**GIORGIO PINO***

# FORMS AND METHODS OF CONSTITUTIONAL INTERPRETATION – ITALIAN STYLE**

ABSTRACT. *This essay will highlight some issues that feature prominently in the Italian debate on constitutional interpretation. To be sure, "constitutional interpretation" is not just a single issue, but rather a cluster of different and tightly interwoven issues, such as: the choice of interpretive canons that best fit the Constitution, the nature of constitutional norms, the relation between constitutional interpretation and statutory interpretation – just to mention a few. I will try to untangle at least some of these issues, and to relate them to the underlying conceptions of the Constitution at work in contemporary Italian legal culture, as well as to similar debates in other countries.*



* Full Professor of Philosophy of Law, Roma Tre University.

** A slightly different version of this essay will appear in V. Barsotti, P. Carozza, M. Cartabia, A. Simoncini (eds.), *Dialogues on Italian Constitutional Justice*, Routledge 2020.

### *1. Constitutional Interpretation in Contemporary Italian Legal Culture*

Constitutional interpretation has received an extensive and extremely sophisticated treatment by Italian scholars. To be sure, legal interpretation *in general* has always been a point of thorough and intense scholarly debate in contemporary Italian legal culture.[1] But constitutional interpretation has attracted additional interest in its own right, in virtue of the fact that it is widely perceived as a *sui generis* kind of legal interpretation, different in character from 'ordinary' (*i.e.*, statutory) interpretation.[2] Moreover, constitutional interpretation has gradually become an extremely pervasive issue. Indeed, at least in the last three decades the Italian legal culture has firmly embraced the idea that constitutional principles may be relevant for any kind of legal question, and may exert their normative force on any branch of the law. The Constitution, as a consequence, steadily appears in the legal reasoning of Italian jurists – constitutional interpretation is business as usual for Italian jurists, judges and academics alike.[3] Moreover, the Italian Constitutional Court, while originally designed by the Constitution to play the role of just a "negative legislator", has gradually evolved also, and prominently, into an "interpretive agency". In other words the Italian Constitutional Court, in addition to issuing declarations of unconstitutionality, pure and simple, consistently produces also "interpretive decisions", which avoid a declaration of unconstitutionality insofar as it is possible to interpret the "suspect" statute in a "constitutionally compatible way".[4]

1 To name just two Italian classics, E. Betti, *Interpretazione della legge e degli atti giuridici (teoria generale e dogmatica)*, Milan, Giuffrè, 1949 (a torch-bearer of the hermeneutic approach to legal interpretation); G. Tarello, *L'interpretazione della legge*, Milan, Giuffrè, 1980 (an outstanding example of analytical and legal realistic jurisprudence). More recent and comprehensive primers to legal interpretation are P. Chiassoni, *Tecnica dell'interpretazione giuridica*, Bologna, Il Mulino, 2007, and R. Guastini, *Interpretare e argomentare*, Milan, Giuffrè, 2011.

2 See L. Paladin, *Le fonti del diritto italiano*, Bologna, Il Mulino, 1996, p. 110 (the Constitution «paves the way for a new theory of interpretation»).

3 Hereinafter, I will use "Constitution" (with a capital C) in order to refer to a particular constitution (such as, and most frequently, the Italian one), and "constitution" (with a lowercase c) in order to refer to the constitution as an abstract object.

4 According to a long-standing doctrine of the ItCC, ordinary judges should not even refer a question of constitutionality, if the suspect statute can be interpreted in a way that is compatible with the Constitution (see *e.g.*, Judgment 356/1996). See V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice*

This essay will highlight some issues that feature prominently in the Italian debate on constitutional interpretation. To be sure, "constitutional interpretation" is not just a single issue, but rather a cluster of different and tightly interwoven issues, such as: the choice of interpretive canons that best fit the Constitution, the nature of constitutional norms, the relation between constitutional interpretation and statutory interpretation – just to mention a few. I will try to untangle at least some of these issues, and to relate them to the underlying conceptions of the Constitution at work in contemporary Italian legal culture, as well as to similar debates in other countries.

## *2. The Nature of Constitutional Norms*

A preliminary issue that needs to be addressed concerns the very the nature of constitutional norms. Are constitutional norms properly *legal* norms, or should they be considered more akin to policy directives or political programs?[5]

### *2.1. Constitutional Norms vs. Constitutional Programs*

This issue has been heatedly debated in the Italian legal culture especially during the hiatus between the entry into force of the Republican Constitution (1948), and the first ruling of the Italian Constitutional Court (1956). Back then some scholars, as well as the Supreme Court (*Corte di Cassazione*), maintained that substantial parts of the Constitution should be understood as "programs" or "policies" rather than as full-blown, mandatory legal norms. These would include the "Bill of Rights" part of the Constitution (Articles 1 to 54) almost in its entirety, and possibly also some articles of the "Frame of Government" part. Under this view, arguably shared even by the Framers themselves, the Constitution is to be regarded more as a *political* document, rather than a properly *legal* one. It does not really qualify as *law*, but rather as a sort of political

*in Global Context*, Oxford, Oxford University Press, 2016, pp. 82-91.

5 I use "policy" here in roughly the sense stipulated by R. Dworkin, *Taking Rights Seriously*, London, Duckworth, 1978, p. 22 («I call a "policy" that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community»); see also M. Atienza, J. Ruiz Manero, *A Theory of Legal Sentences*, Dordrecht, Springer, 1998, p. 5, p. 11. For a more general view on this topic, see L. Weis, *Constitutional Directive Principles*, *Oxford Journal of Legal Studies*, 37, 2017, p. 916.

statement. As such, it is not apt for judicial application – its function, instead, is to serve as a point of reference in the political debate and the legislative process.[6]

Now, the idea that the Constitution (or ample portions thereof: hereafter I will leave this qualification aside) is better conceived just in terms of a set of policy directives has clear implications on constitutional interpretation. For one thing, under this view the legislature becomes the sole "master of the constitution": implementing the Constitution is up *only* to the legislature. It is only through legislation that constitutional policies become legal norms (*interpositio legislatoris*).[7] Courts, on the other hand, in their ordinary adjudicative functions, will not be able to resort directly to the Constitution – the Constitution, as such, is not justiciable.

Interestingly, the merely programmatic character of the constitution, and particularly of the provisions on fundamental rights and liberties – an idea somewhat anticipated by Hans Kelsen[8] – is now vindicated by "political constitutionalists," whose fundamental claim is that rights are better left to political debate and to the determinations of a democratically elected legislator rather than to courts. And, to this effect, they recommend also that the constitution be stripped of its properly legal

6 C. Mezzanotte, *La Corte costituzionale: esperienze e prospettive*, AA.VV. *Attualità e attuazione della Costituzione*, Bari, Laterza, 1979. For a discussion of the theory of the "programmatic" character of the Constitution, see L. Paladin, *Le fonti del diritto italiano*, n. 2, p. 135; M. Luciani, *Dottrina del moto delle costituzioni e vicende della Costituzione repubblicana*, G. Brunelli, G. Cazzetta (eds.), *Dalla Costituzione "inattuata" alla Costituzione "inattuale"? Potere costituente e riforme costituzionali nell'Italia repubblicana*, Milan, Giuffrè, 2013, pp. 40-49.

7 Some scholars distinguish between "implementation" and "application" of the constitution – the former understood as a matter of legislation and administrative regulations, the latter as a judicial task (M. Luciani, *Dottrina del moto delle costituzioni e vicende della Costituzione repubblicana*, n. 6). The intended practical import of this distinction is that some constitutional norms are apt to (judicial) application, whereas other such norms are subject only to (legislative) implementation. In the interest of space, I will not expand on this point here, but I do think that this distinction is precarious at best. In the following, then, I will use "implementation" and "application" as synonymous.

8 H. Kelsen, *The Nature and Development of Constitutional Adjudication*, 1929, L. Vinx (eds.), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Cambridge, Cambridge University Press, 2015, p. 60. For a recent restatement of this very idea, G. Webber, *Legal Reasoning and Bills of Rights*, *LSE Law, Society and Economy Working Papers*, 1, 2011, p. 1 at 10: «Legislation […] gives the various rights and freedoms affirmed in a bill of rights legal life. […] Legislation does no more and no less than take the abstracted and reified affirmations of rights in a bill of rights and render them apt and cognisable in law by specifying their scope and content».

character and confined only to the "political" realm.[9]

The opposite view is that the constitution is not just a political manifesto but a properly legal document – a proper source of law.[10] As such, the constitution is directly amenable to legal interpretation (as opposed to being confined to political debate), and constitutional norms are to be considered legal norms on all counts. The implementation, or application, of the constitution is not only a matter of sheer political choices to be adopted by the legislature, but also a matter of legal interpretation and legal reasoning performed by courts, with only scarce exceptions.[11]

To be sure, in Italian legal culture the policy/mandatory norms alternative has now lost most of its appeal. As soon as the Italian Constitutional Court became fully operative, it claimed the power of enforcing – or at least of using in its legal reasoning – any kind of constitutional provision; as a consequence, Italian scholars became suddenly aware that the Constitution could and should be regarded as a proper source of law. Put differently, in Italy the legal culture has undergone a massive and, as much as one can foresee, irreversible paradigm shift from a political constitutionalist to a legal-constitutionalist stance.[12] Even those who insist that courts should play a more limited role in the administration of rights – and conversely that the legislature should play a more central role therein – do not question the full-blown legal character of the Constitution and the importance of judicial review of legislation.

9 See J. WALDRON, *A Right-Based Critique of Constitutional Rights*, in 13 *Oxford Journal of Legal Studies* 18 (1993); J. WALDRON, *Law and Disagreement*, Oxford, Oxford University Press, ch. 12; R. BELLAMY, *Political Constitutionalism*, Cambridge, Cambridge University Press, 2007; G. WEBBER, *The Negotiable Constitution*, Cambridge, Cambridge University Press, 2009, ch. 5.

10 See S. GARDBAUM, *The Place of Constitutional Law in the Legal System*, M. ROSENFELD, A. SAJÓ (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012 (contrasting "political," "legal," and "total" constitutionalism).

11 The usual example is Art. 4: «The Republic recognises the right of all citizens to work and promotes those conditions which render this right effective».

12 Among the very few dissenting voices, A. PINTORE, *I diritti della democrazia*, Bari, Laterza, 2003.

### *2.2. Constitutional Rules, Principles, and Values*

If constitutional norms are proper, mandatory legal norms and not just policy directions for future legislation, one may still ask what kind of norms they are. Here the relevant distinction is between rules, principles, and values.[13]

Of course, nobody would actually claim that the Constitution consists *only* of rules, or *only* of principles, or *only* of values. Rather, the point here is about the comparative importance of these different kinds of norms in the architecture of the constitution.[14]

In legal scholarship, "rules", "principles" and "values" are not always clearly defined, nor always used in a consistent manner.[15] For present purposes, we may rely on the following provisional definitions. Rules are norms that are relatively *precise* and *determinate* in both their scope of application and their normative consequences. Principles are norms that are relatively *generic* and *indeterminate* in both their scope of application and their normative consequences. Moreover, principles embody, or give direct legal expression to, some moral or political ideal;[16] accordingly, a principle is a norm that conveys a peculiar dimension of "importance".[17] Values are moral or political

13 On this distinction, as referred to constitutional norms, see R. Alexy, *A Theory of Constitutional Rights*, Oxford, Oxford University Press, 2010, ch. 3; O. Chessa, *Libertà fondamentali e teoria costituzionale*, Milan, Giuffrè, 2002, pp. 357-393; G. Zagrebelsky, *Ronald Dworkin's Principle Based Constitutionalism: An Italian Point of View*, *I-CON*, 1, 2003, p. 621.

14 In quite a similar vein, I think, but with different terminology, Jeffrey Goldsworthy distinguishes between a "positivist" and a "normativist" conception of the constitution, as two extremes of a spectrum that includes various intermediate possibilities. According to the former, the constitution consists of "a set of discrete written provisions" (*i.e.*, rules), while according to the latter the constitution is «a normative structure whose provisions are, either explicitly or implicitly, based on deeper principles, and ultimately on abstract norms of political morality»; see J. Goldsworthy, *Constitutional Interpretation*, M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, sec. 1. This choice of words, however, is rather unfortunate since "positivism" and "normativism" normally refer to two well-known traditions in legal philosophy, which are not even remotely related to specific viewpoints on the nature of constitutions.

15 G. Pino, *Teoria analitica del diritto I. La norma giuridica*, Pisa, ETS, 2016, ch. 4.

16 S. Perry, *Two Models of Legal Principles*, *Iowa Law Review*, 82, 1997, p. 787 at 788 («the explicit content of principles is value-oriented, whereas that of rules is action-oriented»). See also N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford, Clarendon, 1978, p. 234; M. Jori, *I principi nel diritto italiano*, M. Jori, *Saggi di metagiurisprudenza*, Milan, Giuffrè, 1985, pp. 301-302.

17 S. Bartole, *Costituzione (Dottrine generali e diritto costituzionale)*, *Digesto delle Discipline Pubblicistiche*,

goods, conceived at an extremely high level of abstraction – equality, liberty, dignity, and democracy, are good cases in point.

Now, how is the rules-principles-values distinction relevant for constitutional interpretation? For one thing, when we talk about constitutional *norms,* we are assuming that some kind of interpretive job has already taken place: a norm is always the *result*, rather than the starting point, of legal interpretation. Before interpretation, there is no norm; there is just a text. The norm is the meaning (the semantic content) that is extracted from a source of law through interpretation. Accordingly, the possibility itself of framing constitutional norms in terms of rules, principles, or values is the outcome of a preliminary interpretive choice. Of course, the wording of the constitutional text provides some guidance to this effect. Accordingly, a sharply drafted provision will be easily interpreted as stating a rule, whereas a provision drafted in abstract, morally laden language will be easily interpreted as stating a principle (the case of values is different, as we shall see shortly). But the interesting point, here, is that *in principle* nothing prevents an interpreter from deriving a rule from a provision that is drafted in abstract, morally laden terms. And of course it is also possible to derive a principle from, or to read a value behind, a sharply formulated provision. Such interpretive choices ultimately depend on the background conception of the constitution adopted by the interpreter.

But there is more, of course. The "pre-interpretive" choice of framing constitutional norms in terms of rules, principles, or values, in turn, affects the next moves in the constitutional interpretation game – there are things that can be done (only, or preferably) with rules, things that can be done (only, or preferably) with principles, and things that can be done (only, or preferably) with values. Let's see.

If constitutional norms are framed in terms of *rules*,[18] they will be expected to

IV, 1989, p. 288 at 318; R. Guastini, *Teoria e ideologia dell'interpretazione costituzionale*, LI *Giurisprudenza costituzionale*, 1, 2006, p. 743.

18 Examples of a rule-oriented approach to the Constitution in Italian scholarship include: A. Pace, *Metodi interpretativi e costituzionalismo*, *Quaderni costituzionali*, XXI, 2001, p. 35; A. Pace, *Interpretazione costituzionale e interpretazione per valori*, G. Azzariti (ed.), *Interpretazione costituzionale*, Turin, Giappichelli, 2007; M. Dogliani, *Il «posto» del diritto costituzionale*, *Giurisprudenza costituzionale*, 1993, p. 525; R. Guastini, *Diritto mite, diritto incerto*, *Materiali per una storia della cultura giuridica*, XXVI, 1996, p. 513; L. Ferrajoli, *Costituzionalismo principialista e costituzionalismo garantista*, *Giurisprudenza costituzionale*, 2010, p. 2809; V. Angiolini, *Costituente e*

provide clear-cut requirements applicable in an "all-or-nothing" fashion, and thus they will provide clear indications of what is constitutionally permissible and what is constitutionally forbidden. Rules, when they are applicable, are supposed to apply without exception. A rule-based constitution, thus, will provide interpreters with precise indications as to what is constitutionally permissible and what is constitutionally forbidden. Courts will enjoy little discretion in applying the constitution.

Interpreting and applying a principle-based constitution,[19] on the other hand, is an entirely different matter. As we have already seen, *principles* are characterized by a certain degree of genericity, indeterminacy, and importance. As such, principles cannot determine directly the outcome of a case. The application of principles requires a previous "specification" – a process that translates the original principle into a more manageable rule, or set of rules. Moreover, principles tend to conflict with one another: many principles may be relevant in a given case, pulling in different directions. And such conflicts are usually solved through a "balancing" exercise – an assessment of the respective importance of the principles at stake in the case in question. It is easy to see, then, that the interpretation and application of a principle-based constitution is bound to become a discretionary exercise – far more discretionary than the interpretation of a rule-based constitution. Specification and balancing are necessary steps for the judicial application of a principle-based constitution, and – precisely because of the indeterminacy and genericity of principles – there are many different ways of either specifying a given principle or of balancing competing principles against each other. From an abstract principle, or from two or more colliding principles, many different and alternative rules may be derived by way of specification or balancing. So, a principle-oriented understanding of the constitution brings to the fore the need for courts to engage in a highly discretionary interpretive exercise, as opposed to the alleged "automatic" precision

*costituito nell'Italia repubblicana*, Padua, Cedam, 1995.

19 Examples of a principle-oriented approach to the Constitution in Italian scholarship include: G. Zagrebelsky, *Il diritto mite*, Turin, Einaudi, 1992; G. Zagrebelsky, *Ronald Dworkin's Principle Based Constitutionalism: An Italian Point of View*, 13, 2003, p. 621; G.U. Rescigno, *Interpretazione costituzionale e positivismo giuridico*, in 1 *Diritto pubblico,* 2005, p. 19; C. Pinelli, *Il dibattito sull'interpretazione costituzionale tra teoria e giurisprudenza*, *Scritti in memoria di Livio Paladin*, Naples, Jovene, 2004, p. 1665.

that is supposed to characterize the application of rules.[20]

Finally, constitutional *values* – a rather under-analysed concept in both legal theory and general legal discourse. Indeed, the distinction between principles and values is far from clear. Scholars and courts use these two terms more or less interchangeably, to refer to some exceedingly abstract normative standard imbued with moral or political significance.[21] Still, recourse to "values" gives a peculiar twist to constitutional interpretation (as we shall see shortly). While rules and principles certainly fit in the customary picture of the legal norm (in the sense that they are both *legal* and *norms*), the status of values is far less certain. On the one hand, a value is not normally thought of as a proper *norm*, but rather as the *foundation* of norms. On the other hand, the *legal* status of values is rather peculiar when compared to the legal status of an ordinary legal norm. Normally, values are not directly written into the text of the constitution,[22]

20 For this reason, some scholars maintain that it is the job of the legislator – and not of the judge – to transform abstract constitutional principles into judicially manageable rules: S. Fois, *«Ragionevolezza» e «valori»: interrogazioni progressive verso le concezioni sulla forma di Stato e sul diritto*, *Il principio di ragionevolezza nella giurisprudenza della Corte costituzionale. Riferimenti comparatistici*, Milan, Giuffrè, 1994, p. 103, p. 109; A. Pace, *Metodi interpretativi e costituzionalismo*, n. 18, pp. 57-58; R. Guastini, *Ponderazione. Un'analisi dei conflitti tra principi costituzionali*, *Ragion pratica,* 151, 2006, p. 159; G. Scaccia, *Valori e diritto giurisprudenziale*, in 1 *Diritto e società*, 2011, p. 135; L. Ferrajoli, *La democrazia attraverso i diritti*, Bari, Laterza, 2013, pp. 133-137.
Similar concerns are also visible in constitutional scholarship in other countries: see M. Nimmer, *The Right to Speak from* Times *to* Time. *First Amendment Theory Applied to Libel and Misapplied to Privacy*, *California L.R.*, 56, 1968, p. 935 at 947 («[balancing] may be criticized as a form of judicial lawmaking, and as such a usurpation of the legislative function»); B. Neuborne, *Notes for a Theory of Constrained Balancing in First Amendment Cases*, *Case Western L.R.,* 38, 1988, p. 576 at 578 («judicial balancing […] licenses a judge to engage in overtly subjective decision-making that replicates and occasionally displaces identical thought-processes already carried out by a politically responsible official»); P. de Lora, *Tras el rastro de la ponderación*, *Revista Española de Derecho Constitucional,* 2000, pp. 359-367 («Esa tarea de los tribunales no dista mucho de la legislación»); A. Stone Sweet, *Governing with Judges*, Oxford, Oxford University Press, 2000, p. 98 («A balancing jurisprudence not only gives the court great discretion, but it will inevitably cast the court into a more legislative style of deliberation and decision-making than would a jurisprudence of absolute rights»).

21 Examples of a value-oriented approach to the Constitution in Italian scholarship include: A. Baldassarre, *L'interpretazione della costituzione*, A. Palazzo (eds.), *L'interpretazione della legge alle soglie del XXI secolo*, Naples, Edizioni Scientifiche Italiane, 2001, p. 215; M. Cartabia, *Principi inviolabili e integrazione europea*, Milan, Giuffrè, 1995; A. Barbera, *La Costituzione della Repubblica italiana*, Milan, Giuffrè, 2016. For a stark criticism of value-talk in constitutional interpretation, however, see L. Paladin, *Le fonti del diritto italiano*, n. 2, p. 143, and G. Zagrebelsky, *La legge e la sua giustizia*, Bologna, Il Mulino, 2008, pp. 206-208.

22 A. Baldassarre, *L'interpretazione della costituzione*, A. Palazzo (eds.), *L'interpretazione della legge alle soglie*

and the individuation of values normally takes the interpreter far away from the text. Values are supposed to be inferred from the "spirit" of some constitutional provision, or even from the whole constitution. The written provisions of the documentary constitution may work as epiphanies of the constitutional *relevance* of a certain value, but the value itself will rest on some "objective," non-legal ground. More precisely, values are thought to be grounded in some objective moral system (or in some kind of natural law),[23] or in society,[24] or in a combination of both morality and society.[25]

Hence, the identification of values hardly qualifies as an exercise in legal interpretation – it is not constrained by the text of the constitution, and it is conceived as a kind of objective cognition of some moral reality.

*del XXI secolo*, 2001, p. 215. Among the scarce exceptions, one may point to Art. 13 of the Italian Constitution («Personal liberty is inviolable»), and Art. 1 of the German *Grundgesetz* («Human dignity shall be inviolable»).

23 An approach of this sort is conspicuous in German constitutional jurisprudence, whereby the German Basic Law is understood to incorporate an "objective order of values". See R. Herzog, *The Hierarchy of Constitutional Norms and Its Function in the Protection of Basic Rights*, in 13 *Human Rights L.J.*, 13, 1992, p. 90 at 91; D. Kommers, *German Constitutionalism: A Prolegomenon*, *Emory L.J.*, 40, 1991, p. 837 at 851; D. Kommers, *Germany: Balancing Rights and Duties*, J. Goldsworthy (ed.), *Interpreting Constitutions. A Comparative Study*, Oxford, Oxford University Press, 2006, p. 203; M. Hailbronner, *Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism*, *I-CON*, 12, 2014, p. 626; J. Bomhoff, *Balancing Constitutional Rights*, Cambridge, Cambridge University Press, 2013, p. 103 *et seq.* According to B. Schlink, *The Dynamics of Constitutional Adjudication*, *Cardozo L.R.*, 17, 1996, p. 1231, however, the «Bundesverfassungsgericht's value orientation is a myth» (at 1234). See also A. Chaskalon, *From Wickedness to Equality: The Moral Transformation of South African Law*, *I-CON*, 1, 2003, p. 590 at 608 («The Constitution now contains an objective normative value system»). For the use of value-arguments in American constitutional interpretation, see R. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, *Harvard L.R.*, 100, 1987, p. 1189 at 1204-1209; P. Bobbitt, *Constitutional Law and Interpretation*, D. Patterson (eds.), *A Companion to Philosophy of Law and Legal Theory*, Oxford, Blackwell, 1996. For a comparison between the German and the American approach to values in constitutional interpretation, see M. Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, *I-CON* , 2, 2004, p. 633 at 650-651, 661.

24 A. Baldassarre, *L'interpretazione della costituzione*, A. Palazzo (eds.), *L'interpretazione della legge alle soglie del XXI secolo*, 2001, p. 226; A. Barak, *Purposive Interpretation in Law*, Princeton, Princeton University Press, 2005, pp. 381-382; G.J. Jacobsohn, *Constitutional Values and Principles*, M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, p. 777.

25 G. Fassò, *Il giudice e l'adeguamento del diritto alla realtà storico-sociale e procedura civile*, *Rivista trimestrale di diritto e procedura civile,* XXVI, 1972, p. 897.

### *3. Constitutional Interpretation and Conceptions of the Constitution*

The three approaches to the constitution (as rule-based, principle-based, and value-based) introduced in the preceding section embody different *conceptions* of the constitution – *i.e.*, different conceptions of the nature and function of the constitution in the legal and political system. It is in the light of a given background conception of the constitution that it makes sense to frame the normative content of constitution in terms of rules, or principles, or values.

In this regard, one can usefully distinguish between a "defensive" and a "foundational" conception of the constitution – or, somewhat more accurately, between a cluster of "defensive" conceptions and a cluster of "foundational" conceptions of the constitution.[26]

### *3.1. The Defensive Constitution*

According to a "defensive" conception of the constitution, the constitution should be primarily, or even exclusively, regarded as a protective device against governmental intrusion into certain rights.[27]

Under this approach, the constitution is limited in scope – it covers only a well-defined area of the social and political life of the relevant polity, and legislation is legitimate as long as it remains outside the area protected by the constitution. In other words, the legislature normally moves in a "constitution-free" area, and the content of a great deal of legislation is constitutionally irrelevant; the legislature must stop only in

26 See G. Tarello, *L'interpretazione della legge*, n. 1, pp. 335-337. In slightly different terms, see V. Onida, *L'attuazione della Costituzione tra magistratura e Corte costituzionale*, *Scritti in onore di Costantino Mortati*, Milan, Giuffrè, 1977, p. 501, and M. Dogliani, *Il «posto» del diritto costituzionale*, n. 18 (contrasting "defensive" and "expansive" conceptions of the constitution).

27 This approach is usually associated to the mainstream American understanding of the constitution: see L. Weinrib, *The Postwar Paradigm and American Exceptionalism*, S. Choudhry (eds.), *The Migration of Constitutional Ideas*, Cambridge, Cambridge University Press, 2007; M. Cohen-Eliya, I. Porat, *Proportionality and Constitutional Culture*, Cambridge, Cambridge University Press, 2013, chs. 5 and 6; J. Bomhoff, *Balancing Constitutional Rights*, n. 23, ch. 5. The poster child of this attitude is of course the rule-like rendering of the First Amendment in the jurisprudence of the Supreme Court: see F. Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, G. Nolte (ed.), *European and US Constitutionalism*, Cambridge, Cambridge University Press, 2005.

front of the gates of the constitutional fortress, guarded by the Constitutional Court. As a consequence, the constitution should work primarily as a checklist of "negative" validity conditions for legislation. Legislation may have any content whatsoever, as long as it does not clearly encroach upon the area protected by the constitution.

A defensive constitution, then, is premised exactly upon the possibility of clearly distinguishing between what is protected by the constitution and what is constitutionally irrelevant – between the freedom of the legislature and the competence of the Constitutional Court. And this condition can be satisfied only if the constitution is designed as a set of (precise) *rules*.

All this has some interesting implications for constitutional interpretation. Under a defensive, rule-oriented conception of the constitution, constitutional interpretation should be performed with a good amount of self-restraint, with a view to preserving legal certainty and the distinction of competences between legislator and courts. To that end, textualism and originalism become the favourite canons of constitutional interpretation.[28] More generally, under this approach there is no meaningful difference between constitutional interpretation, on the one hand, and statutory interpretation, on the other. Constitutional interpretation resorts to the same interpretive canons that are in place in ordinary, statutory interpretation[29] – the constitution is just a statute that happens to be hierarchically superior to other statutes.

Finally, the defensive conception has implications for the role of courts *vis-à-vis* the constitution. Under this conception, the constitution is not supposed to be

28 M. Dogliani, *Il «posto» del diritto costituzionale* n. 18; A. Pace, *Metodi interpretativi e costituzionalismo*, n. 18; M. Luciani, *Interpretazione costituzionale e testo della costituzione. Osservazioni liminari*, G. Azzariti (ed.), *Interpretazione costituzionale*, Turin, Giappichelli, 2007, p. 48, and *Interpretazione conforme a costituzione*, *Enciclopedia del diritto*, Annali IX, 391 (2016), 441; M. Esposito, *In penetralibus pontificum repositum erat: brevi considerazioni sulla parabola discendente del diritto scritto*, *Giurisprudenza costituzionale*, 2004, p. 2995. More generally, on the link between originalism and a perception of the constitution "as a statute", see M. Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, n. 25, pp. 656-657.

29 R. Guastini, *Interpretare e argomentare*, n. 1, pp. 343-351; A. Pace, *Interpretazione costituzionale e interpretazione per valori*, n. 18, p. 95; M. Luciani, *Interpretazione conforme a costituzione*, n. 28, p. 441 (nevertheless acknowledging that the difference between constitutional and statutory interpretation may in fact be "in degree", rather than in kind); M. Troper, *Constitutional Interpretation*, *Israel L.R.*, 39, 2006, p. 35; P. Bobbitt, *Constitutional Law and Interpretation*, n. 25, p. 127.

applied directly by ordinary courts in their ordinary adjudicative functions; rather, ordinary courts should limit themselves to "alerting" the Constitutional Court when they happen to stumble upon a constitutionally suspect statute. The Constitutional Court, in turn, should operate only as a "negative legislator" – its job is not to develop or implement the constitution but only to quash those statutes that are in clear contrast with the constitution.[30]

### *3.2. The Foundational Constitution*

Under a "foundational" conception of the constitution, the constitution is seen as the foundation of the entire legal order: each and every norm of the legal system is valid only insofar as it is produced in accordance with the constitution, and is compatible with the constitution. Under this conception, the constitution is supposed to work *not only* as a set of negative limits but *also* – and most importantly – as a set of principles and values that call for implementation at both the legislative and the judicial level. Constitutional principles and values project their normative force upon the entire legal system. According to this conception, the function of the constitution is not only to *limit* governmental activities, but also to *direct* the actions of public authorities (including legislatures) towards certain constitutionally mandated objectives. Under a "foundational" conception, the constitution – far from being just a kind of statute – is a law of a peculiar kind, in virtue of its content and functions.[31]

As a consequence, the normative content of the constitution cannot be reduced to a set of fixed, stable, precise rules – the kind of norms we would expect to find in a statute. Rather, the constitution – the real content of the constitution, the most important part of the constitution – is seen either as a set of principles or as set of values. A foundational conception of the constitution, thus, may present itself either in a

30 The idea of the Constitutional Court as an essentially "negative legislator" was famously defended by H. Kelsen, *The Nature and Development of Constitutional Adjudication*, n. 8, and H. Kelsen, *General Theory of Law and State*, Cambridge, Harvard University Press, 1945, p. 268.

31 G. Zagrebelsky, *La legge e la sua giustizia*, 2008, p. 267; P. Hogg, *Canada: From Privy Council to Supreme Court*, J. Goldsworthy (ed.), *Interpreting Constitutions. A Comparative Study*, Oxford, Oxford University Press, 2006, p. 55, p. 77 (after the entry into force of the Canadian Charter of Rights and Freedoms, «the concept of the Constitution as a statute is well and truly over»).

principle-based or in a value-based fashion.

A few interesting implications follow from this. First, under a foundational approach the constitution is not a separate field of the law, but rather it irradiates the entire legal order. Every area of the law is subject to the influence of constitutional principles and values. The entire legal system has to be rendered fully compatible with the constitution, with no "black holes" or "constitution-free" areas.[32] The constitution, thus, becomes relevant for any kind of legal, political, and social dispute – it is a "total" constitution.[33]

Secondly, under a foundational approach the responsibility to implement constitutional principles and values falls on every legal and political actor. Constitutional principles will be implemented – through specification and balancing – not only by legislatures but also by courts, no matter how much judicial discretion is involved in such operations.

Thirdly, under a foundational approach constitutional interpretation is perceived as different in character from ordinary, statutory interpretation. As a consequence, it resorts to interpretive methodologies that are specifically appropriate for the constitution.[34] For instance, the peculiar normative content of the constitution

32 This is sometimes referred to as the "constitutionalization" of the (entire) legal system. As far as I know, this term, now widely used, has been first introduced in this sense by G. Tarello, *L'interpretazione della legge*, n. 1, p. 337. Subsequently, see A. Gambaro, R. Pardolesi, *L'influenza dei valori costituzionali sul diritto civile*, A. Pizzorusso, V. Varano (eds.), *L'influenza dei valori costituzionali sui sistemi giuridici contemporanei*, Milan, Giuffrè, 1985, I, p. 5, p. 12; L. Favoreau, *Le droit constitutionnel, droit de la Constitution et constitution du droit*, in 1 *Revue française de droit constitutionnel*, 1, 1990, p. 71; L. Favoreau, *La constitutionnalisation du droit*, J.-B. Auby (eds.), *L'unité du droit. Mélanges en hommage à Roland Drago*, Paris, Economica, 1996, p. 25; L. Favoreau, *La constitutionnalisation de l'ordre juridique: considerations générales*, *Revue belge de droit constitutionnel*, 1998, p. 233; R. Guastini, *La "costituzionalizzazione" dell'ordinamento italiano*, *Ragion pratica*, 11, 1998, p. 185; A. Stone Sweet, *Governing with Judges*, n. 20, 2000, pp. 114-125 (analysing this phenomenon in Italy, France, Germany, and Spain).

33 R. Bin, *Cosa è la Costituzione?*, *Quaderni costituzionali*, XXVII, 2007, p. 11. See also M. Kumm, *Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, in 7 *German L.J.*, 7, 2006, p. 341; S. Gardbaum, *The Place of Constitutional Law in the Legal System*, n. 10; M. Cohen-Eliya, I. Porat, *Proportionality and Constitutional Culture*, n. 27, p. 60 («in Germany, almost any legitimate individual or collective interest is grounded on a constitutional value and accorded constitutional status»).

34 The idea that constitutional interpretation is a peculiar kind of interpretation, which is not reducible to the ordinary techniques of statutory interpretation, is probably the majoritarian view in current Italian constitutional scholarship; see C. Pinelli, *Il dibattito sull'interpretazione costituzionale tra teoria e giurisprudenza*, n. 19, p. 1666. In

– principles, values – is not amenable to a merely literal interpretation (hence the rejection of textualism), and requires to be frequently adjusted to the ever-changing factual and social circumstances (hence the rejection of originalism). Principles and values ask for a "generous", purposive interpretation (hence the rejection of strict constructionism). Moreover, given that the normative content of the foundational constitution is constituted by moral and political principles and values (such as liberty, equality, dignity…), the interpretation and application of the constitution will inevitably require some kind of "moral reading". Constitutional interpretation, that is, will necessarily be contaminated by moral arguments.[35]

The upshot of all this is quite straightforward: the foundational model acknowledges a wide range of interpretive discretion for the judiciary. Both constitutional and statutory interpretation become "activist" and "dynamic" enterprises, as opposed to the "restrained" and "static" approaches required by a defensive, rule-based model of the constitution.[36] Courts will routinely use constitutional principles and values, either by directly applying them to a case, or by using them "indirectly," as aid in determining the meaning of a statute. The Constitutional Court, in turn, will tend to perform judicial review mainly on an interpretive level, as it were. The Constitutional Court, that is, rather than quash a constitutionally suspect statute, will mostly strive to interpret it in a "constitutionally compatible way". [37]

Put differently, a "foundational" conception of the constitution recasts the role

the international debate, see for instance A. Barak, *Hermeneutics and Constitutional Interpretation*, *Cardozo L.R.*, 14, 1993, p. 767 at 772; W. Waluchow, *Constitutional Interpretation*, A. Marmor (ed.), *The Routledge Companion to Philosophy of Law*, Abingdon, Routledge, 2012, pp. 418-419.

35 B. Celano, *I diritti nello Stato costituzionale*, Bologna, Il Mulino, 2013; G. Pino, *Positivism, Legal Validity, and the Separation of Law and Morals*, *Ratio Juris*, 27, 2014, p 190. The phrase "moral reading" has been famously coined by R. Dworkin, *Freedom's Law*. *The Moral Reading of the American Constitution*, Cambridge, Harvard University Press, 1996.

36 R. Guastini, *Teoria e ideologia dell'interpretazione costituzionale*, n. 17 (contrasting "activist" vs "restrained", and "dynamic" vs "static" approaches to constitutional interpretation). In a similar vein, see also P. Chiassoni, *Tecnica dell'interpretazione giuridica*, n. 1, pp. 159-161 (contrasting "traditionalist" and "modernist" approaches to constitutional interpretation).

37 G. Zagrebelsky, *La legge e la sua giustizia*, 2008, pp. 261-262 (judicial review as performed by the Italian Constitutional Court is more concerned with issuing "constitutionally compatible" statutory interpretations rather than judgements on the constitutional validity of statutes).

of both the Constitutional Court and ordinary courts in some important ways:

1) The Constitutional Court will not just be a "negative" legislator, but also a "positive" one: the Court will claim the power not only to quash statutes, but also to manipulate them in order to make them coherent with the constitution.[38]

2) The Constitutional Court will not only be engaged in a "validity check" on statutes, but will also play the role of an "interpretive agency."[39]

3) Due to the important and activist role played by ordinary courts in taking care of potentially unconstitutional legislation, the system of judicial review will tend to become a "mixed" one – both centralized and partially decentralized.[40]

So far, I have pointed to some features that can be found in all versions of a foundational conception of the constitution. To be sure, within the foundational conception it is possible to find important variations, which depend on whether the normative core of the constitution is framed in terms of principles or of values. To these variations I now turn.

### *3.2.1. The Principle-Based Model*

As already noted, principles are norms that are characterized by a substantial degree of indeterminacy and importance. Constitutional principles, thus, do not have a precise scope of application. They display their normative force by generating more determinate rules or other – less determinate – principles. Now, if the normative content of the foundational constitution is framed in terms of principles, the general

38 On this kind of judgments, see V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context*, n. 4, pp. 86-88. See also D. Rousseau, *The Constitutional Judge: Master or Slave of the Constitution?*, *Cardozo L.R.*, 14, 1992, p. 775 at 778, on "constructive interpretations" rendered by the French Constitutional Council, whose role tends to become akin to a "colegislator" (783).

39 For similar trends in other European countries, see A. Stone Sweet, *Governing with Judges*, n. 20, 2000, pp. 71-73.

40 See V. Onida, *L'attuazione della Costituzione tra magistratura e Corte costituzionale*, n. 26, 514; S. Cassese, *La giustizia costituzionale in Italia: lo stato presente*, *Rivista trimestrale di diritto pubblico*, 2012, p. 603 at 606. For some general remarks on this trend, visible also in other European countries, see V. Ferreres Comella, *The European Model of Constitutional Review of Legislation: Toward Decentralization?*, *I-CON*, 2, 2004, p. 461.

picture drawn in the preceding section may be enriched in the following way.

First, a principle-based constitution is pervasive – any kind of legal, social and even political issue may be "subsumed" under some constitutional principle. And in this sense, the constitution is indeed a "total" constitution. But this does not imply that the constitution also provides *complete and precise answers*;[41] in fact, it is in the very nature of legal principles that they do not directly provide precise answers, exactly in virtue of their indeterminacy and genericity. A principle points in a direction: it "governs" – *i.e.*, it is relevant for – a given subject-matter, without "regulating" it in a precisely detailed way. A principle-based constitution, thus, is not a blueprint but a compass – it allows for many "possible constitutional worlds."[42]

Secondly, in a principle-based constitution there is no fixed intra-constitutional hierarchy.[43] The several constitutional principles are generally on a par. To be sure, it is possible that some constitutional principle *presumptively* weighs more than some other principle. But even in these cases, principles do not escape the balancing game – indeed, a presumptively weightier principle may in some cases be less important than another competing principle. Consequently, a principle-based constitution makes room for the possibility – indeed, the inevitability – of intra-constitutional conflicts.[44] A related point is this: as a matter of course, it is consistent with the foundational model that constitutional principles are balanced and/or specified by both the legislature and the courts. But there's

41 See D. Grimm, *The Function of Constitutions and Guidelines for Constitutional Reform*, 1972, D. Grimm, *Consitutionalism*, Oxford, Oxford University Press, 2016, p. 133; V. Ferreres Commella, *The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, *Texas L.R.*, 82, 2004, p. 1705 at 1736. For a contrary opinion, see R. Guastini, *Applying Constitutional Principles*, *Analisi e diritto*, 2016, p. 241 at 243 («since principles have no definite boundaries of application, the more constitutional provisions are treated as principles the more the constitution looks as "gapless" or "complete", in the sense that the constitution looks able to regulate any possible subject-matter whatsoever»).

42 J.J. Moreso, *Legal Indeterminacy and Constitutional Interpretation*, Dordrecht, Springer, 1998, ch. 4.

43 G. Zagrebelsky, *Il diritto mite*, 1992, p. 11, and G. Zagrebelsky, *La legge e la sua giustizia*, 2008, p. 284; R. Bin, *Diritti e argomenti*, Milan, Giuffrè, 1992, pp. 32-35; G. Pino, *Diritti e interpretazione*, Bologna, Il Mulino, 2010, ch. 6.

44 G. Zagrebelsky, *Il diritto mite*, 1992, pp. 11, 16, 170-173; R. Bin, *Cosa è la Costituzione?*, n. 33; G. Pino, *Diritti e interpretazione*, 2010, ch. 6. More generally on this point see R. Dworkin, *Taking Rights Seriously*, 1978, p. 22; R. Alexy, *A Theory of Constitutional Rights*, 2010, ch. 3; L. Tribe, M. Dorf, *On Reading the Constitution*, Cambridge, Harvard University Press, 1991, pp. 24-25.

a wrinkle. When balancing/specification is carried out by the legislature, the result is a new piece of legislation. By contrast, when balancing/specification is carried out by a court – even by an ordinary court – the result is a new rule or principle that has constitutional "relevance", because it is supposed to derive directly from the constitution. The paradox, then, is that the implementation of the constitution performed by the legislature produces *legislation*, whereas the implementation of the constitution performed by courts produces *more constitutional norms*, albeit "unwritten" ones.[45]

Thirdly, as we have seen a principle-based constitution makes for a high degree of judicial discretion (supra, § 2.2). Supporters of this conception tend to countenance this with the development of rational – or at least controllable – ways to interpret and apply constitutional principles.[46] To that end, it is usually suggested that judicial balancing of conflicting principles should be consistent in time, *i.e.*, that the Constitutional Court should respect its own precedents;[47] that "definitional" or "categorical" balancing should be preferred to "ad hoc" balancing; or that balancing should be performed not in a whimsical fashion, but in a procedural way with multiple steps, tests, or phases – thus transforming balancing into the ostensibly more structured "proportionality" analysis.[48]

Lastly, under a principle-oriented model constitutional interpretation is not different *in kind vis-à-vis* statutory interpretation. Rather the difference between constitutional and statutory interpretation is regarded as a difference *in degree*. This

45 See S. Bartole, *Costituzione (Dottrine generali e diritto costituzionale)*, n. 17, p. 320; R. Guastini, *Applying Constitutional Principles*, n. 43, p. 248 («the judicial derivation of rules from constitutional principles develops and enlarges constitutional law»); A. Marmor, *Interpretation and Legal Theory*, Oxford, Hart Publishing, 2005, p. 142 («the main way in which constitutions change is by judicial interpretation»).

46 L. Paladin, *Le fonti del diritto italiano*, n. 2, pp. 146-150; S. Bartole, *L'elaborazione del parametro e del protocollo delle argomentazioni*, *Corte costituzionale e principio di eguaglianza*, Padua, Cedam, 2001, p. 35; R. Bin, *Diritti e argomenti*, n. 43, p. 5, p. 140.

47 L. Paladin, *Le fonti del diritto italiano*, n. 2, pp. 146-150; G. Zagrebelsky, *Ronald Dworkin's Principle Based Constitutionalism: An Italian Point of View*, 2003, pp. 647-649, and G. Zagrebelsky, *La legge e la sua giustizia*, n. 2008, pp. 289-295.

48 This attitude is epitomized by Robert Alexy's "arithmetic" theory of balancing: R. Alexy, *A Theory of Constitutional Rights*, 2010, ch. 3 (see esp. the "Postscript"), and R. Alexy *Constitutional Rights, Balancing and Rationality*, *Ratio Juri,* 16, 2003, p. 131. See also J.J. Moreso, *Ways of Solving Conflicts of Constitutional Rights: Proportionalism and Specificationism*, in 25 *Ratio Juris*, 25, 2012, p. 31.

means that the same interpretive techniques are in place in both constitutional and statutory interpretation; however, in the case of constitutional interpretation, some such techniques (most notably, literal interpretation) are less used, while others are used more frequently, more visibly, and with a more intense exercise of value-judgements.[49] This, it should be noted, does not necessarily mean that the interpretive canons of statutory interpretation should also apply to constitutional interpretation (as the "defensive" conception, or the model of rules, would have it); rather, and more interestingly, under a principle-based model a sort of circulation of interpretive techniques takes place between constitutional and statutory interpretation. The quite "generous" interpretive techniques that are usually in place in constitutional interpretation – balancing, holistic interpretation, use of moral arguments, purposive interpretation, evolutive interpretation – will frequently be used also in statutory interpretation.

### *3.2.2. The Values-Based Model*

A different variation of the foundational conception of the constitution is value-based – it claims that the most important part of the constitution is represented by the host of moral and political *values* that it incorporates.

A value-based model of the constitution inevitably loosens the constraining role of the text. In fact, rare exceptions notwithstanding, values are not explicitly written down in the constitution – they can only be read between the lines of the constitutional text. So, according to a value-oriented approach, the text of the constitution matters only in so far as it reveals the relevant underlying values. Constitutional interpretation unearths the underlying axiological texture implicit in the body of canonically stated constitutional norms, with the aid of philosophical speculation, social observation, and

49 G. Zagrebelsky, *Appunti in tema di interpretazione e di interpreti della Costituzione*, *Giurisprudenza costituzionale*, 1970, p. 904; E. Diciotti, *Come interpretare la Costituzione?*, in *Ragion pratica*, 4, 1995, p. 203; G.U. Rescigno, *Interpretazione costituzionale e positivismo giuridico*, n. 19; G. Pino, *Diritti e interpretazione*, Bologna, Il Mulino, 2010, pp. 116-117. See also O. Pfersmann, *Le sophisme onomastique: changer au lieu de connaître. A propos de l'interprétation de la constitution*, F. Mélin-Soucramanien (eds.), *L'interprétation constitutionnelle*, Paris, Dalloz, 2005. This, in turn, squares well with the fact that the difference between rules and principles is itself a difference in degree and not in kind: see G. Pino, *Teoria analitica del diritto I. La norma giuridica*, 2016, ch. 4.

intuition.[50]

Moreover, supporters of this view tend to assume a cognitivistic and irenic approach to constitutional values. Constitutional values, that is, are supposed to enjoy some kind of objectivity (be it a moral objectivity, or a "social" objectivity, or both), and they coexist in perfect harmony.[51] This produces some interesting consequences for constitutional interpretation.

First, under a value-based approach, conflicts among constitutional values are merely superficial appearances – on a deeper level, constitutional values constitute a harmonic whole. Thus, constitutional balancing is represented as an equilibrium-seeking enterprise – as a matter of discovering an objective equilibrium among the relevant values, rather than as a matter of choice and mutual sacrifice between the values involved. Balancing, and constitutional interpretation generally, are supposed to bring to light a sort of immanent harmonic ordering of constitutional values.[52] The magic word, here, is "reasonableness". Reasonableness becomes the guiding light of constitutional interpretation, enabling the interpreter to find the exact equilibrium between (apparently) conflicting constitutional values.

Second, in addition to projecting a cognitivist allure on balancing and constitutional interpretation generally, a value-oriented approach paves the way for a hierarchical ordering of constitutional values, whereby the value of human dignity ranks first, then life, health and liberty, then economic values, and so on.[53] Several constitutional values can coexist in a harmonious way because they are not all on the same axiological level: according to this model, some constitutional values rank as

50 See A. Baldassarre, *L'interpretazione della costituzione*, n. 21, p. 227.

51 A. Baldassarre, *Interpretazione e argomentazione nel diritto costituzionale*, *Costituzionalismo*, 2, 2007, pp. 6-7; R. Nania, P. Saitta, *Interpretazione costituzionale*, S. Cassese (ed.), *Dizionario di diritto pubblico*, vol. IV, Milan, Giuffré, 2006, p. 3215. This is particularly apparent in the value-talk of German constitutional jurisprudence: see for instance R. Herzog, *The Hierarchy of Constitutional Norms and Its Function in the Protection of Basic Rights*, n. 23, p. 9 (and generally the literature referred to at n. 23 above).

52 See P. Häberle, *Die Wesensgehaltgarantie des Art. 19 Abs. 2 Grundgesetz*, München, C.F. Beck, 1962; D. Kommers, *German Constitutionalism: A Prolegomenon*, n. 23, p. 851.

53 D. Kommers, *German Constitutionalism: A Prolegomenon*, n. 23, 860; E.-W. Böckenförde, *Critique of the Value-based Grounding of Law*, (1990), E.-W. Böckenförde, *Constitutional and Political Theory*, Oxford, Oxford University Press, 2017, p. 224.

"supreme" values and enjoy axiological priority over the other, "ordinary" constitutional values – the former entering the balancing game with a presumptively heavier weigh than the latter, and are immune from constitutional amendment.[54]

Third, the weight of a value cannot be appreciated in isolation; rather, it depends on the relation between that value and all the other constitutionally relevant values, rights etc. Constitutional interpretation, then, becomes a holistic enterprise. On the other hand, since values are extremely abstract entities, they will react in different ways when faced with different factual circumstances; as a consequence, the interpretation and application of constitutional values becomes a case-by-case judgement.[55]

In sum, under a value-based model, constitutional interpretation is an intuitive enterprise, sensitive to social mores, and case-oriented. Its fundamental methodological principle is "reasonableness". Constitutional interpretation is only minimally constrained by the text of the constitution (the wording of the constitution may be easily trumped by the appeal to some fundamental value, as long as it is "reasonable" to do so), and it is fully entitled to "discover" new unwritten constitutional rights, insofar as they derive from the underlying axiological structure of the constitution.[56] Moreover, constitutional interpretation is presented as a "cognitive" enterprise, inasmuch as it is meant to bring to light morally or socially immanent values. In this scenario, of course, the constitution requires forms and styles of interpretation that are completely different from the ordinary techniques of statutory interpretation: the difference between constitutional interpretation and statutory interpretation is really a difference in kind, and not just in degree.[57]

54 See M. Cartabia, *Principi inviolabili e integrazione europea*, n. 21. This idea has now wide currency in Italian constitutional scholarship, and has been adopted also by the ItCC in a series of important decisions: see V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context*, n. 4, 62, pp. 98-99. On the idea of an intra-constitutional hierarchy of values (or principles) see D. Kommers, *German Constitutionalism: A Prolegomenon*, n. 23, p. 852, p. 860; Y. Roznai, *Unconstitutional Constitutional Amendments*, Oxford, Oxford University Press, 2017, esp. ch 2.

55 A. Baldassarre, *L'interpretazione della costituzione*, n. 21, p. 225.

56 R. Nania, P. Saitta, *Interpretazione costituzionale*, n. 51, p. 3217.

57 A. Baldassarre, *Interpretazione e argomentazione nel diritto costituzionale*, A. Palazzo (eds.),

### *4. Taking Stock*

The Italian Constitution fully belongs to the so called "postwar paradigm," or "rights constitutionalism".[58] Indeed, it has been a forerunner of this paradigm, at the very least for chronological reasons.

Constitutions that fit this paradigm all have some broad features in common: they are written and fully legal in character, they include a long and detailed Bill of Rights, they are protected by a system of judicial review, and they are difficult to amend. Moreover, these constitutions are supposed to last, they embody a broad project of social transformation in the aftermath of some traumatic event (a war, a civil war, a dictatorship, a revolution, etc), and they are inspired by the overarching value of social and political pluralism.[59]

These features of contemporary constitutions rule out the descriptive plausibility of both political constitutionalism and of a mere "defensive" conception of the constitution. In fact, contemporary constitutions are undisputably legal in character (which rules out political constitutionalism), and have a clear foundational function. Moreover, it is quite implausible that the normative content of a "postwar paradigm" constitution be framed essentially in terms of rules: the pluralistic character, the aspiration to last long, and the transformative spirit of this kind of constitutions require that constitutional provisions be drafted in generic, indeterminate, flexible terms. Of course, a political-constitutionalist or a "defensive" conception of the constitution may still be defended as projects of legal and political reforms that move away from the existing post-war model. I will not argue here on this. I will just note, without even trying to argue in favour of this position, that under the prevailing conditions of many contemporary societies,

*L'interpretazione della legge alle soglie del XXI secolo*, 2001, p. 225; F. Modugno, *Interpretazione per valori e interpretazione costituzionale*, G. Azzariti (ed.), *Interpretazione costituzionale*, Turin, Giappichelli, 2007, p. 56.

58 For these expressions, see L. Weinrib, *The Postwar Paradigm and American Exceptionalism*, n. 27; L. Prieto Sanchís, *El constitucionalismo de los derechos*, *Revista Española de Derecho Constitucional*, 2004, p. 47; G. Anderson, *Constitutional Rights after Globalization*, Oxford, Hart Publishing, 2005, ch 1; G. Pino, *Il costituzionalismo dei diritti*, Bologna, Il Mulino, 2017. See also A. Somek, *The Cosmopolitan Constitution*, Oxford, Oxford University Press, 2014 (on "constitutionalism 2.0").

59 On the essential pluralistic character of contemporary, "postwar" constitutions, see G. Zagrebelsky, *Il diritto mite*, 1992; E. Diciotti, *Come interpretare la Costituzione?*, n. 49; R. Bin, *Cosa è la Costituzione?*, n. 33.

the foundational model seems, on balance, more likely to sustain a just society than its alternatives.[60] The favourable attitude expressed in the text does not ignore, of course, that the foundational model may lead to exaggerations and aberrations in the exercise of judicial discretion, with costs in terms of legal certainty and democratic legitimacy. Nothing can prevent even a model that is fairly good in its abstract formulation to go astray in its actual applications. Moreover, the comparative merits and demerits of each model cannot be assessed in purely abstract terms – they are contingent on the general institutional context.

Be that as it may, and assuming that a foundational model appears to be both descriptively accurate and normatively desirable, one may still ask if such a model is to be preferred in the principle-based variant or rather in the values-based one. In my opinion, there are sound reasons to prefer a principle-based approach to the Constitution and to constitutional interpretation. These reasons essentially boil down to the following:

– A principle-based approach does not result in an implausibly "cognitivistic" picture of constitutional interpretation (one in which the normative content of the constitution is just discovered out of an immanent order of values). Quite to the contrary, it acknowledges the ineliminable margin of choice that is required by constitutional interpretation; and this choice, in turn, brings with it the need for accountability – first of all under the guise of a duty to give a complete and persuasive justification for the interpretive decision.

– A principle-based approach does not tie the meaning of constitutional rights to social values, which would make fundamental rights prey to majoritarian attitudes (thus betraying its pluralistic aspirations).[61]

– A principle-based approach makes for an evolving interpretation of the constitution, ensuring that the constitution does not become rapidly outdated.

– A principle-based approach acknowledges the space of democratic decisions,

60 See C. Sunstein, A. Vermeule, *Interpretation and Institutions*, *Mich. L.R.*., 101, 2003, p. 885; G. Itzcovich, *On the Legal Enforcement of Values. The Importance of the Institutional Context*, A. Jakab, D. Kochenov (eds.), *The Enforcement of EU Law and Values*, Oxford, Oxford University Press, 2017.

61 Against the "social consensus" argument in constitutional interpretation, see A. Marmor, *Interpretation and Legal Theory*, 2005, pp. 151 *et seq.*; G. Pino, *Diritti e interpretazione*, Bologna, Il Mulino, 2010, pp. 135-139.

since it does not assume that the constitution contains the precise regulation of any social and legal matter. Rather, this model actually requires that in many instances the responsibility of balancing and specifying the relevant constitutional principles fall exactly on the legislature.[62] Even more importantly, in such a model no single authority – not the democratically elected legislature, not ordinary judges, not even the Constitutional Court – has the last word on the interpretation/implementation of the constitution. The normative content of the constitution, in this model, is supposed to be shaped in the ongoing interaction (be it in the guise of dialogue or of conflict) among several institutional actors.[63]

If these admittedly sketchy arguments are sound, then the theory of constitutional norms as principles seems better suited to the idea of a contemporary, pluralistic constitution, such as the Italian one.

62 R. Alexy, *A Theory of Constitutional Rights*, 2010, ch. 3.

63 On this feature of contemporary constitutionalism, see G. Zagrebelsky, *Il diritto mite*, 1992, p. 213; B. Celano, *I diritti nello Stato costituzionale*, n. 35, pp. 161-162; M. Fioravanti, *Legge e costituzione: il problema storico della garanzia dei diritti*, in 43 *Quaderni fiorentini per la storia del pensiero giuridico*, 43, 2014, pp. 1077 at 1092-1093; M. Cartabia, *Diritto amministrativo e diritti fondamentali*, L. Torchia (ed.), *Attraversare i confini del diritto*, Bologna, Il Mulino, 2016, p. 187; G. Pino, *Il costituzionalismo dei diritti*, 2017, pp. 46-49.