Making and re-making the theory of constitutional democracy: further observations

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Abstract: In this reply I address many of the observations and criticisms raised by Donald Bello Hutt, Mathieu Carpentier, Maris Köpcke, and Graziella Romeo vis-à-vis in my book *The Making of Constitutional Democracy: From Creation to Application of Law* (Hart 2022). The discussion touches upon a host of different but interconnected issues: from the necessary connection (or lack thereof) between the state and the rule of law; to the feasibility and relevance of the distinction between law as *lex* and law as *ius* for modern constitutionalism; to the role and scope of a theory of normative powers for the concept of law-application; to the centrality of the idea of contingency in constitutional theory and its consequences for constitutional design. As a result, I clarify and further develop several aspects of the theory (and meta-theory) of constitutional democracy I originally presented in the book.

Keywords: constitutionalism; *lex*; *ius*; normative power; power-conferring norm; contingency; constitutional theory; rule of law; state

1. Introduction

I am incredibly grateful to the editors of *Revus* for hosting this symposium on my recently published (and now fully Open Access) book *The Making of Constitutional Democracy: From Creation to Application of Law* (hereinafter: TMCD). The comments, the majority of which originate from a book roundtable held at Roma Tre University in October 2022, are of exquisite quality.[1] This, to be clear, should not come as a surprise, given the academic caliber of their authors, to whom goes my gratitude as well for their very generous engagement with my work. In what follows I try my best to address most of the challenges raised, sometimes by agreeing with them and sometimes by respectfully rejecting them. Overall, I hope that my discussion will return the complexity of the issues raised in many different areas – from the necessary connection (or lack thereof) between the state and the rule of law, to the relevance of the distinction between *lex* and *ius* for the theory of modern constitutionalism; from the relationship between the concept of normative powers and the possibility of law-application, to the undertheorised role of contingency in constitutional theory – and the scope of agreement (or disagrement) between the commentators and myself.

2. Bello Hutt on the relationship between the state and the rule of law

Is the state necessary for the rule of law to emerge? This is the main question Donald Bello Hut poses in his contribution to this symposium entitled 'The State and Legal Otherness'. The question is prompted by some of the arguments I develop about the emergence of the social practice we generally refer to as 'law' in chapter 1 of TMCD. These include the fact that I explicitly reject the equivalence between 'law' and 'state-law' (one of the causes of the 'parochialism' of much jurisprudential discourse) and the idea of the state as an unqualified 'good'. Overall, according to Bello Hutt, my position would be that 'the state is not necessary

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[1] My gratitude goes also to the organisers of that symposium, Giorgio Pino and Matija Žgur, and to all the participants for their generous engagement and comments.

for the rule of law to emerge and be secured' and 'it may even be counterproductive for achieving those goals'.[2]

I must say from the outset that I disagree with Bello Hutt's reconstruction of my argument in this respect. For nowhere in TMCD I say that the 'state' is not necessary for the rule of law to emerge,[3] let alone that it is counterproductive for achieving the ideal. I simply do not engage at all with said point. But given that our disagreement appears broader than this specific point, we might be able to chart the source of this misunderstanding by attending at these other points first.

To begin with, Bello Hutt finds 'puzzling' my way of asking whether the state is an 'unqualified' good after all, for he cannot 'think of any contractarian who would argue in the affirmative'. Therefore, he agrees with me that 'we should indeed qualify its acceptance'.[4] Is our disagreement here merely terminological, spurred by my use of the expression 'unqualified good'? It does not seem so. For the position I was referring to is a very common position in the history of political thought, which Bobbio has famously called the 'positive' conception of the state,[5] and which 'culminates' in the rational conception of it 'that goes from Hobbes through Spinoza and Rousseau to Hegel'.[6] Crucially, the positive conception of the state is necessarily juxtaposed to a negative conception of the 'non-state', from varies from that of the 'wild' or 'savage' state of primitives people to that of the state of anarchy, 'understood by Hobbes as the war of all against all'.[7] And it is at this positive conception of the state – which is at the basis of the contractarian thought – that the argument developed in chapter 1 of TMCD takes aim.[8]

Bello Hutt retorts that the 'qualification' I demand on the acceptance of the state is present in every contractarian argument for the state. Thus, according to him, for Hobbes the state is primarily geared towards predictability; for Locke, towards legitimacy and rights; and for Rousseau, towards equality.[9] Bello Hutt then illustrates – necessarily in an expedite manner – the way in which, for each of these fundamental theorists, the institution of the state is normatively premised on the attainment of those values. Of particular relevance is Hobbes' theory, not just because he is indeed the main target of the criticism in chapter 1 of TMCD but also because, crucially, Bello Hutt thinks that the value that the state must pursue for Hobbes is 'the rule of law'.[10]

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[2] Bello Hutt 2024: 2.

[3] I will however claim, in the next pages, that the rule of law can be pursued also by political organisations which are not 'states'.

[4] Bello Hutt 2024: 2.

[5] Bobbio 1989: 125-27.

[6] Bobbio 1989: 126.

[7] Bobbio 1989: 126.

[8] Nothing be clear, nothing said in TMCD or here should be taken as denying that the state can also be used to pursue 'positive' functions which contribute to the improvement of the living conditions of its subjects (for discussion, see Barber 2018: ch 1). Modern constitutional democracies are precisely premised on the idea that the state can be used to improve the welfare of all while keeping its powers in check (through a set of fundamental rights).

[9] Bello Hutt 2024: 2.

[10] Bello Hutt 2024: 4, 6-7. Due to reasons of space, I will simply grant Bello Hutt's reconstruction of Hobbes' Leviathan as necessarily geared towards 'predictability' even though I do harbour some reservations about it.

Up to this point, I took Bello Hutt's reconstruction of the contractarian positive argument for the state as being normative, in the sense that the state *ought* to pursue certain values – which vary from contractarian to contractarian – in order to be deemed legitimate. But at some point in the second part of his contribution Bello Hutt goes beyond normative arguments and appears to put forward, instead, a necessary – and not contingent – relationship between the state and the rule of law.[11] More precisely, he says that predictability – a core tenet of the rule of law irrespective of whether one holds a thinner or thicker conception of the ideal – 'is a *necessary* feature of the state'.[12] This implies that, according to Bello Hutt, what a political institution 'cannot fail to do to be considered a state, is to create the conditions for a predictable life'.[13]

Rather unexpectedly, this is then followed by a return to the language of *desiderata* indicating a merely contingent relationship between the state and predictability: Bello Hutt affirms that '[state's] power over others ought to be exerted non-arbitrarily'[14] and that 'predictability' is 'precisely' 'a demand – a normative background against which the holder of political power ought to exert it for it to count as discharging its function'.[15] So which one is it? A normative desideratum or a necessary condition, so that a political organisation in which public power is not exercise predictably is not a 'state'?

The question is not trivial: if predictability is a (normative) 'demand', akin the others associated with the various conceptions of the rule of law, then states can contingently achieve it or not; but if it is instead a 'necessary' feature of the state – so that a state which does not achieve (even a minimal level of) predictability is not a 'state' – then *all* states at *all* times must possess or anyway display this quality. Clearly, I have no queries about the former option, as it is fully compatible with the thesis I defend in chapter 1 of TMCD according to which states are human institutions *always* in need of legitimation. But the latter contention would represent a very novel claim in political theory – at least to my knowledge – which strikes me as theoretically problematic, as well as explanatorily misguided.

This is because predictability of the exercise of public power does not appear to be a necessary nor a sufficient condition for the identification of a form of political rule as 'state'. First, this position would rule out as a 'state' every form of political organisation in which political power is not exercised in a predictable manner. That, in my view, would leave very few historical political organisations as 'states', given that – at least until the emergence of the idea of the rule of law in 14th century England – there was no overarching principle clearly demanding the predictable exercise of public power.[16] We would have of course to entertain a longer discussion here, but my contention would be that a large number of 'states' in human history have not exercised political power predictably, not even in a

[11] Bello Hutt 2024: 6.
[12] Bello Hutt 2024: 6 (italics mine).
[13] Bello Hutt 2024: 6.
[14] Bello Hutt 2024: 7.
[15] Bello Hutt 2024: 7.
[16] And even after the emergence of this ideal, is it maybe only with the affirmation of the rule of law state model in the XIX century in Continental Europe that the value of predictability was truly instantiated in a generalised manner. On this see eg Ippolito and Sandro 2023.

minimal sense.[17] Second, it is also easy to point out that the rule of law can be pursued (and contingently achieved) also by political organisations that are not 'states', like the European Union for instance.

What is constitutive of a 'state' is not the predictable exercise of political power, but – following Weber – the monopoly of the use of force within a territory.[18] The confirmation of this can be seen in civil war scenarios where two or more opposing factions might be claiming 'control' of the same territory (or parts of it), thus throwing into doubt whatever claim to sovereignty by any single group. This very basic (and uncontroversial, I would say) definition of 'state' does not deal with the question of the 'legitimacy' of the use of said force within the territory; it is also in line with the analysis provided in chapter 1 of TMCD of the emergence of political authority due to the centralisation of power in the hands of a sub-group of the population, from the preceding situation of normative equality in (pure) customary normative orders.

It appears, therefore, that the disagreement between Bello Hutt and me is more fundamental than the nature of the relationship between the rule of law and the 'state'. It is due to our seemingly incompatible conceptions of the latter. As I will discuss in a moment, I think we do agree on the fact that the conditions for the emergence of the *ideal* of the rule of law are necessarily linked with the centralisation of political power and the emergence of that artificial 'power over' which I discuss in TMCD. But despite its origins story, it is clear that law can prescind from the state and thus questions about the rule of law can be meaningfully asked beyond the state context.[19]

With this in mind, let us turn to my rejection of Hobbes' thesis that the Leviathan is necessary to overcome the state of nature, which Bello Hutt criticises. In fact, and contrary to what I think, he claims that for Hobbes life in the 'civil' state is not necessarily better than life in the state of nature – except for predictability.[20] True, in the state of nature one enjoys the freedom from having no master, but so does everyone else too. As such, 'absent common enforceable rules determining what belongs to whom, there is little you can do with such freedom if everyone else enjoy it too'.[21] What is needed is that (mere) possessions are turned into 'properties backed by rights that may be enforced should dispute arise' –[22] and only the Leviathan can play such a role (making it necessary for creating the conditions for a prosperous life).

The gist of my criticism in TMCD is that this is a false dichotomy, at least as long as we are dealing with communities up to a certain size. For the historical occurrence of flourishing isonomic communities in specific contexts – new social groups formed by immigrants not bound by kinship moving to new and uninhabited lands which can be distributed equally

[17] Unless Bello Hutt understands 'predictability' in such a minimal fashion that ceases to be a relevant threshold/standard for the exercise of political power and consequently loses any explanatory value.
[18] See eg Barber 2018: 3-5.
[19] See eg Lefkowitz 2020: ch 5.
[20] Bello Hutt 2024: 4-5.
[21] Bello Hutt 2024: 5.
[22] Bello Hutt 2024: 5.

among them and of which there exists a surplus –[23] disproves Bello Hutt's claim that enforceable property rights – and the condition of normative inequality associated with such a power – are necessary for (some level of) stability and prosperity. As I underscored in TMCD, it is only in the regime of isonomia that equality and freedom can be truly reconciled.[24]

At the same time, though, the very unique and limited circumstances under which isonomic regimes could emerge and flourish make it indeed the case that the emergence of centralised authority is arguably a necessary 'phase' of human civilisation once the dimensions and composition of the social group go beyond a certain threshold. As such, and to conclude, I do not think it is contradictory to claim at the same time that a) from a theoretical point of view, the ideal of the rule of law (at least in its formal or procedural understanding) can be conceptualised and operationalised beyond and independently of what we have called to identify as 'the state'; and b) that from an historical point of view, there is an undeniable connection between those types of political organisations we have come to identify as 'states' and the emergence of a set of normative demands as to how that centralised political authority ought to be exercised vis-à-vis those subject to it. These are different levels of discourse, in my view, that can and should be kept separate.

3. Carpentier on the distinction between *lex* and *ius* and its relevance for modern constitutionalism

Mathieu Carpentier, in his comment 'Legal Constitutionalism and the *Ius*/*Lex* Distinction', goes at the heart of my dyadic theory of constitutionalism. Are *ius* and *lex* 'treachearous friends'[25] after all? And is this distinction necessary to conceive of the doctrine of modern constitutionalism?

Carpentier begins by reconstructing the distinction between *lex* and *ius* put forward in TMCD, carefully differentiating it from the mysterious version of it given by Adrian Vermeule and his acolytes as part of the trendy (but already old) common good constitutionalism. He also correctly underscores that my understanding of *ius* is different from many Anglo-American legal philosophers, who have come to understand – arguably following Hart – *ius* as a moralised conception of law, a sub-type of the wider genus *law*. For me, instead, *lex* and *ius* are 'two different independent types, or bodies, of law, whose constitutive difference lies in their distinct sources'.[26]

According to Carpentier, my insistence that we must distinguish between these two types of law is due to two reasons, a jurisprudential (theoretical) and a political (contingent) one. The first one is my 'Ferrajolist worry'[27] to explain and account for the phenomenon of 'unlawful law', particularly in the context of the modern constitutional state where also primary legislation can be invalid due to violation of some norms contained in the (entrenched) constitution. This kind of internal – as opposed to external – limitation of law *by* law is only

[23] Sandro 2022: 32-35.
[24] Sandro 2022: 32-35.
[25] Carpentier 2023: 1.
[26] Sandro 2022: 53.
[27] Carpentier 2023: 1.

possible, I argue, if there is a different type of law than *lex* (*ius*). The second reason is instead 'political' or 'strategic' and involves my belief that 'constitutional codification is but a stage of constitutionalism'[28] in which *ius* is crystallised in an entrenched, hierarchically superior (to ordinary legislation) document. This allows me to argue that, contrary to what is indisputably held in the literature, the common law constitutional model is effectively contiguous to the documentary, entrenched one – their differences lying instead in the more or less formal manifestation of each country's institutional settlement.

Carpentier finds the *lex*/*ius* distinction 'problematic'.[29] I do not disagree. Looking at the historical usages of the two terms, the distinction can be arguably understood – diachronically – in a number of ways which are related between each other but not always perfectly superimposable. Because – at least in part – of this 'messiness',[30] the distinction would not be able to serve the role I assign to it in my theory of constitutionalism. A first problem is with the roman 'pedigree' of the distinction: Carpentier offers a more nuanced and complex reconstruction of the emergence of *lex* and *ius* (respectively) than I do in the book, well before the end of the Roman Republic in the first century BC. In this respect, *ius* actually predates *leges*, and it is perhaps only with the written Law of the Twelve Tables (449 BC) that a paradigmatic juridical shift – 'from a secret *ius* to an officially proclaimed *lex*'[31] – begins to take place in Republican Rome. This does not mean that *ius* disappears, and indeed it keeps evolving into a progressively more and more secularised normative ordering of society so that, by the end of the Republic, '*ius* was a wholly systematized body of rules, regulating most aspects of the life of Roman Citizens'.[32]

Still, this does not mean that I would be right in thinking that *ius*, by the end of the Roman Republic, constituted a check on the legislative powers of the political authority. Carpentier underscores that *ius* and *lex* regulated different objects: *ius* private law matters, while *lex* dealt with public law ones. So it is 'inaccurate', as I do, 'to make *ius* the ancestor of constitutionalism' because *ius* 'was not at all concerned with constitutional rules'.[33] Any conflict between *ius* and *lex* would not result in the former limiting the latter, but in a 'division of labour' between them, and even when leges were explicitly promulgated with clauses to make their interpretation '*ius*-compliant', they were not 'automatically' unlawful in case of inconsistency.[34] Finally, during the Roman Empire the distinction 'became more and more fluid', so that by the time the *Corpus iuris civilis* was compiled, the idea that these were two distinct bodies of law 'had long been abandoned'.[35]

Even leaving aside questions of Roman legal and intellectual history, Carpentier doubts the jurisprudential relevance of the distinction. In particular, is not clear why we should 'lump together' all sources of law which are not legislation (including custom, precedent, and possibly legal scholarship) under '*ius*' 'just because at some point during the late Roman

[28] Carpentier 2023: 1.
[29] Carpentier 2023: 2.
[30] Carpentier 2023: 2.
[31] Schiavone 2012: 93.
[32] Carpentier 2023: 2.1.
[33] Carpentier 2023: 2.1.
[34] Carpentier 2023: 2.1.
[35] Carpentier 2023: 2.1.

Republic *ius* meant something such as a distinct body or source of law'.[36] And even if one accepts this move, it is not clear why this body of law would 'necessarily act as a limit' on the other, *lex* – unless we were to understand *ius* as a form of *ius cogens*. This would need a long justification he cannot find in the book. So, for Carpentier, is it more natural to understand *ius* as 'law in general' (and possibly legal system) and *lex* as a 'specific *source of law*',[37] but this is hardly a useful conceptual distinction in the context of modern legal systems (and their overlapping hierarchical jurisdictions).

Finally, for Carpentier the *ius*/*lex* distinction is 'useless' for the explanation of legal constitutionalism,[38] and it might even backfire against the core thesis defended in the book. First, 'unlawful law happens all the time and *across the normative board* – ie not just at the constitutional level'.[39] So a statute would be relevant as *lex vis-à-vis* the constitution and as *ius vis-à-vis* secondary legislation or administrative decrees, which means that the *ius*/*lex* distinction 'cannot be the key' to understanding the idea of unlawful law.[40] Second, is not *ius* grounded too in the will of (arguably) the most relevant sovereign in modern constitutional states – constituent power? Am I conveniently 'stipulating the problem away', by identifying political authority with, and exclusively with, the legislator?[41] Third, and possibly even more problematically, does not the *lex*/*ius* distinction undermine the main one defended in the book, between law-creation and law-application?

All of this makes Carpentier conclude that I would be better off by dropping the *ius*/*lex* distinction altogether and simply adopt the known principle of *lex superior derogat legi inferiori* to account for the 'unlawful law' issue in constitutional theory.[42] Legal constitutionalism, in other words, did not 'aim' to create a 'legal otherness', but rather to do its very opposite – 'to homogenize constitutional rules with statutes'.[43] In this way, if a conflict between the two emerges, all that is the left to do is to simply apply the *lex* superior criterion – to treat it as a '*ordinary* conflict of norms'.[44] He finds more or less explicit endorsements of this idea in a range of foundational constitutional thinkers, from Sieyes to Hamilton and Chief Justice Marshall in *Marbury v Madison*. In other words, the 'acme' or 'intellectual legacy' of legal constitutionalism does not reside in the distinction between *lex* and *ius*, but in the explicit recognition of the normative hierarchy (and potential conflicts) between two *leges* – the constitutional and the ordinary one.[45]

3.1. Still defending the relevance of *ius* for the theory of modern constitutionalism: a rejoinder to Carpentier

Have I made my life unnecessary complicated? It certainly appears so after reading Carpentier's comment. He is, to be sure, right on several things. But in what follows, I will try

[36] Carpentier 2023: 2.2.
[37] Carpentier 2023: 2.2. (italics original).
[38] Carpentier 2023: 3.
[39] Carpentier 2023: 2.3.
[40] Carpentier 2023: 2.3.
[41] Carpentier 2023: 2.3.
[42] Carpentier 2023: 3.
[43] Carpentier 2023: 3.
[44] Carpentier 2023: 3. (italics original)
[45] Carpentier 2023: 3.

to explain why I think that the distinction between *lex* and *ius* is indeed conducive to the most accurate understanding of the doctrine of modern constitutionalism.

First things first, history. Carpentier's magnificent *excursus* in Roman legal history shows the diachronic complexity of the emergence of the distinction between *lex* and *ius*. In the book, I did not do justice to such complexity. In one passage, I also incorrectly attributed to Aldo Schiavone the identification of the emergence of *ius* in Roman legal thought with the end of the Roman Republic.[46] *Ius*, as Carpentier reminds us, emerges way before that. What I meant to write – as I do two pages later –[47] was that the emergence of *ius* as a constitutionalist tool – in a sense comparable to the 'modern' one – happened during the demise of the late Roman Republic. This is the crucial thesis for my account of constitutionalism, not the one about the emergence of *ius* per se.

As we saw, Carpentier disputes this too. I remain however convinced by the ground-breaking argument to this end put forward by Benjamin Straumann in his beautiful book *Crisis and Constitutionalism*.[48] While confusing terminological uses cannot be denied,[49] to my mind Straumann puts forward a convincing case that the of use of *ius* and *mos maiorum* in political writings and speeches in the last century BC indicates an innovative and *distinct* constitutionalist way of thinking.[50] In particular, Straumann shows that these two sources of law began to be progressively understood (and deployed) as being entrenched and of superior political importance vis-à-vis statutory law.[51] *Ius*, in this respect, 'denotes the foundational institutions of public life' (*ius publicum*):[52] it is, in other words, 'a body of constitutional norms' over the interpretation of which the crises and civil wars of the late Republic were fought.[53] And while this distinct meaning of *ius* might indeed have slowly merged with others and become less distinguishable by the time of compilation of the Corpus Iuris Civilis, Straumann does an excellent job in bringing to the surface the influence of this innovative way of constitutional thinking in the subsequent republican tradition of political thought.[54]

Still, what is the jurisprudential relevance of the distinction today? And do we really need it to understand constitutionalism? Let me start from the latter challenge. To put it shortly, Carpentier's preferred explanation to understand the doctrine of modern constitutionalism and the issue of 'unlawful legislation' – *lex superior derogat legi inferior* – would not allow us to make sense of systems like the United Kingdom's *qua* constitutional ones. That is, in systems where a hierarchically entrenched constitution is missing, an explanation based exclusively on the *lex* superior normative criterion appears to miss the mark by a large margin. In fact, following AV Dicey, it is routinely said that the UK's political constitution is

[46] Sandro 2022: 51.
[47] Sandro 2022: 53
[48] Straumann 2016.
[49] See eg Straumann 2016: 45.
[50] Straumann 2016: ch 1-2.
[51] Straumann 2016: 36ff; ch 4.
[52] Straumann 2016: 54.
[53] Straumann 2016: 57.
[54] Straumann 2016: chs 7-8.

'flat' –[55] there is no hierarchy (and there cannot be) between different statutes. Under these premises the UK constitutionalism paradox, which I have already illustrated elsewhere,[56] emerges: the motherland of the doctrine of modern constitutionalism lacks a hierarchical constitution and, therefore, it is not clear *how* it can be its motherland in the first place.

What the common law model of constitutionalism indicates instead is that this limitation of *law* by *law* can happen chiefly *pragmatically*: that is, without an explicit – formalised – normative hierarchy between statutory and constitutional norms. What is necessary, at a minimum, is a dyadic institutional settlement where part of the law which governs the relationship between the state and individuals is developed independently by courts and which must be buttressed (even more than in the other model) by political conventions of collaboration and mutual respect between the branches of the state.[57]

Therefore, it is only by decoupling constitutionalism with the presence – or lack thereof – of a formally hierarchical constitution that we can fully understand how the common law model sits on a continuum with the entrenched model of constitutionalism.[58] In this respect, an understanding of modern constitutionalism centred around the vertical extension of the *ordinary* model of conflict of norms is an impoverished one in my view, given that it overlooks the institutional dimension of the doctrine.[59] That is, it only returns us part of the picture. For this institutional dimension requires, as I explain in TMCD, that the law which is the product of the exercise of political authority is limited by a different type of law whose source and main tenets are outwith the disposal of the ordinary lawmaker. A 'mere' normative hierarchy between ordinary statutes and constitution, without an underlying institutional settlement in which that hierarchy is effectively enforced by an autonomous decision-making body other than the one with legislative powers, can be completely moot and easily circumvented.[60]

This means that while constitutionalism is generally (in most cases) realised through both a normative hierarchy as well as a particular type of institutional settlement, this latter element must be given theoretical priority in an elucidation of the doctrine.[61] For a settled historical institutional settlement between legislatures and courts, adequately sustained by mutual respect between the institutions of government, can provide such limitation of law

[55] The recently identified category of 'constitutional statutes' has prompted several commentators to affirm that a form normative hierarchy is now present in the UK constitutional arrangements (albeit a shallow one). However, the very recent decision by the UK Supreme Court in *Re Allister* [2023] UKSC 5 has now cast a shadow on the continuous existence on of the category: see eg Majewski 2023.
[56] Sandro 2021.
[57] Sandro 2021.
[58] Sandro 2022: 64-71.
[59] Or, alternatively, it seems to equate those demands with the presence of a codified, entrenched constitution.
[60] Carpentier seems to explicitly acknowledge this point in his comment, therefore I wonder whether our disagreement here is only apparent.
[61] This does not mean that what I am referring to as the common law model is normatively attractive as much as the entrenched constitutional one. The history of the United Kingdom shows us, in this respect, that this model can only be thought as providing adequate constitutional protection of fundamental rights with the legislative enactment of the Human Rights Act 1998. See, eg, Gearty 2016.

by law even in the absence of an explicitly – formal – normative hierarchy between statutory and constitutional rules.[62]

Still, what is the basis for limitation of *lex* by *ius*? Is *ius* a type of natural law? These questions, particularly in the context of UK model of constitutionalism, have been raised also by Lewis in the most comprehensive review of TMCD published to date.[63] To be sure, contending (pace Carpentier) that this is precisely the sense in which *ius* (*publicum*) was being deployed during the demise of the Roman Republic, can only get me so far. For I do not identify, as Carpentier correctly underscores in his comment, *ius* with natural law. This however does not mean that there is no connection altogether between *ius* and (a secularised type of) natural law.

It would be fanciful to deny in this respect that – especially at its inception – the development of *ius* has drawn its legitimacy mostly from the natural law theory of rights.[64] This holds true both in the case of the progressive inclusion of charters of fundamental rights in constitutional documents since the revolutions of the 18th century, as well as in the case of the protection that the common law of the land has recognised throughout time to a (extremely limited) number of rights in Britain.[65] But *ius* is, from a formal point of view, positive (human-made) law through and through: it is a system of rules (and principles) that is developed by a specific sub-group of society with technical knowledge which includes judges, lawyers, and academics, and that progressively has come to be also 'crystallised' in a formal document by a constitutional convention or assembly (or through a constituent 'moment' anyway).

What gives *ius* its 'limitation' function over *lex*? In the case of *ius* as codified in a constitutional document, it is the protection of the fundamental rights of everyone against their encroachment by public and private powers alike.[66] But what about the common law model? Here my contention is that it is the rule of recognition itself which establishes that there are limits to the law-making power of the sovereign. As I argue elsewhere,[67] it is a matter of recognised practice, in England and Wales, that certain – very few, admittedly – things were beyond the legislative power of monarch first and parliament after. That is, I argue that the doctrine of the unlimited sovereignty of the British Parliament is a myth, one that has taken hold from Dicey onwards (though a more careful reading of Dicey already leads to question what has become the 'orthodox' account) but which, instead, does not find unequivocal correspondence in the historical and accepted official practice in Britain. This is also the sense in which Great Britain is and should be identified as the motherland of modern constitutionalism: for it is here that, for the first time in the history of Western civilisation, an institutional settlement develops as a matter of practice which sees the unlimited power of the sovereign subject to legal – and not just political – limits.

[62] In other words, such a system can bear the presence of meaningful indeterminacies as to who wields the last word on the meaning of legislation.
[63] Lewis 2023: 819-20.
[64] See eg Fasel 2024.
[65] Gearty 2016.
[66] Ferrajoli 2007.
[67] Sandro (forthcoming).

Finally, I would like to double down on the jurisprudential relevance of the distinction, even though I will not have space to develop the point here. My intuition in this respect is that the relevance of the theoretical distinction between *lex* and *ius* goes beyond capturing the essence of the doctrine of modern constitutionalism. For it appears also to explain – and possibly dissolve – one of the core debates in general jurisprudence: that is, whether law is necessarily – or only contingently – connected to morality. What if those on both side of the dispute were actually each referring to a different type of 'law'? What if positivists were referring to *lex* when they say that law is not necessarily (but only contingently) connected to morality, and non-positivists were referring to *ius* when they argue the opposite? Let me illustrate this, in a snapshot, through Alexy's argument for law's dual nature and his contention that it would be performatively contradictory for a state constitution to have manifestly unjust provisions.[68] Alexy has a point here, but I submit that his choice of example – a constitution rather than ordinary legislation – is significant, because modern constitutions belong to the *ius* type and as such have a different relationship with morality than law that belongs to the *lex* type. If law has indeed a *dual* nature, it is not in the sense Alexy thinks.

4. Köpcke on the notion of normative powers

Maris Köpcke begins her incisive commentary 'Normative Power and The Making of Constitutional Democracy' by arguing that I might have overstated the need to 'defend' the distinction between law-creation and law-application. This is not to say that an 'explanation' of this distinction is 'worthless' for her;[69] but, rather, that it is such a fundamental assumption of legal thinking since time immemorial that no one can really question its theoretical feasibility. At most, sceptical scholars can exhibit 'a critical hue'[70] towards the idea of law-application, but not more. I would also not have demonstrated, according to Köpcke, that Raz and most post-Hartian positivists presuppose the distinction in their theories without substantiating it.[71]

4.1. Is law-application really at stake?

As to the first issue, it is true that even some hardcore legal realists can and do employ the language of law-creation and law-application. This objection – that I might be proposing a false dichotomy between moderate cognitivism and legal realism after all, given that there are certainly different ways to conceive of the distinction and that some of those might be compatible with a realist approach to law – has already been raised by Jorge Baquerizo-Minuche in an already published symposium on TMCD.[72] Without repeating my full answer in there here, the gist of it is that not any conception of the distinction between law-creation and law-application will meet the two requirements – the action-guiding and the collective autonomy one – of a theory of law which purports to be compatible with our constitutional

[68] A*lex*y 2010: 168-69.
[69] Köpcke 2023: 1
[70] Köpcke 2023: 1. In the introduction of TMCD the reader can find a discussion of the authors (which include, at least, several realists and CLS scholars, as well as neo-dworkinians like Kyritsis and constructivists like Somek) who go beyond merely exhibiting a 'critical hue' towards the idea of law-application and explicitly call instead for this positivist idea to be abandoned.
[71] Köpcke 2023: fn 5.
[72] Bacherizo-Minuche 2023: 10-11.

democratic practices.[73] So the fact that some legal realists use 'law-application' to describe the activity of ascribing meaning to a legal provision does not make their theories compatible with constitutional democracy. Pierluigi Chiassoni, for one, is explicit about this.[74] And so is Francesca Poggi.[75] Legal realism and a robust conception of law-application – in which the text of a legal provision is determinative (at least in part) of the norm-meaning being ascribed to it – seem mutually exclusive.

Second, how do you 'demonstrate' that in the work of Hart and of those following in his tradition, the notion of law-application is not substantiated, besides pointing it out? Short of reproducing verbatim the entire text of their contributions to 'demonstrate' that they do not do so, I am afraid I do not understand what exactly is being asked of me. Let me put it this way. In order to substantiate the idea of law-application, in my view, you need at least to provide an explanation of how legal norms are created – that is, what it means to create a legal norm – and of how it is possible to apply *those* norms (and not some other ones) at a different point in time after that of their creation. This is indispensable and it implies, among other things, dealing with significant objections to the idea of law-application, such as: a) the idea that discretion is pervasive in the legal process, and that as a result there is always a degree of fresh choice which makes it doubtful if we can ever talk of 'applying' a standard to a factual situation; b) the thesis according to which norms in general do not exert any causal influence on human behaviour (how could they, if they don't belong to our reality and cannot be experienced through our senses); and c) the application of pragmatics – in particular Neo-Gricean ones – to legal theory and the ensuing contention that there cannot be fully-formed legal norms before the interpretation by courts. To my knowledge, no one has ever attempted a comprehensive defence of the distinction of the kind put forward in TMCD, which deals extensively with all the objections above. Even Raz, who (to his credit) more than any other Hartian positivist discusses the centrality of the idea of law-application to general jurisprudence, effectively assumes that there is such thing as the activity of 'applying the law' without really explaining in what it actually consist in the first place.[76]

4.2. From normative powers to power-conferring norms: on the incompleteness of TMCD

Be that as it may, the main criticism Köpcke moves to TMCD is in relation to the account of normative power developed therein, which she finds incomplete ('at best').[77] The issue would lie in the 'less than fully articulated' notion of power developed in chapter 1 of the book. She begins by criticising the main dichotomy I sketch between 'power to' and 'power over', arguing that it is not fit for the purposes I assign to it. For one thing, 'power to' does not seem to stand in opposition to 'power over': rather, the latter is a species of the former, given that it identifies always a 'power to' with a specific object – the ability to influence the behaviour of others (rather than the sensorial world). But even this criterion is 'shaky':[78] for one can affect the sensorial world by persuading someone else, and so it would not *what* is affected, but *how* that would matter.

[73] Sandro 2023: 59-60.
[74] Chiassoni 2021; see also Martí 2002.
[75] Poggi 2013.
[76] Raz 1979.
[77] Köpcke 2023: 2.
[78] Köpcke 2023: 3.

This could be purely definitional, but for Köpcke instead it bites as a substantive point when it comes to one of the most important 'moves' in chapter 1 of TMCD: the contrast I draw between two types of 'power over', normative and non-normative one. This contrast is, in her view, significantly under-theorised, as I would simply rely on existing accounts in the political theory literature which are themselves the product of 'fluctuating treatment' of the notion.[79] This would, in turn, generate three shortcomings which compromise the development of the argument in the rest of the book: first, is the 'other-regarding' focus of the account of normative power in TMCD, which sits uneasily with the consideration in later chapters of other kinds of normative powers (including the power to bind oneself); second, the fact that I do not consider the possibility that a change in normative (and particularly legal) relations might also derive from something else than the exercise of normative powers (like an assault); third, that I did not work the idea that normative power must be generated by something (in particular social rules) back into the original distinction between normative and non-normative 'power over'.

Each of these 'loose ends' generates in turn a problem for the account developed in TMCD, according to Köpcke. Starting in reverse order: first, she finds that it is unclear in the book whether the emergence of *ius* in a legal system as a limitation on *lex* (my account of constitutionalism as 'legal otherness') 'is inherent to law, or rather is a feature of certain political cultures that legal systems may approximate to more or less'.[80] Second, the initial imprecisions about the definitional scope of normative powers affect my account of law-application, which is premised on the presence of power-conferring rules in every complex legal system. This is because, Köpcke notes, I do not provide any explanation of what is distinctive about power-conferring rules vis-à-vis duty-imposing ones. She then goes to reconstruct my account of law-application, which she finds 'over-inclusive' because it is 'coextensive' with what we routinely call 'obedience'.[81] She does observe that my account seeks to make explicit some form of closer connection between law-application and the exercise of legal powers, but for her 'it is not even clear what it means to comply with a power-conferring rules because the law says so'.[82] Is the relevant mental status awareness or full-blown intentionality? Should not we say, more precisely, that legal powers are constituted by an 'intention to change legal relations'?[83] She ultimately suggests that what might characterise legal powers is the 'very manifestation' of the intention to complying with them (rather than the *kind* of intention itself),[84] and that this would require revising the account of law-application put forward in TMCD (because it would be, from this angle, underinclusive). Finally, Köpcke laments that the book 'does not connect its discussion of political power with its discussion of powers in the law'.[85] This is a massive oversight in her view, given that legal powers are primary ways to shape the normative landscape in a

[79] Köpcke 2023: 3.
[80] Köpcke 2023: 5.
[81] Köpcke 2023: 7.
[82] Köpcke 2023: 7.
[83] Köpcke 2023: 8.
[84] Köpcke 2023: 8.
[85] Köpcke 2023: 10.

complex society – 'privileged tools to realise democratic ideals' as she puts it –[86] and thus highly relevant to the realisation of constitutional democracy, the core issue of the book.

4.3. From *powers* to *power*, and back. On the connection between power-conferring norms and law-application

I will tackle each problem in turn. The first is perhaps easier to deal with, because it should be clear from reading chapter two of TMCD that the emergence of *ius* and its use in a 'constitutionalist' sense is not something inherent to modern legal systems. Köpcke appears to acknowledge this,[87] only to immediately cast doubt on this reconstruction. But the fact that I sketch a theoretical genealogy of the concept of *ius* which goes all the way back to its inception in ancient Rome – as discussed above in the reply to Carpentier – should not lead anyone to think that the use of *ius* as a limiting device vis-à-vis the power of the political sovereign has become inherent to legal systems. For one thing is the emergence of *ius* as a distinct body of judge-made norms and principles, and another its deployment – more or less explicit – as a tool for constitutional thinking and practice: that 'legal otherness' which I roughly chart, in chapter two of TMCD, from the end of the Roman Republic to the consolidation as the core principles of the English common law as outside the reach of the sovereign. The final stage of this trajectory can been in the crystallisation and formal entrenchment of *ius* in codified constitutions around the world since the end of the 18th century. But, again, it should be apparent that I am not suggesting that the 'mere' emergence of a distinct body of judge-made law (which is not, strictly speaking, customary) is enough for that body of law to play the constitutionalist role I assign it within my theory of constitutionalism.

The second problem goes to the core of the account of the distinction between law-creation and law-application I develop in TMCD: the exercise of power-conferring norms. Is my account of law-application both over- and under-inclusive? I do not think so. Here there seems to be a misunderstanding, because Köpcke writes that my account of law-application is 'co-extensive' with what is normally called 'obedience', whereas I spend several pages of TMCD to distinguish between obedience (or 'compliance', as I call it) and what I define as law-application.[88]

More precisely, I distinguish the normativity of duty-imposing rules – that only require, as such, unthinking compliance from their addressees – with that of power-conferring ones, which instead require a relevant intentional state from the power-holder. So Köpcke is incorrect when she affirms that, under my account, stopping at a red light is an instance of law-application if the driver acts because of the relevant duty-imposing norm. My theory is based on the different normativity of power-conferring vis-à-vis duty-imposing norms: that is, on what the norms *require* in terms of the relevant intentionality or lack thereof – as Köpcke acknowledges but then disregards.[89] What power-conferring norms require, to be exact, is that the norm itself figures – as a reason for action – in the process of practical

[86] Köpcke 2023: 10.
[87] Köpcke 2023: 5.
[88] Sandro 2022: 234-240.
[89] Köpcke 2023: 7.

reasoning of the power-holder, because the power-holder wants to achieve the effects predisposed by the norm itself (that is, the change in legal relations).[90]

Köpcke appears to suggest as much in an attempt to 'rescue' my account of law-application,[91] but I respectfully suggest that it does not need such rescuing. For I explicitly illustrate in the book that it is the need to ensure, on part of the legal system, that the intention to change legal relations is present which makes the normativity of power-conferring norms different from that of duty-imposing ones.[92] I also show how this necessarily implies the need for the expression of the relevant intention to be somehow *manifested* in the external world, given the epistemic impossibility to directly access mental states. It is crucial, though, that such external manifestation is always understood as an *objective* proxy whose relationship with the relevant mental state can be more or less immediate – and sometimes be entirely missing (like in the case of objective contracts).[93] As I argue in TMCD, this is unavoidable and should not lead us to find the understanding of these cases as the unintentional exercise of a power-conferring norm as a 'conceptual contortion'.[94]

Now, what about the second (and opposite) charge of under-inclusivity? Have I drawn too close a link between law-application and the exercise of legal powers and left out, along the way, an important sense in which people 'apply' the law? Do not people also apply the law when they use a legal rule as part of an instance of legal reasoning to reach a normative conclusion?[95] Again, I cannot say I agree with Köpcke's reconstruction of what I say in TMCD. Far from 'ruling [it] out from the outset',[96] I explicitly affirm that

> […] [w]e can certainly talk meaningfully of the application of legal provisions, in the sense of the mental activity of interpreting those peculiar linguistic utterances that are found in authoritative legal texts with the aim of obtaining a norm(-meaning) […].[97]

Before that, I also clearly distinguish between process-application and product-application, as the concept of law-application suffers from the same process/product ambiguity as that of interpretation.[98] So you effectively end up with four different things which are routinely bundled up together under the term of 'law-application:

I. the application of legal provisions (process): the interpretation of one or more legal provisions (norm-sentences) to obtain a norm(-meaning);
II. the application of legal provisions (product): the norm(-meaning) so obtained;
III. the application of legal norms (process): the use of a legal norm in an instance of legal reasoning;

[90] Sandro 2022: 234.
[91] Köpcke 2023: 8.
[92] Köpcke 2023: 8.
[93] Sandro 2022: 234-37.
[94] Halpin 1996: 144.
[95] Köpcke 2023: 9.
[96] Köpcke 2023: 9.
[97] Sandro 2022: 230
[98] Sandro 2022: 228.

IV. the application of legal norms (product): the decision to perform action A in situation because the [power-conferring]norm requires so.

On this basis, I argue in TMCD that the application of legal provisions is to be properly considered part and parcel of the process of legal interpretation,[99] and that there are good theoretical reasons to reserve the expression 'law-application' for the application of (power-conferring) norms – and not, strictly speaking, of provisions.[100] But an act of law-application, under my account, requires *both* the process- and product-application of norms, and I of course also recognise the possibility of mental processes of law-application – like the ones done by the academic lawyer in the classroom or by the lawyer before her client – which never culminate in an external act of law-application (product). Köpcke argues that, in this kind of scenarios, 'one applies a law without thereby complying with a power-conferring rule, and thus without changing normative relations',[101] but I find that the objection proves too much: because what both the professor and the lawyer seem to be doing is precisely to be applying a given norm (as part of a reasoning) *as if* they were entrusted with the relevant official power to apply it and to effect a change in legal relations. So, while Köpcke is right in saying that, under my account, all legal power-conferring rules demand application, I do not deny – and actually explicitly recognise –[102] that there can be mental processes of law-application which never culminate in an authoritative decision. They are simply not the focus of my analysis in chapter six of TMCD.

Third, and finally: Köpcke is right that I should have done a better job in connecting the discussion of political power in chapter one with the discussion of powers in law in chapter six. As she aptly puts it, the discussion from [natural] powers to [political] power in chapter one should have been followed by a further one 'from power to powers' within the realm of law, illustrating the way in which the conferral of many power-conferring norms can realise individual and collective autonomy.[103] This is an important insight for which I am very grateful to her and that I hope to address in future work.

5. Romeo on the meta-theory of constitutionalism

Graziella Romeo's perceptive contribution, 'The invention of constitutional supremacy: the role of legal traditions in legal theory', takes up and develops some of the challenges to mainstream thinking in constitutional theory I raise in TMCD. As we shall see, the endpoint of her argument is the warning that modern constitutional democracies – at least in their dominant conceptualisation – might have come to rely too much, to their own detriment, on courts and the judicialisation of politics. This appears to have become a recurrent theme in contemporary 'critical' constitutional theory – just think about the recent books by Loughlin and Gargarella – vis-à-vis the ongoing patterns of democratic decay exhibited by several countries around the world.

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[99] Sandro 2022: 230 fn 116.

[100] Sandro 2022: 230. Among these reasons, the need to account more precisely for what judges do when they say they are 'applying a provision' (and not a norm) stands tall, given the potential gap between the literal meaning of a legislative provision and the (norm-)meaning ascribed to it via judicial interpretation. See contra Duarte D'Almeida (2021), who explicitly claims that law-application is of provisions (and not norms).

[101] Köpcke 2023: 9.

[102] Sandro 2022: 228.

[103] Köpcke 2023: 10. On this, more generally, see Ferrajoli 2007: chs 13-14.

Before we get into that, it is worth examining what Romeo calls the 'challenge of contingency' for constitutional theory and how it relates to the theory (and meta-theory) of constitutionalism I put forward in TMCD. After underscoring that the understanding of modern constitutionalism as coexistence of two types of law (*lex* and *ius*) allows us to build a more 'sophisticated' picture of it, Romeo dwells on the role of legal tradition in constitutional theory. In this respect, she juxtaposes the 'context-bound' understanding of constitutional systems defended in TMCD with a significant trend in contemporary constitutional theory which seeks to theorize a 'generic' constitutional law: that is, the idea that there is a more or less universal blueprint of constitutional design which can be deployed, through transnational dialogue or imitation, independently of the more particular contextual circumstances of each legal system. This captures, at least in one significant sense, the emerging paradigm of 'global constitutionalism' (or 'global constitutional law').

Exploring the social foundations of any constitutional order, however, points to a more basic issue faced by contemporary constitutional theory. For rather than a dichotomous choice between two competing accounts of modern constitutionalism – the rationalistic one and the historical/contextual one-, there is a further and arguably harder-to-capture variable which shapes the genesis and life of constitutional orders: contingency. This latter concept, Romeo explains, goes beyond being 'merely' forget by history, and seeks to capture instead the social dynamics which determine which alternatives (among many potential ones) are ultimately selected in each polity when it comes to constitutional design. Following Parsons, she then argues that constitutions can (and should) be understood as 'devices for coordination or strategic coping in highly differentiated polities'[104] and concludes that the constitutional theory methodology exhibited by TMCD takes this dimension seriously – as it rejects the supposed mutual exclusivity between normative and sociological accounts of constitutionalism and demands instead an 'integrated' approach to constitutional theory.

5.1. On the role of contingency in constitution-making (and theorising)

I am very grateful to Romeo for the way in which she connected the account of constitutional democracy in TMCD with the sociological scholarship on constitutions and constitutionalism (which I know less well). In particular, I agree with her that constitutions – particularly of the revolutionary type – are to be understood as strategic devices in light of diversity and fragmentation of the underlying polity (or polities). Two examples – one of success and one of lack thereof of constitutions as strategic devices – come to mind. The first one lies in the way in which the elected Italian constituent assembly managed to produce a new constitution for post-war Italy which could be *acceptable* to a highly fragmented (still across previous political fault lines) Italian society.[105]

Illuminating, in this respect, is Marta Cartabia's remark that such fragmentation meant that none of the major post-war political parties knew if they were going to be voted into office after the first republican elections and that, as such, they had to make the choices of constitutional design in the constituent assembly as from behind the Rawlsian 'veil of ignorance'.[106] This, together with the shared aim to prevent any future decay into

[104] Romeo 2023: 5.
[105] This is perfectly captured in Cartabia e Lupo 2022: 8-11.
[106] Cartabia 2023.

authoritarianism, arguably shaped the strongly countermajoritarian design of the Italian Republican Constitution – as no one knew if they were going to be in government or in the opposition after the election and thus settled for a constitutional system which curbed substantially the power of the upcoming parliamentary majority.

Much more recently, instead, we have witnessed the failure of a new draft constitution to gain popular support in Chile, when the new constitutional text was voted down by a majority of the public.[107] While the causes of the popular rejection of the draft are arguably multifaceted,[108] it has been widely suggested that the draft constitution was rejected in part precisely because it failed from the outset to fulfil its role as a 'strategic device' for coordination (and compromise) between the highly fragmented Chilean civil society and political landscape – especially in light of its ambitious contents vis-à-vis indigenous and social rights.[109] Overall, I think the acknowledgement of contingency as an important driver of constitutional design outcomes yields two important metatheoretical insights for constitutional theorists.

On the one hand, the role of contingency in shaping constitutional trajectories reminds us that there is no universal formula to striking the balance between description and prescription in constitutional texts. Constitutions should be, in this respect, devices which aim to create a bridge between the world as it is and the world as it should be – between reality and utopia. Borrowing from speech-act theory, they must have both word-to-world and world-to-word directions of fit.[110] But how to strike the balance between capturing and consolidating the existing reality of a polity – what, if anything, makes them a *demos* in the first place – and providing the aspirational *ought to be*[111] which can constitute the lodestar of the political community going forward is highly context-sensitive and arguably the most difficult – and yet most crucial – task of constitutional design.

Modern constitutions, in this sense, are fundamentally shaped by an inner tension, as they seek, through various levels of entrenchment, to crystallise basic rules and principles which protect democracy while also leaving space – the question being precisely 'how much?' – to the self-government of each future generation. Too much of the former and you risk ending up like the United States, where an unchangeable, two-hundred years old Federal Constitution – combined with a Supreme Court which is not a 'court' in a strict sense – evidently impedes social and political progress. But too much of the latter – flexibility in changing the constitutional norms by simple parliamentarian majority – and the whole point of a constitutional settlement in the first place seems gone, opening up all sorts of avenues for abusive majoritarianism. It is precisely in this always present and ever-shifting deontic gap between constitutional presents and futures that the concept of contingency can play a first, and every useful, explanatory role.

On the other hand, better acknowledgment of contingency in constitutional theory points to all those causes of legal and political change which are not routinely captured in

[107] This after almost 80% of the Chilean population voted to replace the Pinochet Constitution with a new one.
[108] Gargarella 2022.
[109] See eg Carrasco 2022.
[110] Searle & Vanderveken 1985.
[111] Ferrajoli 2007.

constitutional design. Maybe the most prominent example lies in the role of traditional mass and social media, which are rarely if ever the subject of constitutional norms but play a very significant role in our modern societies in creating (or manufacturing) and shifting consensus. One only needs to think about the debate leading to the Brexit referendum in the United Kingdom and to the way in which the Leave Campaign, supported also by popular tabloids, weaponised social media to achieve a result that no-one thought would be really possible up to the night before the vote.

There are, in this respect, two relevant issues which are not captured by existing constitutional design and represent potent causal forces of political and societal change. The first is traditional and social media ownership concentration in a handful of all-powerful private actors, which effectively get to play a decisive but significantly unregulated role in constitutional dynamics. The second is the way in which social media now allow political actors to reach the wider public directly and at a very low cost, thus bypassing the institutional gatekeepers – such as traditional print newspapers – which were in charge of verifying information before communicating it to the public. How constitutionalism should evolve in order to tackle these and other issues related to the algorithmicisation of our democracies is at the centre of the emerging paradigm of so-called 'digital constitutionalism'.[112]

5.2. How unambitious can constitutionalism *really* be?

In the final part of her comment Romeo warns us about the perils of what she calls 'all-powerful' constitutionalism. In a similar vein to Loughlin, she seems to identify this constitutional form in the recent experience of continental European countries where public policy has been significantly subjugated to law – the law contained in the constitution, *ius* – and a normative hierarchy which sees constitutional (or supreme) courts above democratically-elected legislatures has consolidated. To use my terminology, *ius* over *lex*. In this form of constitutionalism, therefore, judges take centre-stage in the creation of constitutional norms through their application vis-à-vis ordinary legislation, also in light of the inability of many national legislators to govern society.

She contrasts this model of constitutional with the one, instead, which we can observe in the United Kingdom and some commonwealth countries (I am assuming she is thinking about Canada and New Zealand, for instance) and which she calls 'unambitious' constitutionalism. This latter is characterised, in her view, by a scaled-back role for courts and more prominence for national parliaments. The relationship between the lawmaker and the constitution is different here: for while the constitution would still prevail in case of conflict with legislation, a) constitutional norms do not condition the application of all other norms in the system; and b) the legislator's job is not merely that of 'applying' the constitution. *Lex* is not fully subordinate to *ius*, in this model, but they have more of a *symbiotic* relationship. In a nutshell, Romeo points to the idea that, from a democratic perspective, what is problematic is not the counter-majoritarian paradigm of constitutionalism per se, but a narrower and court-centric view of constitutional supremacy that appears to have taken hold in many European constitutional democracies. Finally, she

[112] De Gregorio 2022.

also warns that this all-powerful constitutionalism model makes the distinction between law-creation and law-application – the core objective of TMCD – more difficult to achieve.

Let us begin with the classification of different models of constitutionalism. As I illustrate in my reply to Carpentier, the account of constitutionalism developed in TMCD urges constitutional theory to take more seriously the institutional – and not just the normative – dimension of the doctrine. Thus, Romeo is right when she highlights how my account allows us to understand that the existence of a certain type of formalised constitutional supremacy is not strictly speaking necessary to the realisation of the doctrine. But the theory of constitutionalism as 'legal otherness' developed in chapter two of TMCD was not meant to suggest to the reader that the two models – the common law and the legal constitutional one – are to be considered equally valuable from a teleological perspective. For it would be way too easy to show that it is only with the creation of the Council of Europe in 1949 and with the enactment of the Human Rights Act in 1998 that the level of protection for fundamental rights in the UK has reached levels comparable to that of other European neighbours with codified constitutions. The protection to most rights at common law is, in fact, quite limited (if at all), and it is only thanks to the influence of supranational instruments (including European Union Law until the UK was a member state) that the domestic protection of fundamental rights in the UK had improved markedly.

This is to say that, although I do believe that the common law model of constitutionalism is one genus with the 'legal' or 'codified' one, the two are not the same in terms of their capacity to protect fundamental rights. And while the birthplace of modern constitutionalism should be identified with Great Britain and with the evolution of the common law, we should always keep in mind that the constitutionalist function played by courts was historically extremely limited and not comparable – at least before the HRA 1998 – to the one offered by domestic courts in most continental European countries.[113] But is not Romeo's point instead that it is precisely the system of rights protection envisaged *post* HRA 1998 in the UK – and the related Commonwealth model of constitutionalism as developed for instance in Canada and New Zealand – that strikes the balance right? Does the solution to the counter-majoritarian issue lie in decoupling constitutional review from judicial supremacy?

Here, my argument that we must give prominence to institutional settlements and dynamics and not just to formal normative hierarchy in constitutional thinking bites again. For, as it has been perceptively argued by Kavanagh,[114] the reality is that the 'weak' form of constitutional review in Canada or UK post-HRA might not be so weak after all – and achieve pretty much similar substantive results to countries with full-blown judicial supremacy like Germany or Italy.[115] The difference would lie rather in how rights' protection is achieved – whether through the formal striking down of statutes (without possibility of legislative override) or through a combination of expansive interpretive tools (the HRA section 3 powers) and non-

[113] Gearty 2016.
[114] Kavanagh 2015.
[115] The inclusion of Canada in the new 'Commonwealth' model of constitutionalism is doubtful in the first place, given that the Canadian Supreme Court has powers to invalidate legislation (unlike in the UK) and the role of the 'notwithstanding clause' of the Canadian Charter of Rights was better conceived of, at least until very recently, as exceptional. See eg Sirota (forthcoming).

binding declarations of incompatibility – and in the inherent resilience to internal and external shocks of each rights' protection framework. In a similar vein, the relationship between legislation and constitutional norms and principles does not appear fundamentally different under the HRA regime for instance, given that the HRA includes both *ex ante* and *ex post* political and judicial mechanisms to make sure that all norms of the legal system – at all levels – comply with the rights in the ECHR.

So, how unambitious can constitutionalism *really* be? In my view, not much. For while I indeed argue that it can be pursued without establishing formal judicial supremacy in constitutional interpretation, the reality that I tried to illustrate in TMCD is that constitutionalism *does* require the democratic legislator to be limited, at least pragmatically, by a different type of law administered by a separate and independent body.[116] Of course, the number and scope of such limits will be different from jurisdiction to jurisdiction, shaped among other things by the political and social history of that country and by the wider context at the time of constitutional revolution (or evolution). But the point is that constitutional norms and principles, to be recognised as such, must achieve a form of supremacy vis-à-vis ordinary legislation at least from a practical point of view.

Finally, is all-powerful constitutionalism at odds with the possibility of distinguishing between law-creation and law-application? The worry, to be sure, is not just Romeo's. The objection of the compatibility between the 'constitutional confirming interpretation' interpretive criterion and my account of the distinction has been raised in conversation by one of my Genoese legal realist friends, Giovanni Battista Ratti. For reasons of space, I will have to address the objection in full on another occasion. For now, building on the further considerations on the moderate cognitivist theory of interpretation put forward in TMCD that I have offered in an already published symposium on the book in *Diritto & Questioni Pubbliche*,[117] I will limit myself the following brief observations.

I do not think that the all-powerful model of constitutionalism and the distinction between creation and application of law are mutually incompatible. The crucial insight, which I discuss in chapter 5 of TMCD,[118] lies in the acknowledgment that statutory legal norms are unlike ordinary oral communicative exchanges and are instead the product of complex text-acts whose provisions must be read in light of their co-text. At least four levels of this latter can be identified:[119]

1. the other utterances from the same section of the statute as the norm-sentence which is the object of interpretation;
2. the other sections from the same statute;
3. different statutes in the legal system which nonetheless bear on the norm-sentence being interpreted; and
4. the norms and principles contained in the constitutional text (especially if a formal constitution is present).

[116] This does not imply the denial of the positive functions of constitutionalism, which I discuss in Sandro (2022: ch 2).
[117] Sandro 2023.
[118] Sandro 2022: 195-200.
[119] In listing these four levels I am slightly amending the list and discussion offered in Sandro (2022: 198-99).

Insofar as a given norm-sentence might have to be read in light of another norm-sentence in another statute which bears on its meaning (or operation, anyway), so it might have to be read also in light of a constitutional norm or principle in order to make it fully valid within the system. Under normal circumstances, one should expect most norms in the system to be created by legislative acts which have been drafted abiding by both procedural as well substantive norms contained in the constitution of the system, so that the issue of 'constitutional conforming interpretation' ought not to rise often. But, clearly, not every applicative scenario can be foreseen in advance, and there will be cases where the constitutionality of a legal norm is called into question during legal proceedings.[120] In these cases, nonetheless, it is still possible to talk of law-application under the theory I developed in TMCD.[121]

Of course, the more the constitutional text contains vague clauses which are not further specified through a stable line of case-law from a supreme or constitutional court, the more chances that the literal meaning of a statutory provision (or set of provisions) might at some point be modified or set aside to make it constitution-conforming.[122] This, using the terminology developed in chapter 3 and 6 of TMCD, certainly constitutes a significant source of systemic discretion,[123] although an unavoidable one in constitutional systems with a rigid constitution and related constitutional review.[124] It is, in other words, a price to pay – vis-à-vis legal certainty – to the 'altar' of constitutionalism. But this should not startle us, given that it is line with the very tension (and the associated costs in terms of certainty) between the static and dynamic normative dimensions of our complex, modern legal systems.[125]

5. Fin

I cannot end but by deeply thanking again Bello Hutt, Carpentier, Köpcke, and Romeo for their probing comments on some of the main arguments developed in TMCD. I take my responses here not as the end point, but rather as the starting one for many more conversations on these topics (and beyond), hopefully for years to come.

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[120] It should be noted that this possibility is significantly increased by the fragmentation of legal system and the resulting possibility of unforeseen (on part of the drafters) interaction between different provisions in different statutes.
[121] See the further considerations on this point in Sandro (2023).
[122] Sandro 2022: 199.
[123] Sandro 2022: 199.
[124] But the same can be said, *mutatis mutandis*, of the s 3 interpretive obligation established by the HRA1998 in the UK.
[125] Sandro 2018.

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