. In these cases, the impression is that the court has acted as a small parliament, as Zagrebelsky acknowledges, and that judges' ethical and political individual convictions outweighed the republican concerns for the defense of individual rights. There are several historical examples: I will only mention the different decisions taken by the US Supreme Court regarding the legitimacy of slavery or racial segregation laws. Zagrebelsky (2006, p. 12) tries to convince us that there would still be a difference between parliament and constitutional court: "discretionality as an expression of an imposing will, which is proper to political bodies, is different from the 'republican' discretionality, directed to the consensus over the constitution". I admit, however, that I cannot see the distinction very clearly, particularly if one takes into account decisions taken by various constitutional courts, including the Brazilian one—decisions that seem to reflect judges' personal political and moral positions more than a genuine republican interest.

The problem with the neoconstitutionalist model is that it could work only if we guaranteed that judges were all like Dworkin's Judge Hercules and could *de facto* reach their decisions in an absolutely impartial manner, taking into account the relevant moral principles (assuming they can identify them in the first place). However, empirical reality presents us with a very different picture of the situation. The supposed moralization of law (which, as we have seen, is already the problem) hides a politicization of the judiciary, which is even more problematic. More and more frequently, the impression arises that judges make purely political decisions, and they do so by entrenching themselves behind moral principles arbitrarily chosen from a myriad of equally valid principles that could have been equally called into question to justify different or even opposite decisions. We are facing an unprecedented form of lawfare: the constitution itself is invoked to overrun democratically taken decisions, to remove democratically elected officials—despite the lack of legal grounds for doing so—, or to take away fundamental due process rights for some citizens while they are guaranteed for others. These political decisions are presented to us as purely juridical decisions or, worse, as morally grounded decisions, taken by individuals who consider themselves to be the moral vanguard of the country.

The constitution has created the judiciary power to defend itself against possible authoritarian attacks. The problem is that the judiciary seems to have become Frankenstein's creature: created with the best intentions, but doomed to cause misfortune and ultimately the destruction of its creator.

Bibliographical References

BARROSO, L. R. 2015. A razão sem voto. O Supremo Tribunal Federal e o governo da maioria. *Revista Brasileira de Políticas Públicas*, 5, 24-50.

BERNAL PULIDO, C. 2007. Refutación y defensa del neoconstitucionalismo. In: CARBONELL, M. (ed.). *Teoría del neoconstitucionalismo. Ensayos escogidos*. Madrid: Trotta, 289-325.

BÖCKENFÖRDE, E.-W. 1981. *Gesetz und gesetzgebende Gewalt. Von den Anfängen der deutschen Staatsrechtslehre bis zur Höhe des staatsrechtlichen Positivismus*. 2. Aufgabe. Berlin: Duncker & Humblot.

COMANDUCCI, P. 2007. Modelos e interpretación de la constitución. In: CARBONELL, M. (ed.). *Teoría del neoconstitucionalismo. Ensayos escogidos*. Madrid: Trotta, 41-67.

CONSANI, C. F.; PINZANI, A. 2013. Jefferson vs. Madison Revised. *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics. Bd. 21: Das Rechtsstaatsprinzip / The Rule of Law-Principle*, 111-132.

DWORKIN, R. 2010. *Levando os direitos a sério*. 3ª edição. São Paulo: Martins Fontes.

GARCÍA AMADO, J. A. 1996/97. ¿Ductilidad del derecho o exaltación del juez? Defensa de la ley frente a (otros) valores y principios. *Archivo de Filosofía del Derecho*, XIII-XIV, 65-85.

GARCÍA AMADO, J. A. 2007. Derechos y pretextos. Elementos de crítica del neoconstitucionalismo. In: CARBONELL, M. (ed.). *Teoría del neoconstitucionalismo. Ensayos escogidos*. Madrid: Trotta, 237-264.

GUASTINI R. 2002. La "costituzionalizzazione" dell'ordinamento giuridico. In: MAZZARESE, T. (ed.), *Neocostituzionalismo e tutela (sovra)nazionale dei diritti fondamentali*. Torino: Giappichelli, 147-172.

JESTAEDT, M. 2011. Phänomen Bundesverfassungsgericht. Was das Gericht zu dem macht, was es ist. In: JESTAEDT, M.; LEPSIUS, O.; MÖLLERS, Ch.; SCHÖNBERGER, Ch. *Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht*. Berlin: Suhrkamp, 77-157.

MAUS, I. 2018. *Justiz als gesellschaftliches Über-Ich. Zur Position der Rechtsprechung in der Demokratie*. Berlin: Suhrkamp.

MÖLLERS, Ch. 2011. Legalität, Legitimität und Legitimation des Bundesverfasssungsgerichts. In: JESTAEDT, M.; LEPSIUS, O.; MÖLLERS, Ch.; SCHÖNBERGER, Ch.. *Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht*. Berlin: Suhrkamp, 281-422.

MOREIRA, E. R. 2008. *Neoconstitucionalismo. A invasão da constituição*. São Paolo: Método.

PAUER-STUDER, H.; FINK, J. (Hrsg.) 2014. *Rechtfertigungen des Unrechts. Das Rechtsdenken im Nationalsozialismus in Originaltexten*. Berlin: Suhrkamp.

POSNER, R. 2005. The Supreme Court, 2004 Term – Foreword: A Political Court. *Harvard Law Review*, 119, 32-102.

PRIETO SANCHÍS, L. 2003. Neoconstitucionalismo y ponderación judicial. In: CARBONELL, M. (ed.). *Neoconstitucionalismo(s)*. Madrid: Trotta, 123-158.

PRIETO SANCHÍS, L. 2007. El constitucionalismo de los derechos. In: CARBONELL, M. (ed.). *Teoría del neoconstitucionalismo. Ensayos escogidos*. Madrid: Trotta, 213-235.

ZAGREBELSKY, G. 2006. *Le Corti costituzionali, le Costituzioni democratiche, l'interdipendenza e l'indivisibilità dei beni costituzionali*. Discorso pronunciato in Campidoglio per la celebrazione dei 50 anni di attività della Corte costituzionale – Roma, 22 aprile 2006 Acessível em: http://www.astrid-online.it/static/ upload/protected/Zagr/Zagrebelsky_Repubblica_22apr2006.pdf (acessado em 30/04/2020)